[2020] FWCFB 2124

DECISION

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

4 yearly review of modern awards
(AM2019/17)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 27 APRIL 2020

4 yearly review of modern awards – finalisation of exposure drafts – tranche 3 awards.

Abbreviations

ABI	Australian Business Industrial representing the Australian Childcare Alliance Inc and the New South Wales Business Chamber Limited
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
A.I.S	Association of Independent Schools
AMWU	Australian Manufacturing Workers' Union
ANMF	Australian Nursing and Midwifery Federation
APESMA	Association of Professional Engineers, Scientists and Managers Australia
ASIAL	Australian Security Industry Association Limited
ASSA	Australian Swim Schools Association
AWU	Australian Workers' Union
BCC	Birch Carroll and Coyle and other cinema industry employers
CAI	Clubs Australia Industrial
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CFMMEU	Construction, Forestry, Maritime, Mining & Energy Union
CFMMEU – M & E Division	Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division
CFMMEU – Manufacturing Division	Construction Forestry Maritime Mining Energy Union – Manufacturing Division
CFMMEU – MUA Division	Construction Forestry Maritime Mining Energy Union – Maritime Division
CMAA	Club Managers' Association Australia
Construction awards	Building and Construction (General) On-Site Award 2010, Joinery and Building Trades Award 2010, Mobile Crane Hiring Award 2010, Plumbing and Fire Sprinklers Award 2010
CPSU	Community and Public Sector Union
HIA	Housing Industry Award
IEU	Independent Education Union of Australia
LPA	Live Performance Australia
MIAL	Maritime Industry Australia Limited
PGA	Professional Golfers Association
UWU	United Workers' Union

1. Background

[1] On 2 September 2019 we published a decision[1] providing an overview of the status of the 4 yearly review of modern awards and setting out the process for finalising the Exposure Drafts and the consequent variation of each award.

[2] On 29 January 2020 Exposure Drafts and draft variation determinations were published for each of the Tranche 3 modern awards. On the same day we published a decision[2] (the *January 2020 Decision*) in which we expressed the *provisional* view that the variation of the modern awards in Tranche 3 in accordance with the draft variation determinations was, in respect of each of these awards, necessary to achieve the modern awards objective.

[3] Interested parties were invited to comment on our provisional view and on the Tranche 3 Exposure Drafts and draft variation determinations.

[4] Submissions were filed by:

- Australian Business Industrial & NSW Business Chamber Limited (ABI) – Submissions re Amusement, Events and Recreation Award; Black Coal Mining Industry Award; Broadcasting, Recorded Entertainment and Cinemas Award; Building and Construction General On-Site Award; Business Equipment Award; Educational Services (Teachers) Award; Electrical, Electronic and Communications Contracting Industry Award; Fitness Industry Award; Food, Beverage and Tobacco Manufacturing Award; Funeral Industry Award; General Retail Industry Award; Graphic Arts, Printing and Publishing Award; Health Professional and Support Services Award; Horticulture Award; Joinery and Building Trades Award; Journalist Published Media Award; Miscellaneous Award; Mobile Crane Hiring Award; Nurses Award; Plumbing and Fire Sprinklers Award; Professional Employees Award; Racing Clubs Events Award; Registered and Licensed Clubs Award; Security Services Award; Sugar Industry Award; Supported Employment Services Award; Telecommunications Services Award; Textile, Clothing, Footwear and Associated Industries Award; Timber Industry Award; Wine Industry Award on 6 March 2020
- Association of Independent Schools (A.I.S) – Submissions re Educational Services (Teachers) Award on 3 March 2020
- Association of Professional Engineers, Scientists and Managers Australia (APESMA) – Collieries' Staff and Officials Association – Submissions re the Black Coal Mining Industry Award on 4 March 2020
- Australian Federation of Employers and Industries (AFEI) – Submissions re the Ports, Harbours and Enclosed Water Vessels Award on 4 March 2020
- Australian Industry Group (Ai Group) – Submissions re Black Coal Mining Industry Award; Business Equipment Award; Electrical, Electronic and Communications Contracting Award; Food, Beverage and Tobacco Manufacturing Award; Graphic Arts, Printing and Publishing Award;

[1] [2019] FWCFB 6077

[2] [2020] FWCFB 421

Horticulture Award; Miscellaneous Award; Nurses Award; Professional Employees Award; Sugar Industry Award; Telecommunications Services Award; Textile, Clothing, Footwear and Associated Industries Award; Timber Industry Award; Wine Industry Award on 6 March 2020

- Australian Manufacturing Workers' Union (AMWU) – Submissions re Black Coal Mining Industry Award; Food, Beverage and Tobacco Manufacturing Award; Miscellaneous Award; Sugar Industry Award; Timber Industry Award on 5 March 2020
- Australian Nursing and Midwifery Federation (ANMF) – Submissions re the Nurses Award on 4 March 2020
- Australian Security Industry Association Limited (ASIAL) – Submissions re the Security Services Industry Award on 2 March 2020
- Australian Workers' Union (AWU) – Submissions re the Food, Beverage and Tobacco Manufacturing Award; Funeral Industry Award; Horse and Greyhound Training Award; Horticulture Award; Pest Control Industry Award; Racing Clubs Events Award; Sugar Industry Award; Wine Industry Award on 6 March 2020
- Birch Carroll & Coyle and Ors – Submissions re the Broadcasting, Recorded Entertainment and Cinemas Award on 3 March 2020
- Club Managers' Association Australia (CMAA) – Submissions re Registered and Licensed Clubs Award on 4 March 2020
- Clubs Australia Industrial (CAI) – Submissions re Registered and Licensed Clubs Award on 4 March 2020
- Commercial Radio Australia – Submissions re the Broadcasting, Recorded Entertainment and Cinemas Award on 12 February 2020
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) – Submissions re the Black Coal Mining Industry Award on 5 March 2020
- Construction, Forestry, Maritime, Mining & Energy Union (CFMMEU) – Manufacturing Division – Submissions re the Textiles, Clothing, Footwear and Associated Industries Award on 6 March 2020
- Construction, Forestry, Maritime, Mining & Energy Union (CFMMEU) – Manufacturing Division – Submissions re the Timber Award on 10 March 2020
- Construction, Forestry, Maritime, Mining and Energy Union – Mining And Energy Division (CFMMEU – M & E Division) – Submissions re the Black Coal Mining Industry Award on 4 March 2020
- Independent Education Union of Australia (IEU) – Submissions re Educational Services (Teachers) Award on 4 March 2020
- Live Performance Australia (LPA) – Submissions re the Amusement, Events and Recreation Award on 19 February 2020
- Live Performance Australia (LPA) – Submissions re the Live Performance Award on 4 March 2020

- Maritime Industry Australia Limited (MIAL) – Submissions re the Seagoing Industry Award; Ports, Harbour and Enclosed Water Vessels Award; Marine Towage Award on 17 February 2020 and 4 March 2020
- Master Plumbers – Submissions re the Plumbing and Fire Sprinklers Award on 6 March 2020
- Media Entertainment and Arts Alliance (MEAA) – submissions re Journalists Published Media Award on 26 February 2020
- Private Hospital Industry Employer Associations – Submissions re Health Professionals and Support Services Award on 4 March 2020
- Professional Golfers Association (PGA) – Submissions re the Amusement, Events and Recreation Award on 21 February 2020
- Qantas Group – Submissions re Aircraft Cabin Crew Award 2010 on 11 March 2020
- South Australian Wine Industry Association – Submissions re the Wine Industry Award on 4 March 2020
- United Workers' Union (UWU) – Submissions re the Funeral Industry Award; Miscellaneous Award; Registered and Licensed Clubs Award; Security Services Industry Award; Wine Award on 4 March 2020

[5] On 2 March 2020 we issued a Statement[3] (the Construction Awards Statement) in relation to the four of the Tranche 3 awards set out below;

- *Building and Construction (General) On-Site Award 2010*
- *Joinery and Building Trades Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*

(collectively, the Construction awards)

[6] The Construction Awards Statement said that the Exposure Drafts and draft variation determinations for the Construction awards will be re-published *after* the Full Bench in AM2016/23 has issued final variation determinations. The final variation determinations for the Construction awards were issued on 20 March 2020.[4] A statement and directions will be issued in relation to the finalisation of the Exposure Drafts and draft variation determinations in due course.

[7] On 23 March 2020 we published a Statement[5] (the March 2020 Statement) and a Background Paper (the Tranche 3 BP) which summarised the submissions filed in respect of the remaining 34 modern awards in Tranche 3 and also:

[3] [2020] FWCFB 1079

[4] Building PR715725, Joinery PR715726; Mobile Crane PR715727 and Plumbing PR715728

[5] [2020] FWCFB 1539

- set out some minor drafting errors and omissions in the exposure drafts and draft variation determinations, which we proposed to correct;
- set out some provisional views in response to submissions put: and
- invited interested parties to comment on certain submissions.

[8] The March 2020 Statement also extended the time for filing reply submissions, from 27 March 2020 until 7 April 2020 and contained the following direction:

> 'The reply submissions are to reply to the submissions filed **and** address the *provisional* views and other issues raised in the Background Paper, including the proposals to correct minor drafting errors and responding to invitations to comment on other submissions.'

[9] The March 2020 Statement also vacated the oral hearing previously scheduled for 6 and 7 April 2020.

[10] We granted the IEU and AIS an extension in respect of the filing of submissions in relation to the Educational Services (Teachers) Award 2010. A separate Statement will be published in due course regarding the finalisation of the draft variation determination in respect of this award.

[11] The following reply submissions were filed:

- Australian Industry Group (Ai Group) – Reply submission re the Black Coal Award; the Business Equipment Award; the Electrical Contracting Award; the FBT Award; the Graphic Arts Award; the Horticulture Award; the Miscellaneous Award; the Nurses Award; the Professionals Award; the Sugar Award; the Telecommunications Award; the TCF Award; the Timber Industry Award and the Wine Industry Award
- Ai Group – Submission re the Graphic Arts Award
- Australian Business Industrial & NSW Business Chamber Limited (ABI) – Reply submission re the Broadcasting and Recorded Entertainment and Cinemas Award, the Educational Services (Teachers) Award, the Electrical, Electronic and Communications Contracting Award, the Food, Beverage and Tobacco Manufacturing Award, the Health Professionals and Support Services Award, the Horticulture Award, the Nurses Award, the Professional Employees Award, the Racing Clubs Events Award, the Telecommunications Services Award, the Textile, Clothing, Footwear and Associated Industries Award, the Timber Industry Award and the Wine Industry Award
- Australian Manufacturing Workers' Union (AMWU) – Reply submission re the Graphic Arts and Printing Award
- Australian Nursing and Midwifery Federation (ANMF) – Reply submission re the Nurses Award
- Australian Swim Schools Association (ASSA) – Reply submission re the Fitness Industry Award
- Australian Workers' Union (AWU) – Reply submission re the Amusements, Events and Recreation Award; the Horse and Greyhound Training Award; the Horticulture Award and the Wine Industry Award

- Birch Carroll and Coyle and other cinema industry employers (BCC) – Reply submission re the Broadcasting, Recorded Entertainment and Cinemas Award
- Communications, Electrical and Plumbing Union of Australia (CEPU) – Reply submission re the Electrical, Electronic and Communications Contracting Award
- Construction Forestry Maritime Mining Energy Union – Manufacturing Division (CFMMEU – Manufacturing Division) – Reply submission (extension of time granted to 9 April 2020) re the Textile, Clothing, Footwear and Associated Industries Award and Timber Industry Award
- Construction Forestry Maritime Mining Energy Union (CFMMEU – MUA Division) – Reply submission re the Ports, Harbours and Enclosed Water Vessels Award
- Construction Forestry Maritime Mining Energy Union (CFMMEU – MUA Division) – Reply submission re the Seagoing Industry Award
- Club Managers' Association Australia – Reply submission re the Registered and Licensed Clubs Award
- Community and Public Sector Union (CPSU) – Reply submission re the Telecommunications Services Award, Broadcasting, Recorded Entertainment and Cinema's Award and Miscellaneous Award
- Housing Industry Award (HIA) – Reply submission re the Timber Industry Award
- South Australian Wine Industry Association – Reply submission re the Wine Industry Award
- United Workers' Union (UWU) – Reply submission (extension of time granted to 9 April 2020) re the Food, Beverage and Tobacco Manufacturing Award, Miscellaneous Award, Registered and Licensed Clubs Award, Security Services Industry Award, Wine Industry Award

2. Uncontentious awards

[12] The submissions filed do not identify any issues (other than minor drafting errors[6]) with the Exposure Drafts and draft variation determination in respect of the following awards.

- *Aircraft Cabin Crew Award 2010*[7]
- *Dredging Industry Award 2010*
- *Journalists Published Media Award 20108*

[6] We note that a number of the draft variation determinations include a reference to '20XX', this will be changed to '2020'.

[7] The Qantas Group identified two drafting errors. At clause 2 Definitions – Calendar month definition including an exception for January in the first dot point of the definition. This should be deleted. At clause 7.4 the Facilitative provisions table should be updated to include: B.2.8 Days off – regional cabin crew An individual. We note that a separate Full Bench is dealing with some substantive claims in respect of this award (AM2020/3).

[8] ABI notes that the Exposure Draft and draft variation determination variously refers to payments for shiftwork as '*shift penalty rates'* (clauses 10.5, 12.4), '*shift penalties'* (clause 16.2); '*shift penalty payments'* (clause 18.8; '*penalty rates'* (clause 19) and '*shift rates'* (clause 31.1). ABI suggests that the term "shift penalty rate" should be used throughout the award for the purposes of consistency. We agree and will amend the draft variation determination accordingly.

- *Pest Control Industry Award 20109*
- *Sugar Industry Award 201010*
- *Supported Employment Services Award 2010*

[13] The variation determinations in respect of these awards will be published shortly (see Section 4: Next Steps)

3. Award specific issues

3.1 Amusement, Events and Recreation Award 2010

[14] In its initial submission, ABI submitted that until the application of the casual loading to overtime rates in the Amusement Award is determined, either:

> (i) the drafting pertaining to the casual loading should be maintained in its original form (as currently appears in the Amusement Award); or
>
> (ii) the Exposure Draft for the Amusement Award should not be determined and published in its new form.

[15] At [22] of the Tranche 3 BP we expressed the *provisional* view that option (i) proposed by ABI be adopted. No party opposed our *provisional* view. We confirm our *provisional* view and will adopt option (i) proposed by ABI.

[16] LPA raised an issue concerning table C.3.1 which provides as follows:

> C.3.1 Casual adult employees – ordinary and penalty rates

	Ordinary hours	**Public holiday**
	% of ordinary hourly rate	
	125%	**200%**
	$	**$**
Grade 2 (General hand)	~~26.03~~27.90	~~41.64~~44.64
Grade 4 (Exhibition technician)	~~28.38~~31.30	~~45.40~~50.08
Grade 5 (Supervisory exhibition technician)	~~29.26~~33.20	~~46.82~~53.12

[17] Given the terms of clause 18.2(b) we expressed the *provisional* view (at [31] of the Tranche 3 BP) that the casual hourly rates in Table C.3.1 be amended as proposed by the LPA. No party opposed our *provisional* view. We confirm our *provisional* view and will amend the casual hurly rates in Table C.3.1 as proposed by the LPA.

---

[9] The AWU points out that in cluse 4.5 the insertion of the word 'that' immediately follows the word 'the' and one of these words should be deleted.

[10] Ai Group notes that in clause 20.3(c)(i) the cross reference should be to 'clause 20.3(c)(ii)' and not 'clause 20.3(b)'. Ai Group also notes that the following corrections should be made to clause H.4.1(d)(ii) of Schedule H: (AQF Certificate Level ~~I – II~~ IV traineeship) where it appears in the clause and the Table 4 heading. AWU notes that there is a cross referencing error in clause 31.3(b)(iii), the cross reference should be to clauses 31.3(b)(i) and (ii).

3.3 Black Coal Mining Industry Award 2010

[18] On 12 March 2020 a Statement was published in relation to the *Black Coal Mining Industry Award*.[11] The Statement set out the issues in respect of this award and indicated that it will be the subject of a separate conferencing process.

[19] A conference in respect of the issues raised was held on Friday 20 March 2020. The transcript of the conference is available to be viewed here. A Report published on 23 March 2020 sets out the outcomes of the conference.

[20] The matters that were agreed at the conference are as follows:

1. The correction of the following errors in the Exposure Draft:

   - the reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1'
   - the reference to clause 14 in clause 7.2(a) (the index to facilitative provisions) should be deleted and replaced with a reference to clause 15;
   - in clause 17.4, each time '20XX' appears it should be replaced with '2020';
   - in clause 24.9(a), 24.9(i) and 24.10, the reference to clause 24.4 should be replaced with a reference to clause 24.10;
   - in clause A.1.5 Note, the reference to clause 31 should be deleted, consistent with the note following the extant A.1.5;
   - in clause A.8.2 Wage related allowances and reimbursements – height money, the final column should be amended to reflect the fact that height money is payable per shift, not per hour.

2. The definition of the 'black coal mining industry' in clause 2 will be amended as follows:

   '**black coal mining industry** has the meaning given in clause 4.2 and clause 4.3'

3. The definition of 'ordinary week's pay' in clause 2 will be amended as follows:

   '**ordinary week's pay** means the minimum weekly wage rate in the tables of minimum rates in ~~clause~~s Schedules A~~.4~~ and B~~.2~~ for the award classification rate in respect of 35 ordinary hours.'

4. Clause 25.1 – Personal carers leave and compassionate leave:

   The following explanatory words be inserted into clause 25.1 of the Exposure Draft:

[11] [2020] FWCFB 1297

'Personal/carer's leave entitlements are provided for in the NES. This clause supplements those entitlements and deals with evidence required to be provided by an employee when taking paid personal/carer's leave.'

5. Clause 21.3 – Six day and seven day roster employees.

Variations to clauses 21.3(a) and (b) will be made as follows:

21.3 Six day and seven day roster employees

(a) All time worked in excess of or outside ordinary hours ~~after~~ of an afternoon shift or a rotating night shift by a 6 day roster employee or a 7 day roster employee will be paid at 215% of the employee's ordinary base hourly rate of pay.

(b) All time worked in excess of or outside ordinary hours ~~after~~ of a permanent night shift by a 6 day roster employee or a 7 day roster employee will be paid at 225% of the employee's ordinary base hourly rate of pay.

[21] Two issues remain outstanding.

Issue 1: Shiftwork rates Schedules C and D

[22] The CFMMEU (M&E) submits that the rates in clauses C.1.2, D.1.2 and D.2.2 should be amended, as follows:

(i) for the first 4 hours on a Saturday: 165% for an afternoon and rotating night and 175% for hours worked on a permanent night shift; and

(ii) on a Saturday after the first 4 hours: 215% for an afternoon and rotating night shift and 225% for hours worked on a permanent night shift.

[23] CFMMEU (M&E) proposal is supported by the other unions and opposed by Ai Group and the Coal Mining Industry Employer Group.

Issue 2: Clause 29.4 Employee required to work on a recognised public holiday

[24] Ai Group is pressing a claim in relation to clause 29.4 (clause 18.4 of the Exposure Draft at that time).

'**18.4 Employee required to work on a recognised public holiday**

(a) An employee who is required to work on a public holiday is to be paid at the rate of ~~double time~~ 200% of the relevant minimum hourly rate prescribed by clauses A.4 and B.2 for work performed during ordinary hours, in addition to any amount payable in respect of the relevant minimum weekly rate ~~payment~~ prescribed by clauses A.4 and B.2.

(b) Work performed in excess of ordinary hours on a public holiday is to be paid at the rate of 300% of the relevant minimum hourly rate prescribed by clauses A.4 and B.2. ~~treble time.~~

> **(c)** The rates prescribed by this clause are paid in substitution for, and are not cumulative upon, the penalty rates in clause 13 and the overtime rates in clause 14 of this award.'[12]

[25] The following directions were set out in the Report and continue to apply to the 'agreed' matters and issues 1 and 2 above:

1. All parties are to confirm their agreement to the matters set out [5] above by no later than **4pm, Wednesday 15 April 2020**.

2. The CFMMEU (M&E) is to file a draft determination and a submission in support of its proposed variation by no later than **4pm, Wednesday 15 April 2020.**

3. Ai Group is to file a draft determination and a submission in support of its proposed variation by no later than **4pm, Wednesday 15 April 2020**.

4. Interested parties are to file any submission in reply to the submissions filed pursuant to directions 1 and 2, by no later than **4pm, Wednesday 13 May 2020**.

5. Liberty to apply.

[26] A further conference will be convened after the reply submissions have been filed.

3.3 Broadcasting, Recorded Entertainment and Cinemas Award 2010

[27] ABI, Birch Carroll and Coyle Limited and other cinema industry employers (BCC) and Commercial Radio Australia (CRA) made submissions in relation to the Broadcasting Award.

[28] ABI raised four issues.

(i) Clause 45.3 - Penalty rates not cumulative

[29] Clause 45.3 states:

> **45.3 Penalty rates not cumulative**
>
> Extra rates prescribed in clause 45 are not cumulative so as to exceed a maximum of 300% of the minimum hourly rate.

[30] ABI submitted that the drafting of clause 45.3 is 'somewhat unique' and that it 'does not appear to have any meaningful work to do and should be removed.'

[31] At [39] of the Tranche 3 BP we expressed the *provisional* view that clause 45.3 be deleted.

[32] No party opposed our *provisional* view. We confirm our *provisional* view and will delete clause 45.3.

---

[12] Ai Group submission, 13 November 2015.

(ii) Clause 62.2 (a) - Zone managers - additional allowances

[33] Clause 62.2(a) states:

(a) Zone managers—additional allowances

(i) A zone manager will, in addition to the ordinary wage, be paid the following allowance for each additional theatre supervised:

	Allowance for each additional theatre supervised	**Maximum allowance**
	$ per theatre	$ per week
Zone 1	46.40	278.50
Zone 2	32.52	196.05

(ii) Zone 1 applies to cinemas in the central city areas of the capital cities of the States of the Commonwealth and the City of Newcastle or any cinemas regularly giving 3 or more performances daily.

(iii) Zone 2 applies to drive-in theatres and all other cinemas other than those in Zone 1.

[34] ABI questioned whether the wording of clause 62.2(a)(ii) offends s.154 of the *Fair Work Act 2009* on the basis that is expressed to apply to areas within capitals cities of "*the States of the Commonwealth*".

[35] ABI noted that while the Federal Court has confirmed that a modern award may contain an allowance that applied to a place within a state or territory, the current wording of the clause may still offend section 154 as it expressed to apply to the capital cities of all states, not all state *and* territories.

[36] ABI contended that such issues might be resolved by rewording clause 62.2(a)(ii) as follows:

'Zone 1 applies to cinemas:

A. in the central city areas of:

• Sydney;
• Melbourne;
• Brisbane;
• Perth;
• Adelaide; and
• the City of Newcastle; or

B. any cinemas regularly giving 3 or more performances daily.'

[37] At [44] of the Tranche 3 BP we invited interested parties to comment on the issue raised by ABI and the solution proposed. BCC support the amendment and reasoning advanced by ABI.

[38] We agree with ABI and will amend clause 62.2(a)(ii) as proposed.

(iii) Clause A.1.1(e) - Definitions - Captioner

[39] Clause A.1.1(e)(ii) provides as follows:

> 'Captions are the transcription of speech, sound effects and other pertinent information which features as part of a soundtrack and would not otherwise be accessible to Deaf or hearing impaired viewers. Captions are either transmitted live-to-air or are prepared in advance and are timecoded to keep in synch with the soundtrack. Captions can also include colouring and positioning to help identify speakers.'

[40] ABI submitted that the word "*Deaf*" in clause A.1.1(e) does not need to be capitalised.

[41] At [47] of the Tranche 3 BP we agreed with ABI. No party expressed a contrary to the view. We confirm our view and will amend the Exposure Draft and draft variation determination.

(iv) Clause A.1.23(d) - Definitions - Captioner/Audio Describer and Subtitlers/Subtitling Editors

[42] Clause A.1.23(d) states:

> (d) Multi-Skilled Captioner/Audio Describer Skills, competencies, duties and responsibilities held and exercised
>
> (i) Performs the duties of the lower classification
>
> (ii) Experienced in audio description, live or file captioning
>
> (iii) Meets a high standard of accuracy and productivity across a range of programs and output types to the required levels
>
> (iv) Capable of working independently without direct supervision and applies appropriate discretion and judgment in carrying out work
>
> (v) Provides support and guidance to other Captioners/Audio Describers Duties may include specialised editing of own and others work, audio describing for movies and other longer more complex content and live output on a range of programs including sports and news and current affairs

[43] The sentence beginning with the words "*Duties may include specialised editing*" has been appended to subclause A.1.23(d)(v) and ABI submits that this sentence should be separated from the five subclauses (i) to (v) as in clauses A.1.23(a), (c), (e) and (h).

[44] At [50] of the Tranche 3 BP we expressed the *provisional* view that clause A.1.23(d)(v) be redrafted as follows:

> (v) Provides support and guidance to other Captioners/Audio Describers
>
> Duties may include specialised editing of own and others work, audio describing for movies and other longer more complex content and live output on a range of programs including sports and news and current affairs

[45] No party opposed our *provisional* view. We confirm our *provisional* view and will redraft clause A.1.23(d)(v).

[46] BCC raised three issues.

(i) Definitions

[47] At clause 2 of the Exposure Draft, there is a definition of 'cinema'. At clause 62, at Schedule D (D.1.4(d), D.1.6, D.1.7(a) and D.1.8) and at Schedule H (H.1.1) the word 'theatre' is used. BCC and others submit that there is a clear intention in the award that, at these places in the Exposure Draft, these words have an identical meaning and contend that any possible ambiguity should be resolved. BCC submitted that this could be done by changing 'theatre', each time it appears in these places, to 'cinema'.

[48] The word 'theatre' is also used in Schedule E - Actors at E.2.5. BCC does not suggest that there be any change to Schedule E.

[49] At [54] of the Tranche 3 BP we expressed the *provisional* view that the amendment proposed by BCC be adopted. No party opposed our *provisional* view. We confirm our *provisional* view and will make the amendments proposed by BCC.

(ii) Casual conversion

[50] BCC advanced the following submission:

> 'Clause 8.2 states that Clause 11 - Casual employees will not apply to employees in cinemas. However clause 11.5(k)(ii) indicates that clauses 58.3 and 59.4, which apply to employees in cinemas, are relevant to casual conversion.
>
> The intention of the Full Bench is noted in the Decision of 21 September 2018 as it is stated in AM2014/196 and AM2014/197:
>
> > We consider the cinema industry employers' concern will be addressed if paragraph (j)(ii) of the casual conversion is modified to read:
> >
> > "(ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clauses 54.3(a), 55.1(c) and 55.2(d) in respect of cinema employees and the matters referred to in clause 10.4(c) in respect of all other employees."
>
> Current Award clause 54.3(a) is reflected in clause 57.3 of the Exposure Draft.
>
> Current Award clause 55.1 (c) is reflected in clause 58.3 of the Exposure Draft.
>
> Current Award clause 55.2(d) is reflected in clause 59.4 of the Exposure Draft.
>
> The inconsistencies in the Exposure Draft appear to be:
>
> - Clause 8.2 This states that clause 11.4 - Casual employees will not apply to employees in cinemas (see clause 57 - Types of employment).
> - Clause 11.5(k)(ii) This states that clause 10.1 applies to employees in cinemas. However clause 8.2 states that it does not apply. Clause 57.3 - Part-time employees corresponds with clause 54.3(a) in the current award and is the provision applicable to employees in cinemas.

- Clause 11.5(k)(ii) This also refers to clauses 58.3 (55.1 (c) of the current Award) and 59.4 (55.2(d) of the current Award). No recognition is given in the Exposure Draft to the Full Bench reference to clause 57.3 (54.3(a) in the current Award).'[13]

[51] BCC proposed to advance a 'suitable provision' before the hearing scheduled for 6 and 7 April 2020. In its reply submission of 7 April 2020, BCC submits:

> 'As noted at paragraph 5.2 of the Employers' submission dated 3 March 2020, there is an anomaly at clauses 8.2 and 11 of the Exposure Draft in respect of casual conversion of casuals in cinemas. Clause 8.2 states that clause 11 – Casual employees does not apply to employees in cinemas. However clause 11.5(k)(ii) implies that it does. Further, in its Decision of 21 September 2018, (AM2014/196 and AM2014/197), the Full Bench ordered specific words for the BREC Award in respect of conversion from casual in cinemas.
>
> To give effect to the Full Bench Decision of 21 September 2018, the Employers propose the following:
>
> (i) Clause 8.2 of the Exposure Draft be amended to: Clause 9 –Full-time employees to clause 11.4 will not apply to employees in cinemas.
>
> (ii) Clause 11.5(k)(ii), as decided by the Full Bench on 21 September 2018, be expressed as follows (adopting the clause numbers in the Exposure Draft): if it is agreed that the employee will become a part-time employee, the matters referred to in clauses 57.3, 58.3 and 59.4 in respect of employees in cinemas, and the matters referred to in clause 10.4 in respect of all other employees [Background Paper 55-56].'

[52] We propose to convene a conference to discuss this issue.

(iii) Minimum wages

[53] BCC noted that the Draft Determination attached to the Decision of 20 November 2019 (AM2018/17) has not yet been made. A decision and final variation determination were issued on 20 March 2020.[14] The Exposure Draft and variation determination will be amended to incorporate the 20 March 2020 variation.

[54] The CRA submission concerned clause 18.3(a) of the Exposure Draft, which states:

> **18.3 Annual leave loading**
>
> Before the start of the employee's annual leave the employer must pay the employee:
>
> (a) Subject to clauses 32.1(d) and 32.2(d), instead of the base rate of pay referred to in section 90(1) of the Act, the amount the employee would have earned for working their normal hours, exclusive of overtime had they not been on leave;
>
> (b) An additional loading of 17.5% of the relevant minimum wage for their classification as set out in this award.

[55] The comparable provision in the current award is at clause 23.9(a) and (b), as follows:

---

[13] BCC and others submission 3 March 2020 at 5.2

[14] See [2020] FWCFB 1511; PR717665

> **23.9** Before the start of the employee's annual leave the employer must pay the employee:
>
> (a) subject to clause 30.8, instead of the base rate of pay referred to in s.90(1) of the Act, the amount the employee would have earned for working their normal hours, exclusive of overtime had they not been on leave; and
>
> (b) an additional loading of 17.5% of the relevant minimum wage for their classification as set out in this award.

[56] CRA contended that clause 18.3(a) can be read as 'inappropriately entitling some employees … to payment of both the relevant shift loading (and potentially other amounts payable in respect of ordinary hours, but now excluding overtime) and an additional annual leave loading'. CRA proposed that:

> (a) clause 18.3(a) of the Exposure Draft should be deleted and replaced with the following:
>
> '(a) Subject to clause 32.2(d), instead of the base rate of pay referred to in s.90(1) of the Act, the amount the employee would have earned for working their normal hours had they not been on leave, but excluding overtime, shift rates, penalty rates, special rates or any other payment which might have been payable to the employee as a reimbursement for expenses incurred; and
>
> (b) a new paragraph should be added to clause 18(c) of the Exposure Draft after clause 18.3 as follows:
>
> 'An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to that prescribed in clauses 16.7(a) and 16.7(b) or the shift rates prescribed by this award, whichever is the greater, but not both,'

[57] At [61] of the Trance 3 BP we invited interested parties to comment on the issue raised by CRA and on the amendments proposed.

[58] ABI made the following submission in relation to the issue raised by CRA:

> 'ABI and NSWBC acknowledge that the terms of the exposure draft do not depart from the existing provisions in the modern award.
>
> Despite this, our clients consider the CRA submission to have merit.
>
> ABI and NSWBC agree that is unusual for a modern award to entitle employees on paid annual leave to both the shift rates they would have received had they not been on leave and a 17.5% loading.
>
> This position was expressed by the Full Bench at [184] in the Payment of Wages decision handed down on 1 December 2016.
>
> In this decision, the Full Bench considered annual leave loading clauses in the Joinery Award 2010, the Food, Beverage and Tobacco Manufacturing Award 2010 and the Electrical, Electronic and Communications Contracting Award 2010.
>
> These clauses could be read as entitling employees to payment of both a shift loading and an additional annual leave loading (or a double shift loading).

> The Full Bench found this to be "inconsistent with the norm expressed by the Commission in the 1971 Annual Leave Case" and considered it necessary to vary these clauses in order to meet the modern awards objective.
>
> ABI and NSWBC support the nature of the variations proposed by CRA.
>
> Our clients question whether the proposed wording of the new clause 18.3(c) sufficiently considers the fact that the exposure draft variously expresses payment for shift work as:
>
> > (a) 'shift duty allowances' to be paid as separate amounts in addition to the employee's base rate of pay (e.g. clauses 32 and 45.2); and
> >
> > (b) 'shift penalties' to be paid as total amounts in lieu of the employee's base rate of pay (e.g. clauses 44 and 51).'[15]

[59] Consistent with the Statement[16] published on 20 December 2019, the issue raised by CRA should be pursued by a separate application to vary the award.

[60] ABI also noted that clause 44.4(b) of the Exposure Draft contains a typographical error – the word 'sAn' should be 'An'. We agree and will make the correction.

[61] We propose to republish the Exposure Draft and draft variation determination to incorporate the amendments we have decided to make. We will then convene a conference to discuss the republished documents and the BCC's proposed provision in respect of casual conversion.

3.4 Business Equipment Award 2010

[62] In its initial submission, Ai Group proposed that the words 'in clause 14.2' in the definition of 'minimum hourly rate' in clause 2 be replaced by 'prescribed by this award'. In support of the proposed amendment Ai Group submitted:

> 'The definition is problematic as it requires the calculation of the minimum hourly rate by reference to the weekly rates contained in clause 14.2. This excludes employees who are not entitled to those weekly rates, such as employees to whom clause 14.3 applies (Supported Wage System) and clause 14.4 applies (National Training Wage).'[17]

[63] At [64] of the Tranche 3 BP we expressed the *provisional* view that clause 14.2 be amended as proposed by Ai Group. No party opposed our *provisional* view. We confirm our *provisional* view and will amend the variation determination accordingly.

[64] There are no remaining drafting and technical issues in respect of this award.

3.5 Electrical, Electronic and Communications Contracting Award 2010

[65] In its initial submission, ABI submitted that the current Schedule B 'could be articulated more clearly and there are a few errors in relation to method of calculating rates, relevant

---

[15] ABI reply submission 7 April 2020 at paras. 13-21

[16] [2019] FWC 8582

[17] Ai Group submission 6 March 2020 at para.24

percentages applied and all-purpose allowances'. ABI identified the following issues, listed in order of appearance in Schedule B:

(a) the definition for 'ordinary hourly rate' in clause B.1.1 is different to the definition for 'ordinary hourly rate' in clause 2 of the Exposure Draft;

(b) Tables B.2.1, B.4.1, B.4.5 and B.4.9 set out 'ordinary and penalty rates' for other than shiftworkers and include a 'public holiday' column. Tables B.2.2, B.4.2, B.4.6 and B.4.10 set out 'overtime rates' for other than shiftworkers and also include the same 'public holiday' column. Replication of the 'public holiday' column may cause confusion for users of the Electrical Award;

(c) Table B.2.4 provides for 'overtime rates' but also includes a 'public holiday' column. The comment attached to the percentage set out in this column (namely 250%) indicates that it is from clause 20.4 of the Exposure Draft, however this is the incorrect percentage for all shiftworkers. Public holiday penalties for shiftworkers are contained in clause 13.15 of the Exposure Draft. The penalty which applies on a public holiday differs depending on whether the employee is a continuous shiftworker or other than a continuous shiftworker. The applicable penalties payable on a public holiday to both categories of shiftworkers are correctly outlined in the last column of Table B.2.3;

(d) clause B.3.2 of Schedule B for 'casual shiftworkers' includes a 'day' column. This is unnecessary, as the table is for shiftworkers, and rates applicable to day workers are already provided for in Table B.3.1;

(e) reference to the calculation of apprentice hourly rates for adults and juniors underneath clause B.4 of Schedule B is somewhat confusing. The adult apprentice rates are differentiated based on whether the apprentice commenced their apprenticeship before or, on or after, 1 January 2014. The junior apprentice rates are not expressed in the same manner, despite the fact that clause 16.4(a) of the Electrical Award specifies different rates for apprentices who commenced their apprenticeship before or, on or after, 1 January 2014. There should be consistency between these clauses; and

(f) underneath Table B.4.1, footnote 1 indicates that the apprentice hourly rate includes industry allowance, tool allowance and electrician's licence allowance. However, clause 16.4(a)(iii) for junior apprentices, clause 16.4(b)(iii) and clause 16.4(b)(vi) for adult apprentice indicates that apprentices should be paid:

(i) the full amount of:

A. tool allowance in clause 18.3(g), which is an all-purpose allowance; and

B. fares allowance in clause 18.6(d); and

(ii) the percentages set out in clause 16.4 for the applicable apprentice of:
A. travel time allowance in clause 18.6(c);

B. electrician's licence allowance in clause 18.3(b), which is an all-purpose allowance; and

C. industry allowance in clause 18.3(a), which is an all-purpose allowance.

[66] To resolve these issues ABI submitted that:

(a) the definition for 'ordinary hourly rate' in B.1.1 is amended to reflect the definition provided in clause 2 of the Exposure Draft; and

(b) Tables B.2.1, B.4.1, B.4.5 and B.4.9 are amended so that they only refer to 'ordinary rates' for other than shiftworkers. This requires:

(i) the words 'and penalty' to be deleted from the heading for B.2.1, B.4.1, B.4.5 and B.4.9; and

(ii) the 'public holiday' column be removed from the Tables in B.2.1, B.4.1, B.4.5 and B.4.9.

(c) Tables B.2.2, B.4.2, B.4.6 and B.4.10 be amended so it is 'overtime and penalty rates' for other than shiftworkers; and

(d) remove the 'public holiday' column from Table B.2.4 as the percentage provided for in this table is incorrect, and penalty rates for public holidays is already provided for in Table B.2.3; and

(e) remove the 'day' column from Table B.3.2 as this is unnecessary, as Table B.3.1 already provides for a day workers rates and Table B.3.2 is for casual shiftworkers; and

(f) remove paragraph 2 and 3 underneath Schedule B.4 Apprentice rates and replace with the following "the apprentice hourly rate for adult apprentices is calculated in accordance with clause 16.4(b)" to ensure consistency with junior apprentices; and

(g) depending on the Commission's decision in relation to the all-purpose rate for apprentices, this might involve either:

(i) amending clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii) so references to fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) are removed; or

(ii) amending the footnotes for 'apprentice hourly rate' in Schedule B.4 so that it includes "full amount of tool allowance and fares allowance, and the relevant percentage as set out in clause 16.4 of the travel time allowance, electrician's licence allowance and industry allowance"; and

(iii) amending the rates in the tables in Schedule B.4 so it includes the fares allowance, and percentage of the travel time allowance.

[67] At [83] of the Tranche 3 BP we invited interested parties to comment on the amendments proposed by ABI. We also noted that in relation to [80](a), Schedule B.1.1 does not contain a definition of 'ordinary hourly rate' as such, but simply explains the basis for the calculation of the rates in the table.

[68] Ai Group agrees with ABI's submissions, except as set out below:

'Ai Group proposes that whilst there is a difference between the definition of "hourly rate" in clause B.1.1 and that contained in the definition, we do not see that this is likely to cause any conflict. The schedules appropriately reflect the inclusion of tool allowances where payable and exclude all other all-purpose allowances. An explanation is reflected in the notation under the tables.

If there is any confusion, Ai Group proposes that clause B.1.1 be amended to include the words " as set out in this schedule" after the words "Ordinary hourly rate" so as to read "Ordinary hourly rate, as set out in this schedule, includes the industry allowance (clause 18.3(a)) and tool allowances as applicable (clause 18.3(g)) which are payable for all purposes".'[18]

[69] The CEPU opposes ABI's proposed amendment on the following basis:

'The CEPU opposes the proposed amendment detailed in [paragraph 21(g)(i) above] to clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii) on the basis that by deleting reference to fare allowance in clause 18.6(d) and travel allowances in clause 18.6(c), in the above mentioned clauses, may result in employers failing to pay the said allowances all together or, at the very least, cause confusion as to how the travel time allowance in clause 18.6(c) will be paid to apprentices.

Example of ABI's Proposal to Clause 16.4(iii):

In addition to the minimum wage payments arising from clause 16.4(a), apprentices will be paid the full amount of the tool allowance in clause 18.3(g) and ~~the fares allowances in clause 18.6(d) and~~ the percentages shown in clause 16.4(a) of the electrician's licence allowance in clause 18.3(b), ~~the travel time allowance in clause 18.6(c)~~ and the industry allowance in clause 18.3. These weekly payments in total will form the all-purpose rate to be paid to an apprentice. The weekly all-purpose rate of pay is payable for all purposes of the award and will be included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination. Any other special allowances in clauses 18.4 and 18.5 and allowances for travel and expenses in clauses 18.6 and 18.7 will be paid to apprentices on an 'as incurred' basis at the rate specified, subject to clause 18.2(b).

Currently, apprentices receive the percentage shown in clause 16.4(a) and 16.4(b)(ii) of the travel time allowance in clause 18.6(c). The calculation of how much of the travel time allowance an apprentice is to receive is detailed in clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv) and16.4(b)(vi) and not in clause 18.6(c). Further, no other clauses in the Electrical Contracting Award apart from clauses 16.4(a) and (b) specify that an apprentice is to receive a percentage shown in clauses 16.4(a) and 16.4(b)(ii) of the travel time allowance in clause 18.6(c).'[19]

[70] The CEPU opposes ABI's proposal:

'The CEPU opposes ABI's proposal on the basis of that correctly noted by the Commission at paragraph 83 of the Background Paper, which states that 'Schedule B.1.1 does not contain a definition of 'ordinary hourly rate' as such, but simply explains the basis for the calculation of the rates in the table.'

[18] Ai Group submission in reply 7 April 2020 at paras. 9-10

[19] CEPU submission in reply 7 April 2020 at paras. 11-12

> The CEPU submits that to maintain clarity and consistency with the foot notes which appear in Schedule B with respect to the basis for the calculations in the rates tables in Schedule B, the wording in Schedule B.1.1 should be amended as follows:
>
> > **Ordinary hourly rate** includes the industry allowance (clause 18.3(a)) and for grade 5 and higher classifications the tool allowances ~~as appliable~~ (clause 18.3(g)) which are payable for all purposes.'[20]

[71] In the updated Exposure Draft, the Commission asked the parties to consider whether the fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) should be included in the all-purpose rate for apprentices.

[72] In relation to the all-purpose rate for apprentices, ABI submitted that the fares allowance and travel time allowance should *not* be included, because:

(a) neither allowance falls within clause 18.3 all-purpose allowances;

(b) clause 18.6(d) clearly states that fares allowance only applies where an employee is required to start and/or cease work on a job site, which may not always be applicable;

(c) clause 18.6(c) clearly outlines the circumstances in which the travel time allowance must be paid, namely each day an employee presents to work and when an employee takes an RDO;

(d) clause 18.6(g) provides that the allowances in clause 18.6, which encompasses both the fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) are not to be taken into account when calculating overtime penalty rates, annual leave, personal/carer's leave, long service leave or public holiday payments; and

(e) the wording of the Exposure Draft does not indicate that clauses 18.6(c) and 18.6(d) should be applied any differently in relation to apprentices, particularly when these clauses are read in conjunction with clause 18.6(g) and clause 16.4(a).

[73] In relation to the question posed in the Exposure Draft, Ai Group submitted that the fares allowance (in clause 18.6(d)) and the travel time allowance (in clause 18.6(c)) should not be included in the all purpose rate:

> '…An all-purpose rate is paid not only for time worked but also on certain forms of paid leave under the award (including annual leave and personal/carer's leave), on public holidays not worked and where payment is made in lieu of notice upon termination.
>
> Clause 18.6(c) clearly stipulates that the allowance is paid only on days the employee presents themselves for work and on rostered days off. It is not intended to be paid under any other circumstance. It therefore should not be included in the all-purpose rate.
>
> Clause 18.6(d) similarly is an allowance that is payable when the employee is actually working and required to start or cease work on a job site. This allowance is not intended to be paid under any other circumstance. It therefore should not be included in the all-purpose rate.'[21]

[20] CEPU submission in reply 7 April 2020 at paras 7-8

[21] Ai Group submission 6 March 2020 at paras. 29-31

[74] At [88] of the Tranche 3 BP we invited other interested parties to comment on the submissions of ABI and Ai Group in respect of whether the fares allowance in clause 18.6(d) and the travel time allowance in clause 18.6(c) should be included in the all-purpose rate for apprentices. We also invited ABI to propose an amendment to address the issue it has raised.

[75] ABI agrees with the Ai Group's submission and in response to the Commission's invitation, proposed that the issue could be addressed by removing references to 'fares allowance' and 'travel time allowance' in clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv) and 16.4(b)(vii).

[76] The CEPU proposes that rather than removing references to fares allowance and travel time allowance from clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii), that clause 16.4(a)(iii) be reverted back to the wording of the current version of the Electrical Contracting Award.

> 'The wording of clause 16.4(a)(iii) and 16.4(a)(iv) in the current Electrical Contracting Award accurately and clearly categorises and describes the fare and travel allowance as well as the all purpose allowances payable to apprentices and therefore should remain unchanged.
>
> The CEPU submits clause 16.4(a)(iii) of the exposure draft should be amended as follows:
>
> > *CEPU Proposed Amendment to Clause 16.4(a)(iii):*
> >
> > Delete clause 16.4(a)(iii) as it appears in the Exposure draft and insert the following:
> >
> > (iii) In addition to the minimum wage payments arising from clause 16.4(a), apprentices will be paid the full amount of the tool allowance in clause 18.3(g) and the fares allowances in clause 18.6(d) and the percentages shown in clause 16.4(a) of the electrician's licence allowance in clause 18.3(b), the travel time allowance in clause 18.6(c) and the industry allowance in clause 18.3. Any other special allowances in clauses 18.4 and 18.5 and allowances for travel and expenses in clauses 18.6 and 18.7 will be paid to apprentices on an 'as incurred' basis at the rate specified, subject to clause 18.2(b).
> >
> > (iv) The all-purpose rate to be paid to an apprentice will be the sum of the minimum wage rate arising from clause 16.4(a), the full amount of the tool allowance in clause 18.3(g) and the percentages shown in clause 16.4(a) of the electrician's licence allowance in clause 18.3(b), and the industry allowance in clause 18.3. The weekly all-purpose rate of pay is payable for all purposes of the award and will be included as appropriate when calculating payments for overtime, all forms of paid leave, annual leave loading, public holidays and pro rata payments on termination.'[22]

[77] The CEPU notes that at present clauses 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii) of the exposure draft are consistent with the current Electrical Contracting Award. It is submitted that the current wording of clauses 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii) should be retained.

[78] Further, should fares allowance in clause 18.6(d) and travel time allowance in clause 18.6(c) be found not to be included as all-purpose allowances for the purposes of clauses 16.4(a)

[22] CEPU submission in reply 7 April 2020 at paras. 14-15

and 16.4(b), then the CEPU proposes amending the footnotes for 'apprentice hourly rates' in Schedule B.4 as follows:

> **Apprentice hourly rate** includes the industry allowance, tool allowance and electricians licence allowance payable to all employees for all purposes. Any additional ~~all purpose~~ allowances applicable need to be added to these rates.
>
> 'The removal of the words 'all purpose' from the last line of the footnotes will allow the footnote to capture all other allowances to be paid in addition to the apprentices' hourly rate including the fare and travel time allowance.'[23]

[79] At [89] – [90] of the Tranche 3 BP, we agreed with Ai Group that the reference in the last sentence of clause 21.4(b) to clause 21.4 is an error and the correct reference is to clause 21.2. We will amend the Exposure Draft and draft variation determination accordingly.

[80] A conference will be convened shortly to discuss the disputed issues set out above.

3.6 Fitness Industry Award 2010

[81] Submissions were received from ABI[24] and the Australian Swim Schools Association (ASSA).[25]

[82] ABI agreed with our *provisional* view that the variation of the award in accordance with the draft variation determinations is necessary to achieve the modern awards objective.

[83] ASSA agreed with the submission of ABI, but raised the issues set out below.

(i) Clause 12.3

[84] Clause 12.3 of the Exposure Draft states:

> **12.3 Minimum engagement**
>
> (a) Subject to clauses 12.3(b) and 25.3, a casual employee must be engaged for a minimum period of 3 hours' work at the appropriate rate or be paid per engagement for a minimum of 3 hours at the appropriate rate.
>
> (b) Notwithstanding clause 12.3(a) and subject to clause 25.3, a casual employee who is classified as a Level 2, 3, 3A, 4, 4A or 5 instructor, trainer or tennis coach or as a student undertaking practical work involvement may be engaged for a minimum period of one hour's work at the appropriate rate or be paid per engagement for a minimum of one hour's work at the appropriate rate.

[85] ASSA raised two issues in relation to clause 12.3. First, they submitted that the drafting of clause 12.3 (minimum engagement), paragraphs (a) & (b) would be enhanced by deletion of the references to "clause 25.3" which appears in both. ASSA submitted that the payment (clause

---

[23] CEPU submission in reply 7 April 2020 at para. 18

[24] ABI submission, 6 March 2020

[25] ASSA submission, 30 March 2020

12.2 (b) (ii)) and minimum engagement (clause 12.3 (b)) of casuals on public holidays is already addressed adequately.

[86] Clause 25.3 is set out below:

> **25.3 Payment for working on a public holiday**
>
> (a) A full-time or part-time employee must be paid at the rate of 250% of the minimum hourly rate for all hours worked on a public holiday. An employee required to work on a public holiday must be engaged or be paid for at least 4 hours' work.
>
> (b) Payment for a casual employee working on a public holiday is in accordance with clause 12.2(b).

[87] Clause 12.2(b) is set out below:

> (b) For each ordinary hour worked on Saturday, Sunday or a public holiday, a casual employee must be paid in accordance with Schedule B—Summary of Hourly Rates of Pay (B.2—Casual employees):
>
> (i) the minimum hourly rate; and
>
> (ii) a loading of 30% of the minimum hourly rate, for the work being performed.

[88] We agree with ASSA that the reference to clause 25.3 is unnecessary and it is our *provisional* view that it should be deleted. It is also our *provisional* view that the words 'notwithstanding clause 12.3(a)' should also be deleted from clause 12.3(b) as they are unnecessary.

[89] The second issue raised by ASSA related to the words 'as a student' in clause 12.3(b). ASSA submitted that as a consequence of the amendments made by the substantive issues Full Bench[26], the wording of the 'Classification Definitions' (Schedule A) relating to levels 1 & 2 have been modified. ASSA submitted that the phrase "as a student" should be replaced by 'as a trainee' because the word 'student' does not appear in the Schedule A in the Exposure Draft, whereas 'training' is used at a multiplicity of points. We agree. It is our *provisional* view that clause 12.3(b) should be amended as suggested by ASSA.

[90] It is our *provisional* view that clause 12.3 be amended as followed:

> **12.3 Minimum engagement**
>
> (a) Subject to clause~~s~~ 12.3(b) ~~and 25.3~~, a casual employee must be engaged for a minimum period of 3 hours' work at the appropriate rate or be paid per engagement for a minimum of 3 hours at the appropriate rate.
>
> (b) ~~Notwithstanding clause 12.3(a) and subject to clause 25.3, a~~ A casual employee who is classified as a Level 2, 3, 3A, 4, 4A or 5 instructor, trainer or tennis coach or as a ~~student~~ trainee undertaking practical work involvement may be engaged for a minimum period of one hour's

[26] [2018] FWCB3914, PR608870

work at the appropriate rate or be paid per engagement for a minimum of one hour's work at the appropriate rate.

(ii) Casual loading

[91] ASSA submitted[27] that the wording of clause 7.4(b) (Casual loading), has the potential for misunderstanding and therefore misapplication. This clause was subsequently renumbered as clause 12.2 and is set out in full below:

> **12.2 Casual loading**
>
> (a) For each ordinary hour worked on Monday to Friday, a casual employee must be paid in accordance with Schedule B—Summary of Hourly Rates of Pay (B.2—Casual employees):
>
> (i) the minimum hourly rate; and
>
> (ii) a loading of 25% of the minimum hourly rate, for the work being performed.
>
> (b) For each ordinary hour worked on Saturday, Sunday or a public holiday, a casual employee must be paid in accordance with Schedule B—Summary of Hourly Rates of Pay (B.2—Casual employees):
>
> (i) the minimum hourly rate; and
>
> (ii) a loading of 30% of the minimum hourly rate, for the work being performed.

[92] ASSA submitted that the reference to "….a casual employee must be paid in accordance with Schedule B (B.2) Casual employees" may, reasonably be construed as requiring additional consideration by reference to (i) and (ii): "The minimum hourly rate; and a loading of XX% of the minimum hourly rate." They submitted that there is potential for 'double counting' and that the clause should be redrafted to decouple the reference to the schedule and the explanation of how the rates in the schedule have been established.

[93] It seems unlikely that the clause would be construed as requiring the payment of the both the amount in Schedule B and the amounts in the clauses themselves, however, we think the reference to Schedule B is unnecessary and it is our *provisional* view that the clause should be amended as follows:

> **12.2 Casual loading**
>
> (a) For each ordinary hour worked on Monday to Friday, a casual employee must be paid ~~in accordance with Schedule B—Summary of Hourly Rates of Pay (B.2—Casual employees)~~:
>
> (i) the minimum hourly rate; and
>
> (ii) a loading of 25% of the minimum hourly rate, for the work being performed.

[27] ASSA submission 19 March 2019

(b) For each ordinary hour worked on Saturday, Sunday or a public holiday, a casual employee must be paid ~~in accordance with Schedule B—Summary of Hourly Rates of Pay (B.2—Casual employees):~~

(i) the minimum hourly rate; and
(ii) a loading of 30% of the minimum hourly rate, for the work being performed.

(iii) Summary of monetary allowances

[94] The note at clause 17.1 provides

NOTE: See Schedule C—Summary of Monetary Allowances for a summary of monetary allowances and method of adjustment. Employees engaged under clause 11—Part-time employees, shall be paid all allowances on a pro rata, hourly, basis. Employees engaged other than on a full-time basis under clause 10— Full-time employees shall be paid pro rata the wage-related allowances detailed in clause 17.2(a).

[95] ASSA submitted that Schedule C – (Summary of Monetary Allowances) (C.1), should be amended by adding a further column detailing the 'hourly' rates applicable to the three categories of Leading hands and supervisors allowances for employees other than full-time employees. The relevant table is set out below:

Allowance	**Clause**	**% of standard rate**	**$**	**Payable**
Leading hands and supervisors, in charge of—1 to 5 employees	17.2(a)	3.00	24.56	per week
Leading hands and supervisors, in charge of—6 to 10 employees	17.2(a)	4.10	33.56	per week
Leading hands and supervisors, in charge of—More than 10 employees	17.2(a)	5.50	45.02	per week
Broken shift allowance	17.2(b)	1.70	13.91	per day
First aid allowance	17.2(c)	0.32	2.62	per day

[96] We agree. It is our *provisional* view that the table should be amended as follows:

Allowance	Clause	% of standard rate	$	Payable
Leading hands and supervisors, in charge of—1 to 5 employees—Full-time	17.2(a)	3.00	24.56	per week
Leading hands and supervisors, in charge of—1 to 5 employees—Other than full-time	17.2(a)	Weekly allowance /38	0.65	per hour
Leading hands and supervisors, in charge of—6 to 10 employees—Full-time	17.2(a)	4.10	33.56	per week
Leading hands and supervisors, in charge of—6 to 10 employees—Other than full-time	17.2(a)	Weekly allowance /38	0.88	per hour
Leading hands and supervisors, in charge of—More than 10 employees—Full-time	17.2(a)	5.50	45.02	per week
Leading hands and supervisors, in charge of—More than 10 employees—Other than full-time	17.2(a)	Weekly allowance /38	$1.18	per hour
Broken shift allowance	17.2(b)	1.70	13.91	per day
First aid allowance	17.2(c)	0.32	2.62	per day

[97] We propose to republish the Exposure Draft and draft variation determination in accordance with the *provisional* views we have expressed above. Interested parties will have an opportunity to comment on the revised Exposure Draft and draft variation determination.

3.7 Food, Beverage and Tobacco Manufacturing Award 2010

[98] In its initial submission the AMWU raised three issues.

(i) Annual close down

[99] Clause 25.11 of the Exposure Draft provides for an employer to close down their enterprise or a part of it in certain circumstances, as follows:

> 'Notwithstanding section 88 of the Act and clause 25.5, an employer may close down an enterprise or part of it for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned, provided that…'[28]

[100] The AMWU noted that the reference to clause 25.5 is an error, and the reference should instead be to clause 25.7. The AWU made the same point.

[101] At [94] of the Tranche 3 BP we said that we agreed with the AMWU and would amend the Exposure Draft and draft variation determination accordingly. Ai Group also agreed with the AMWU and the amendment proposed. We confirm that we will amend the variation determination as proposed by the AMWU.

(ii) Casual Employees

[102] Clause 10 of the Exposure Draft deals with casual employees and clauses 10.2 and 10.3 provides as follows:

> **10.2** A casual employee working ordinary time must be paid:
>
> (a) the ordinary hourly rate prescribed in clause 14—Minimum wages and classifications for the work being performed; plus
>
> (b) a casual loading of 25% of the ordinary hourly rate.
>
> **10.3** The loading constitutes part of the casual employee's all-purpose rate.[29]

[103] The AMWU raised two concerns with clause 10 as presently drafted:

(i) The clause does have an equivalent clause to clause 11.2(c) of the Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award) that clarifies that the rate resulting from the calculation required by 10.2 and 10.3 is the 'casual ordinary hourly rate'.

(ii) The clause does not clarify that where employees are entitled to a penalty rate or shift loading, that penalty or loading is to be calculated as a percentage of the casual ordinary hourly rate and not the ordinary hourly rate.

[104] To address these issues, the AMWU proposed that clause 10 be amended consistent with the equivalent clause in the Exposure Draft for the Manufacturing Award,[30] as follows:

> **10.1** A casual employee is one engaged and paid as a casual employee.
>
> **10.2** A casual employee working ordinary time must be paid:
>
> (a) the ordinary hourly rate prescribed in clause 14—Minimum wages and classifications for the work being performed; plus
>
> (b) a casual loading of 25% of the ordinary hourly rate.
>
> **10.3** The loading constitutes part of the casual employee's all-purpose rate."

[28] Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 20XX dated 29 January 2020 clause 25.11.

[29] Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 20XX dated 29 January 2020 clause 10.2 and 10.3.

[30] Manufacturing Award Exposure Draft

10.4 The resulting rate is the casual ordinary hourly rate.

10.5 Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

[105] The balance of clause 10 would be renumbered as a consequence of the proposed amendments.

[106] The AWU also raised an issue about clause 10.2 and submits that the clause should read:

'A casual employee ~~working ordinary time~~ must be paid …'

[107] The AWU contended that there is no longer a dispute that the casual loading is payable on a compounding basis when overtime is worked.[31]

[108] In the Tranche 3 BP we invited interested parties to comment on the amendments to clause 10 proposed by the AMWU and AWU. Ai Group did not oppose the amendments proposed.

[109] ABI did not oppose the nature of the amendments proposed by the AMWU which would essentially introduce a definition of '*casual ordinary hourly rate'* to clause 10 (Proposed Definition) and make it clear that penalty rates or shift loadings are be calculated on this basis. But, ABI noted that this would be inconsistent with the existing definition of '*casual ordinary hourly rate'* in clause B.2.1 of the exposure draft (Existing Definition).

[110] Under the Existing Definition, all-purpose allowances do not form part of the '*casual ordinary hourly rate'* but must be added to it prior to the calculation of penalties. Whereas, under the Proposed Definition, all purpose allowances are to be added to relevant hourly rate, prior to the calculation of the casual loading (by virtue of the interaction between clause 10.2 and the definition of '*ordinary hourly rate'* in clause 2).

[111] ABI notes that this issue arises in part from clause 10.2 (a) which states that a casual employee is entitled to '*the ordinary hourly rate prescribed in clause 14—Minimum wages and classifications'*. Clause 14 prescribes 'minimum hourly rates' and not 'ordinary hourly rates'.

[112] ABI proposes that clause 10 of the exposure draft be replaced with the following:

10.1 A casual employee is one engaged and paid as a casual employee.

10.2 A casual employee working ordinary time must be paid:

(a) the minimum hourly rate prescribed in clause 14—Minimum wages and classifications for the work being performed;

(b) a casual loading of 25% of the minimum hourly rate; and

[31] See [1.2] of this ABI correspondence: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-corr-abinswbc-101019.pdf and [6] of this FWC Statement: https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc8318.htm at [6].

> **(c)** any all purpose allowances that apply to the employee under clause 20.2 – Wage-related allowances.
>
> **10.3** The loading in clause 10.2(b) and the allowances in clause 10.2(c) constitute part of the casual employee's all-purpose rate.
>
> **10.4** The resulting rate is the **casual ordinary hourly rate**.
>
> **10.5** Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

[113] ABI does not support the AWU's proposed amendments to clause 10.2. ABI accepts that there is no longer a dispute in relation to the calculation of overtime, but submits that the proposed changes are unnecessary, particularly, if the amount described by 10.2 becomes the definition for '*casual ordinary hourly rate'*.

(iii) Schedule B.2 Casual Adult Employees

[114] Schedule B sets out tables of rates that summarise the entitlements under the award. Clause B.2 deals with casual rates. Clause B.2.1 provides:

> 'Casual ordinary hourly rate means the hourly rate for a casual employee for the employee's classification prescribed by this award, inclusive of the casual loading which is payable for all purposes. Where an additional allowance is payable for all purposes in accordance with clause 20.2(a), this forms part of the employee's casual ordinary hourly rate and must be added to the casual ordinary hourly rate prior to calculating penalties and overtime.

[115] The AMWU submitted that the difficulty with the above extract is that the rates in schedule B.2.1 are better described as casual minimum hourly rates, owing to the fact that the rates don't include any all-purpose allowances other than the casual loading.

[116] The AMWU proposed that clause B.2.1 be varied consistent with the equivalent clause in the current Exposure Draft for the Manufacturing Award (clause C.3.1 in schedule C) to ensure consistency between clause 10.2 and B.2.1 and also between the Manufacturing and Food Awards.

[117] This would require an amendment to the Exposure Draft as follows:

> '~~Casual ordinary hourly rate means the hourly rate for a casual employee for the employee's classification prescribed by this award, inclusive of the casual loading which is payable for all purposes. Where an additional allowance is payable for all purposes in accordance with clause 20.2(a), this forms part of the employee's casual ordinary hourly rate and must be added to the casual ordinary hourly rate prior to calculating penalties and overtime~~.'
>
> '**Casual minimum hourly rate** includes the casual loading which is payable for all purposes. Where an allowance is payable for all purposes in accordance with clause 20.2(a), this forms part of an employee's casual ordinary hourly rate and must be added to the applicable permanent minimum hourly rate in B.2. prior to the application of the 25% casual loading to form the casual employee's ordinary hourly rate. The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime.'

[118] The cross reference in the parties' submission (to clause 30.2) appears to be incorrect and the correct cross reference is to clause 20.2(a). The variation proposed would also require all the references in B.2 to 'casual ordinary hourly rate' to be changed to 'casual minimum hourly rate'.

[119] The AWU submits that a casual overtime rates table can be inserted into Schedule B.2 in accordance with the agreed position concerning clause 10.2.

[120] At [109] in the Tranche 3 BP we invited interested parties to comment on the amendments proposed by the AMWU and AWU.

[121] ABI opposes the amendment sought by the AMWU on the basis that it seeks to change the method of calculating the '*causal ordinary hourly rate'* and agrees with the AWU's submission that a casual overtime rates table can be inserted to the award.

[122] A conference will be convened shortly to discuss the disputed issues in respect of casual employees.

3.8 Funeral Industry Award 2010

[123] The AWU notes that the headings for Part 3 – Hours of Work and Part 4 – Wages and Allowances do not appear in the body of the Exposure Draft. The Exposure Draft will be amended to correct this.

[124] In a statement on 26 November 2019[32] we outlined an outstanding issue in relation to the Funeral award, namely, the correct rates for afternoon shiftworkers working overtime. The issue arose due to an inconsistency between the rates in the Exposure Draft at clause 20.6 and the rates in the table at A.1.4 and A.1.5. The relevant clauses of the Exposure Draft are set out below:

> 20.5 Afternoon shift penalty rates
>
> (a) A shiftworker whilst on afternoon shift will be paid 120% of the minimum hourly rate.
>
> (b) A shiftworker on a non-continuing afternoon shift will be paid 150% of the minimum hourly rate for all ordinary hours worked during the shift.
>
> 20.6 Overtime for shiftworkers—Afternoon shiftworker
>
> (a) All time worked in excess of, or outside the ordinary working hours in clause 20.2 by a shiftworker, or on a shift other than a rostered shift, will be paid at 170% of the minimum hourly rate for the first 3 hours and 220% thereafter.
>
> (b) When less than 7 hours 36 minutes' notice has been given to the employer by a relief employee that they will be absent from work, and the

[32] [2019] FWCFB 8026

employee whom the relief employee should relieve is not relieved and is required to continue to work on the employee's rostered day off, the unrelieved employee will be paid 220% of the minimum hourly rate.

(c) Clause 20.6 operates to the exclusion of clause 20.5.

A.1.4 Full-time and part-time shiftworkers—overtime rates

Classification	Afternoon shift	Non-continuing afternoon shift[1]	Monday to Friday – first 3 hours	Monday to Friday – after 3 hours
	% of minimum hourly rate			
	120%	150%	150%	200%
	$	$	$	$
Grade 1	23.39	29.24	29.24	38.98
Grade 2	24.07	30.09	30.09	40.12
Grade 3	24.98	31.23	31.23	41.64
Grade 4	25.85	32.31	32.31	43.08
Grade 5	27.24	34.05	34.05	45.40
Grade 6	28.09	35.12	35.12	46.82

[1] **Non-continuing afternoon shift** means any afternoon shift which does not continue for at least 5 successive afternoons or for at least the number of ordinary hours prescribed by one of the alternative arrangements in clause 20.2 (see clause 20.5(b)).

A.1.5 Full-time and part-time shiftworkers—overtime from midnight Friday until midnight Sunday

Classification	Day shift (minimum hourly rate)	Afternoon shift – Saturday and Sunday		Non-continuing afternoon shift[1] – Saturday and Sunday	
		First 3 hours	After 3 hours	First 3 hours	After 3 hours
	% of minimum hourly rate				
	100%	170%	220%	200%	250%
	$	$	$	$	$
Grade 1	19.49	33.13	42.88	38.98	48.73
Grade 2	20.06	34.10	44.13	40.12	50.15
Grade 3	20.82	35.39	45.80	41.64	52.05
Grade 4	21.54	36.62	47.39	43.08	53.85

Classification	Day shift (minimum hourly rate)	Afternoon shift – Saturday and Sunday		Non-continuing afternoon shift[1] – Saturday and Sunday	
		First 3 hours	After 3 hours	First 3 hours	After 3 hours
	% of minimum hourly rate				
	100%	170%	220%	200%	250%
	$	$	$	$	$
Grade 5	22.70	38.59	49.94	45.40	56.75
Grade 6	23.41	39.80	51.50	46.82	58.53

[1] **Non-continuing afternoon shift** means any afternoon shift which does not continue for at least 5 successive afternoons or for at least the number of ordinary hours prescribed by one of the alternative arrangements in clause 20.2 (see clause 20.5(b)).

[125] Submissions were received from the AWU[33] and AFEI.[34]

[126] AWU submit that this issue has been previously determined in the review in the following decisions:

- [2018] FWCFB 1548–Award stage–Group 4 decision.
- [2018] FWCFB 4175–Award stage–Group 4 decision.
- [2018] FWCFB 6852–Award stage–Group 4 decision.

[127] The AWU submit that, in line with the above decisions, the correct rates appear in clause 20.6 and the tables at clause A.1.4 should be amended as follows:

A.1.4 Full-time and part-time shiftworkers – overtime

Classification	Day shift – minimum hourly rate	Afternoon shift – Monday to Sunday – first 3 hours	Afternoon shift – Monday to Sunday – after 3 hours	Afternoon shift – work on an RDO when relief employee absent
	100%	170%	220%	220%

Classification	Non-continuing afternoon shift –	Non-continuing afternoon shift –	Non-continuing afternoon shift – work	All shiftworkers – public holiday – all

[33] AWU submissions 9 October 2019 and 25 October 2019

[34] AFEI submission, 23 December 2019

	Monday to Sunday – first 3 hours	Monday to Sunday – after 3 hours	on an RDO when relief employee absent	day
	200%	250%	250%	200%

An explanatory footnote referring to clause 20.6(b) can be added for the 'work on an RDO when relief employee absent' rates.

(ii) Schedule A.1.5: The table set out below can be deleted:

Classification	**Day shift (minimum hourly rate)**	**Afternoon shift – Saturday and Sunday**		**Non-continuing afternoon shift[1] – Saturday and Sunday**	
		First 3 hours	**After 3 hours**	**First 3 hours**	**After 3 hours**
	% of minimum hourly rate				
	100%	**170%**	**220%**	**200%**	**250%**
	$	**$**	**$**	**$**	**$**
Grade 1	19.49	33.13	42.88	38.98	48.73
Grade 2	20.06	34.10	44.13	40.12	50.15
Grade 3	20.82	35.39	45.80	41.64	52.05
Grade 4	21.54	36.62	47.39	43.08	53.85
Grade 5	22.70	38.59	49.94	45.40	56.75
Grade 6	23.41	39.80	51.50	46.82	58.53

(iii) Schedule A.2.2: Amend the heading of the ordinary hours column to read "Day shift – ordinary hours". Delete the 'Monday – Friday – first 3 hours' and 'Monday – Friday – after 3 hours' columns and insert a 'Public holiday – all day' column with a rate of '225%'.'

[128] In the 26 November 2019 statement we set out the amendments proposed by the AWU and invited interested parties to file submissions by Friday 20 December 2019 and any submissions in reply by Friday 17 January 2020. A submission was received from the AFEI.[35]

[129] AFEI do not agree with the amendments proposed by the AWU and submit that clauses 20.6 and 20.7 of the Exposure Draft, and the consequent table of rates should be amended to reflect an overtime loading of 150% for 3 hours and then 200% thereafter for all shiftworkers (except when working on an RDO when a relief employee is absent).

[35] AFEI submission, 23 December 2019

[130] The AFEI submit that the issue has not been finally determined and that the technical and drafting Full Bench only expressed *provisional* views and did not finalised these views.

[131] In a decision dated 7 August 2018[36], the Group 4 Award Stage Full Bench dealt with the issue as follows:

> '**[264]** The two possible methods of calculations are outlined below. The first method would occur if we adopted the AWU's submission. The second method results if we adopt our provisional view.
>
> **Compounding calculation method**
>
> **[265]** If the term 'applicable rate' were to remain in clause 18.6, a new base rate of pay would effectively be created for a shiftworker (inclusive of their shift penalty). A shiftworker would therefore calculate their entitlement to overtime using a compounding method. In that scenario, an afternoon shiftworker would be entitled to base rate of 120% of the minimum hourly rate under clause 18.5(a), as well as an overtime rate of 150% of the minimum hourly rate for the first three hours and an overtime rate of 200% thereafter under clause 18.6(a). Consequently, the shiftworker working overtime will be entitled to 150% or 200% of their base rate of pay. In practice, that would mean that the shiftworker would receive 150% or 200% of the loaded hourly rate, resulting in a higher hourly rate.
>
> **[266]** For example, if a shiftworker's minimum rate is $18.93 per hour, that shiftworker would be entitled to a loaded hourly rate of 120%, being $22.72 per hour (the 'applicable rate'). Using this interpretation, if that shiftworker's afternoon shift also constitutes overtime, they would be entitled to receive either 150% or 200% of that 'applicable rate', amounting to $34.08 or $45.44 per hour.
>
> **Cumulative calculation method**
>
> **[267]** Alternatively, if clauses 18.6(a) and (b) of the exposure draft were amended by substituting the word 'applicable rate' with 'minimum hourly rate', then a shiftworker's rate would be cumulative with their overtime rate. In effect, when a shiftworker is working overtime, they will be entitled to a shift work rate and an overtime rate, both of which are added to the minimum hourly rate.
>
> **[268]** For example, if a shiftworker's minimum rate is $18.93 per hour, and they are performing overtime during an afternoon shift, they would be entitled to an hourly penalty of either 170% or 220% of $18.29 in accordance with clauses 18.5(a) and 18.6(a), amounting to $32.18 and $41.65 per hour.
>
> **[269]** We consider that the cumulative calculation method is the correct approach to the calculation. Adopting the compounding method of calculation would unduly result in an increase to the minimum overtime rates for afternoon shiftworkers.
>
> **[270]** In accordance with our view in the March 2018 decision we will amend clauses 18.6(a) and (b) of the exposure draft by substituting the word 'applicable rate' with 'minimum hourly rate' to ensure that the calculation of overtime for shiftworkers is clearly payable at the minimum rate of pay for the applicable classification.

[36] [2018] FWCFB 4175

….

[275] It is our *provisional* view that clause 18.6 of the exposure draft be drafted in the following way:

18.6 Overtime for shiftworkers—Afternoon shiftworker

(a) All time worked in excess of, or outside the ordinary working hours in clause 18.2 by a shiftworker, or on a shift other than a rostered shift, will be paid at **170%** of the minimum hourly rate for the first three hours and **220%** thereafter.

(b) When less than 7 hours 36 minutes' notice has been given to the employer by a relief employee that they will be absent from work, and the employee whom the relief employee should relieve is not relieved and is required to continue to work on the employee's rostered day off, the unrelieved employee will be paid **220%** of the minimum hourly rate.

(c) This clause operates to the exclusion of clause 18.5

18.7 Overtime for shiftworkers—Non-continuing afternoon shiftworker

(a) All time worked in excess of, or outside the ordinary working hours in clause 18.2 by a shiftworker on a non-continuing afternoon shift, or on a shift other than a rostered shift, will be paid at **200%** of the minimum hourly rate for the first three hours and **250%** thereafter.

(b) When less than 7 hours 36 minutes' notice has been given to the employer by a relief employee that they will be absent from work, and the employee whom the relief employee should relieve is not relieved and is required to continue to work on the employee's rostered day off, the unrelieved employee will be paid **250%** of the minimum hourly rate.

(c) This clause operates to the exclusion of clause 18.5.

[276] In addition to the amending clause 18.6 of the exposure draft, as discussed above, it is our *provisional* view that the table below be inserted into Schedule A to clearly set out the hourly rates applicable for shiftworkers while working overtime on an afternoon shift.

[277] This table removes the duplication of the minimum hourly rate found in clauses 18.5 and 18.6.

A.1.1 Full-time and part-time shiftworkers—overtime from midnight Friday until midnight Sunday

	Day shift	Afternoon shift – Saturday and Sunday		Non-continuing afternoon shift[x]– Saturday and Sunday	
		First 3 hours	After 3 hours	First 3 hours	After 3 hours
	% of minimum hourly rate				
	100%	170 %	220%	200%	250%

	$	$	$	$	$
Grade 1	18.93	32.18	41.65	37.86	47.33
Grade 2	19.47	33.10	42.83	38.94	48.68
Grade 3	20.22	34.37	44.48	40.44	50.55
Grade 4	20.91	35.55	46.00	41.82	52.28
Grade 5	22.04	37.47	48.49	44.08	55.10
Grade 6	22.73	38.64	50.01	45.46	56.83

[x] **Non-continuing afternoon shift** means any afternoon shift which does not continue for at least five successive afternoons or for at least the number of ordinary hours prescribed by one of the alternative arrangements in clause 18.2 (see clause 18.5(b))

[278] The Funeral Award does not currently provide a summary of hourly rates of pay for full-time and part-time shiftworkers while working overtime on Saturdays and Sundays. The insertion of this table will address that deficiency.'

[132] In the 13 November 2018 Group 4 decision ([2018] FWCFB 6852) (at [54]) the Full Bench dealt with a submission from ABI opposing the provisional view and concluded:

> 'We do not agree with the submission of ABI. The issue was dealt with in detail in the March 2018 decision and the August 2018 decision and ABI's recent submission has not persuaded us to alter our view.'

[133] Accordingly, contrary to the submission of AFEI, we are satisfied that this matter has been considered and finalised during the review. The tables at A.1.4 and A.1.5 will be amended in accordance with the decision of the Group 4 Full Bench with rates updated for subsequent annual wage review decisions. We will republish the variation determination and provide interested parties with an opportunity to review the rates.

3.9 General Retail Industry Award 2010

[134] Two additional issues have been identified in the draft variation determination for the *General Retail Industry Award.*

(i) Clause 17.2

[135] The table of rates at clause 17.2 is set out below:

Table 5—Junior rates

Column 1 Age	Column 2 % of minimum rate
15 years of age and under	45%
16 years of age	50%
17 years of age	60%
18 years of age	70%
19 years of age	85%
20 years of age and employed by the employer for 6 months or less	90%
20 years of age and employed by the employer for more than 6 months	100%

[136] The junior rates are set out at clause 18.1 of the current award as follows:

Table 5—Junior rates

Column 1 Age	Column 2 % of minimum rate
15 years of age and under	45%
16 years of age	50%
17 years of age	60%
18 years of age	70%
19 years of age	80%
20 years of age and employed by the employer for 6 months or less	90%
20 years of age and employed by the employer for more than 6 months	100%

[137] The rate for employees 19 years of age in the exposure draft is 85%, this appears to be an error that has been in the Exposure Draft since it was first published. It is our *provisional* view that the table at clause 17.2 be amended so that the rate for employees who are 19 years of age is 80%.

(ii) Schedule B

[138] Clause 17.3(b) of the Exposure Draft provides:

> **(b)** An employer must pay an apprentice completing a 4 year apprenticeship, who began the apprenticeship on 1 January 2014 or later, the minimum percentage specified in column 2 (or, for an apprentice who has completed year 12, the minimum percentage specified in column 3) of the standard weekly rate in accordance with the year of the apprenticeship specified in column 1 of **Table 7-4 year apprentice minimum rates (start January 2014 or later.)**

[139] In the Exposure Draft published on 29 January 2020, the rates in the tables at B.4.6, B.4.7 and B.4.8 were calculated using the standard hourly rate instead of the standard weekly rate set out at clause 17.3(b). This results in some minor differences in the calculated rates. It is our *provisional* view that the rates in clauses B.4.6, B.4.7 and B.4.8 should be updated to reflect the method set out in clause 17.3(b).

[140] In addition to the issues identified above, we propose that the following minor drafting amendments be made to ensure consistency within the award:

- In each of the tables at B.1.1, B.3.1, B.4.3, B.4.6 and B.5.2 the heading 'Evening work' has been amended to 'Monday to Friday after 6.00pm" to accurately reflect the information in Table 11—Penalty rates".

- In each of the tables at B.4.6, B.4.7 and B.4.8, the words 'Have not completed' have been amended to 'Has not completed'.

- At clause C.2.1 the applicable CPI Figure has been removed from the table and included as a separate clause C.2.2.

[141] A revised Exposure Draft and draft variation determination, incorporating our *provisional* views and correcting the minor drafting errors referred to in paragraph [139], will be issued with this Decision. Interested parties will have 14 days to comment.

3.10 Graphic Arts, Printing and Publishing Award 2010

[142] The AMWU and Ai Group agreed that there is a cross referencing error in clause 13.4(c)(iii) and that the reference to clause 20.4(c) (ii) should read clause 13.4 (c) (ii).

[143] In its initial submission the AMWU raised an issue concerning clause 15.3, which states:

> 15.3 Where an employee is required to work during their usual meal break they will be paid 150% of the hourly rate for the time so worked and they will be allowed their usual meal period as soon as it can be arranged, but not later than 5 hours after commencing work each day.

[144] The AMWU submitted that the expression 'hourly rate' should be amended to read 'ordinary hourly rate.'

[145] At [117] of the Tranche 3 BP we invited interested parties to comment on the amendment proposed by the AMWU.

[146] Ai Group did not oppose the AMWU's proposal to vary clause 15.3, noting that:

> 'the AMWU's proposal to vary clause 15.3 regarding the meal break penalty to refer to the 'ordinary hourly rate'… is consistent with the Commission's decision to delete the definition of the "hourly rate" in its decision of 4 April 2019.'[37]

[37] Ai Group reply submission 7 April 2020 at para [15]

[147] We will vary clause 15.3 of the Exposure Draft and variation determination as proposed by the AMWU.

[148] In its initial submission, Ai Group raised the following issues.

(i) Clause 4.3: Coverage of on-hire employers

[149] Ai Group submitted that the following amendments should be made to clause 4.3 to correct an apparent error and to address the fact that the Award operates on an industry and occupational basis:

> 4.3 This award covers any employer which supplies labour on an on-hire basis in the graphic arts, printing, publishing and associated industries and occupations ~~industry~~ in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in ~~that industry~~ those industries and occupations. Clause 4.3 operates subject to the exclusions from coverage in this award.

[150] At [120] of the Tranche 3 BP we expressed the *provisional* view that clause 4.3 be amended as proposed by Ai Group. The AMWU did not oppose our *provisional* view. We confirm our *provisional* view and will amend the variation determination accordingly.

(ii) Clause 4.4: Coverage

[151] Ai Group submitted that the following amendments should be made to clause 4.5 to correct an apparent error:

> **4.5** This award covers employers which provide group training services for apprentices and/or trainees engaged in the graphic arts, printing, publishing and associated industries and occupations ~~industry~~ and/or parts of those industries or occupations and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described in clause 4.2 are being performed. ~~This subclause~~ Clause 4.5 operates subject to the exclusions from coverage in this award.

[152] At [122] of the Tranche 3 BP we expressed the *provisional* view that clause 4.5 be amended as proposed by Ai Group. The AMWU did not oppose our *provisional* view. We confirm our *provisional* view and will amend the variation determination accordingly.

[153] In the Tranche 3 BP (at [123]-[130]) we agreed with the following amendments, proposed by Ai Group, to the Exposure Draft and draft variation determination:

- *Clause 7.5(a) Facilitative provisions*: Clause 13.3(a)(ii) is not a facilitative provision and is incorrectly listed in this table. The reference to clause 13.3(a)(ii) was intended to be a reference to clause 13.3(c)(ii) and clause 7.5(a) will be varied to reflect this.

- *Clause 32.2: Annual leave*: the final sentence of clause 32.2 should be varied as follows:

Notwithstanding clause 29.5, employees engaged in a daily newspaper office, in circumstances where they work the prescribed public holidays, may, by agreement between the employer and an employee or employees, be credited with an extra 2 weeks and 3 days' annual leave instead of any penalty provision as provided for by clauses 37.3 or 37.4. Where there is an agreement between an employer and an employee under this clause ~~32~~ 37.2, this clause 32.2 applies to the employee instead of clause 32.4.

- *Clause 41: Dispute resolution leave*: the reference in clause 41.6 should be amended as follows, to ensure consistency with the relevant provision in the current award:

41.6 … For the purposes of ~~clause 41~~ clause 41.6, ordinary time earnings means the wage rate for the classification, over-award payment and shift loading which otherwise would be payable…".

[154] No other party opposed the amendments set out above. We will amend the draft variation determination accordingly.

[155] In a late submission Ai Group raised an issue concerning the penalties payable to shiftworkers who work overtime on a public holiday. Ai Group submits that:

> 'Unless the problem is addressed before the new version of the award comes into operation, employers will be required to pay shift workers who work overtime on a public holiday a rate of up to 325% of the ordinary rate, rather 250% of the ordinary rate, as currently applies. This would be unfair and unjust and hence inconsistent with ss.3(b), 134 and 577 of the *Fair Work Act 2009.*[38]

[156] Ai Group propose the following amendment to clause 37.3 of the Exposure Draft:

37.3 An employee required to work on a public holiday or a substitute day, as provided for in the NES or clause 37.5, will be paid as follows with a minimum payment of 4 hours:

For ordinary hours	250% of the ordinary hourly rate
For overtime	250% of the ~~overtime~~ ordinary hourly rate

Provided that:

(a) an employee required as an inserter in a non-daily newspaper office who is required to work on a public holiday will be paid as follows with a minimum payment of 2 hours:

For ordinary hours	250% of the ordinary hourly rate
For overtime	250% of the ~~overtime~~ ordinary hourly rate

[38] Ai Group submission 22 April 2020 at para. 3

(b) an employee engaged as a publishing employee in a non-daily newspaper office who is required to work on a public holiday will be paid as follows with a minimum payment of 3 hours:

For ordinary hours	250% of the ordinary hourly rate
For overtime	250% of the ~~overtime~~ ordinary hourly rate

37.4 Where a weekly employee in a non-daily or regional daily newspaper office, other than an employee listed in clauses 37.3(a) and 37.3(b), is required to work on a public holiday they will be given a day off instead within 7 days of the holiday occurring or be paid as follows with a minimum payment of 4 hours:

For ordinary hours	250% of the ordinary hourly rate
For overtime	250% of the ~~overtime~~ ordinary hourly rate

Provided clause 37.4 applies instead of the provisions in clause 37.3.

[157] The issue raised will be the subject of a conference which will be convened shortly.

3.11 Health Professionals and Support Services Award 2010

[158] The Private Hospital Industry Employer Association (PHIEA) raised an issue relating to clause 11, in particular clause 11.5 which provides as follows:

11.5 Casual loading

(a) For each ~~ordinary~~ hour worked, a casual employee must be paid:

(i) the minimum hourly rate; and

(ii) a loading of 25% of the minimum hourly rate, applicable to the classification and pay point in which they are employed.

(b) The casual loading is paid instead of the paid leave entitlements of full-time employees.

[159] Clause 10.4 of the current award provides as follows:

10.4 Casual employment

(a) A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed-term employee, to work up to and including 38 ordinary hours per week.

(b) A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements of full-time employees.

(c) The minimum period of engagement of a casual employee is three hours with the exception of cleaners employed in private medical practices who will be engaged for a minimum of two hours.

[160] The PHIEA submitted:

> 'In applying plain language drafting, PHIEA is of the view that clause 11.5 (a) has amended the entitlements for casuals and would respectfully suggest that until such time as this issue has been determined by the Full Bench constituted in AM2107/51 no administrative change should be made in the Exposure Draft to the wording of clause 11.5 (a) – casual loading.'[39]

[161] At [135] of the Tranche 3 BP we invited interested parties to comment on the amendment proposed by the PHIEA.

[162] ABI submitted that the issue of casual loading on overtime is still in dispute in relation to this award and accordingly, supports the PHIEA's submission that clause 11.5(a) not be amended until this has been resolved.

[163] We also agree and will adopt the course proposed by PHIEA.

[164] There are no remaining drafting issues in respect of this award.

3.12 Horse and Greyhound Training Award 2010

[165] In its initial submission the AWU raised three issues.

(i) Clause 10.5(a) Casual employees

[166] The AWU submitted that this clause should be amended to read 'For each ~~ordinary~~ hour worked, a casual employee must be paid …', on the basis that there is no longer any dispute that the casual loading is payable on a compounding basis when overtime is worked.[40]

[167] At [138] of the Tranche 3 BP, we invited interested parties to comment on the amendment proposed by the AWU. No comments were received.

[168] We agree to the amendment to clause 10.5(a) proposed by the AWU on the basis that the proposed change is consistent with the current award.

(ii) Clause 18.3

[169] Clause 18.3 of the Exposure Draft states:

> **18.3** Payment for annual leave on termination
>
> Where an employee is entitled to a payment on termination of employment pursuant to section 90(2) of the Act, the amount is to be calculated in accordance with clause 18.2(a) above.

[170] The AWU submitted that:

---

[39] PHIEA submission, 4 March 2020
[40] See [1.2] of this ABI correspondence: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-corr-abinswbc-101019.pdf and [6] of this FWC Statement: https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc8318.htm at [6].

> 'The reference at the end of the clause should be to clause 18.2, not 18.2(a). The current drafting is contrary to the NES because it does not include the annual leave loading prescribed in clause 18.2(b).'

[171] At [141] of the Tranche 3 BP, we invited interested parties to comment on the issue raised by the AWU. No submissions were received. We will amend clause 18.3 as proposed by the AWU.

(iii) Schedule A.2

[172] The AWU submitted that the casual overtime rates table and public holiday rates can be re-inserted in accordance with the agreed position concerning clause 10.5(a).

[173] At [143] of the Tranche 3 BP, we noted that this proposed change is dependent on the resolution of the issues raised in respect of clause 10.5(a). As we have agreed with the amendment proposed to clause 10.5(a) we will reinsert the casual overtime rates table and public holiday rates table.

[174] There are no remaining technical and drafting issues in respect of this award.

3.13 Horticulture Award 2010

[175] ABI, Ai Group and the AWU have made submissions in relation to this award. The only issue raised by ABI in respect of this award concerned overtime for casuals. In its reply submission, ABI withdrew its opposition to the amendment to clause 11.3 in the Exposure Draft.

[176] Ai Group raised two issues. The first concerns clause 10.2, which states:

> **10.2** For each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the relevant classification in clause 0—
>
> Claim to insert annualised wage arrangements is being considered in AM2016/13. See [2019] FWCFB 8583 at [1] and see draft determination.

[177] Ai Group submitted that clause 10.2 is incomplete as a cross reference has been omitted and it should be amended such that it reads as follows:

> **10.2** Subject to clause 15.2, for each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the classification.

[178] The proposed amendment was advanced on the following bases:

(a) The opening words (underlined) would make the interaction between clause 10.2 and clause 15.2 clear. As provided by 15.2(d), if an employee is paid a piecework rate, the employee is not entitled to the minimum rates specified at clause 15. Clause 10.2 is presently inconsistent with clause 15.2(d). The added words rectify this.

(b) Ai Group has been unable to identify an appropriate cross-reference to be inserted at the end of the clause. Ai Group does not consider that clause 15 or clause 15.1 are appropriate cross-references. Neither prescribe the 'ordinary hourly rate'. Moreover, clause 15.1 prescribes only the adult rate. In the context of, for example, a junior employee, a reference to clause 15.1 in clause 10.2 would purport to entitle such a part-time employee to a higher rate than what they would be entitled to under clause 15.3.

[179] At [152] of the Tranche 3 BP we invited interested parties to comment on Ai Group's proposed amendment to clause 10.2. ABI agreed with AI Group and do not oppose the insertion of the words 'Subject to clause 15.2'.

[180] ABI also suggests adding the words '(which deals with pieceworkers)' immediately following the words 'Subject to clause 15.2', to assist those reading the clause. ABI also question whether a similar amendment should be made to clause 11.3 for consistency.

[181] The AWU opposes Ai Group's proposed amendment and submits that the amendment is unnecessary and based on a incorrect understanding of clause 15:

> 'The AWU does not support the AIG's proposed addition of the words, 'Subject to clause 15.2' to clause 10.2. This proposed addition is unnecessary and is based on an incorrect understanding of clause 15. Contrary to the submissions of AIG, clause 15 does entitle pieceworkers to minimum rates of pay – the minimum rates of pay for pieceworkers is found at clause 15.2.
>
> As previously submitted by the AWU, the correct cross reference to be inserted into clause 10.2 is to clause 15. Clause 15 entitles adult workers to adult rates, pieceworkers to piecework rates and juniors to junior rates. Therefore, a cross reference to this clause will enable an employee or employer to determine the applicable rate to which the part-time employee is entitled – be they adult, junior or pieceworker.
>
> In response to the submission of AIG that clause 15 does not prescribe 'ordinary hourly rates', the AWU suggests the following amended clause 10.2 (changes underlined):
>
> > For each ordinary hour worked, a part-time employee will be paid no less than the ordinary minimum hourly rate for the relevant classification in clause 0— 15, plus any applicable all-purpose allowances.'[41]

[182] This issue will be the subject of a conference that will be convened shortly.

[183] The second issue concerns a cross referencing error in Note 2 to clause 16.3. Ai Group submitted that the reference to clause 16 should be replaced by a reference to clause 16.3.

[184] At [154] of the Tranche 3 BP we agreed with Ai Group. No other party took a different view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

[185] The AWU raised five issues. The first concerns clause 10.2 and is subsumed by the point raised by Ai Group. The AWU also notes that clause 10.3 currently has no content and that clauses 10.4 and 10.5 should be renumbered as 10.3 and 10.4. as we noted in the Tranche 3 BP,

[41] AWU Reply submission 7 April 2020 at paras. 18-20

that issue can also be addressed in determining the matter raised by Ai Group. The other points advanced by the AWU are set out below.

(i) Clause 13.2

[186] Clause 13.2 states:

> **13.2 The ordinary hours of work for casual employees other than shiftworkers will not exceed 304 ordinary hours over an eight week period provided that:**
>
> (a) Ordinary hours of work for casual employees can be worked at any time.
>
> (b) Each ordinary hour of work worked by a casual employee on any day of the week (excluding public holidays) between 5.00 am and 8.30 pm will be paid at the employee's minimum hourly wage for his or her classification plus a casual loading of 25%.
>
> (c) In a State or Territory that does not observe daylight saving time, by agreement between the employer and a majority of affected casual employees, the 5.00 am to 8.30 pm daily spread of hours can be moved forward one hour (4.00 am to 7.30 pm) for the period of daylight saving time in other States and Territories.
>
> (d) Each ordinary hour worked by a casual employee on any day of the week (excluding public holidays) between 8.31 pm and 4.59 am (or 7.31 pm and 3.59 am in accordance with clause 13.2(c)) will attract a loading of 15% of the employee's minimum hourly wage for his or her classification (in addition to the casual loading of 25%).
>
> (e) The maximum number of ordinary hours which a casual employee may work per engagement, or on any day, is 12 ordinary hours.
>
> (f) All time worked in excess of 12 hours per engagement, 12 hours in a single day or 304 ordinary hours over an eight week period will be deemed overtime.

[187] The AWU submitted that 'for consistency within this award and with other exposure drafts', the references in clause 13.2(b) and (d) to the 'minimum hourly wage' should be amended to 'ordinary hourly rate'.

[188] At [158] of the Tranche 3 BP we invited interested parties to comment on the AWU's proposed amendment. ABI and Ai Group do not oppose the AWU's proposal. We agree and will amend the Exposure Draft and variation determination accordingly.

(ii) Clause 19.4

[189] The AWU noted that there appears to be an 'unusually large formatting gap' between clause 19.4(e) and 19.4(f).

[190] At [160] of the Tranche 3 BP we agreed with the AWU. No other party took a different view. We confirm our view and we will rectify the issue. We note that due to the insertion of the annualised wage arrangements provision at clause 17, clause 19.4 has been renumbered as clause 20.4.

(iii) Clause 26.4

[191] Clause 26.4 states:

> **26.4 Public holiday rates—casual employees** All hours worked by a casual employee on a public holiday (both ordinary hours and any overtime) will be paid at a rate of 225% of the employee's minimum hourly wage for his or her classification (inclusive of the casual loading).

[192] The AWU submitted that 'for consistency within this award and with other exposure drafts the reference to the 'minimum hourly wage' should be amended to 'ordinary hourly rate'. We also note that the same issue may arise in clause 20.4.

[193] At [163] of the Tranche 3 BP we invited interested parties to comment on the AWU's proposed amendment. ABI and Ai Group do not oppose the AWU's proposal. We agree and will amend the Exposure Draft and variation determination accordingly. We note that due to the insertion of the annualised wage arrangements provision at clause 17, clause 26.4 has been renumbered as 27.4.

(iv) Schedule B.3

[194] The AWU submitted:

> 'Given there are widespread compliance issues in this industry, a casual overtime rate tables should be inserted. There is only one rate – 175% as per clause 20.4.'

[195] At [165] of the Tranche 3 BP we invited interested parties to comment on the AWU's proposed amendment.

[196] ABI agrees with the AWU's proposal in relation to a casual overtime table. Ai Group did not oppose the insertion of tables prescribing casual overtime rates as the rate at which they are to be calculated is not in issue in the Overtime for Casuals Issue proceedings. Ai Group also submits that interested parties should be given an opportunity to review the rates before they are included in the award.

[197] We agree with the AWU's proposal and will amend the Exposure Draft and variation determination accordingly. We will republish the variation determination and provide interested parties with an opportunity to review the rates.

[198] The remaining drafting and technical issue in respect of this award – relating to clause 10.2 – will be the subject of a conference which will be convened shortly.

3.14 Live Performance Award 2010

[199] In its initial submission the LPA raised seventeen issues with this award.

(i) Clause 2 Definitions

[200] The following definitions have been deleted from the Exposure Draft:

> **double time** means in the case of a weekly employee twice the ordinary hourly rate which is obtained by dividing the employee's applicable rate per week by 38 hours, and in the case of an employee engaged by the hour twice the employee's hourly casual rate

…

time and a half means in the case of a weekly employee, one and a half times the ordinary hourly rate which is obtained by dividing the applicable rate per week by 38 hours, and in the case of an employee engaged by the hour one and a half times the hourly casual rate

[201] The LPA disagreed with the removal of these definitions and submitted that they were inserted in accordance with [2018] FWCFB 4175 at [314], and if deleted, will introduce an ambiguity regarding payment of overtime for casual employees who are entitled to overtime payments of either double the casual hourly rate or time and a half the casual hourly rate.

[202] The LPA submitted that these definitions should remain.

[203] At [170] – [171] of the Tranche 3 BP we said:

'In a decision about the Live Performance Award, the Group 4 Full Bench said:

> [538] Interested parties have agreed to adopt terminology like 'time and a half' and fractions like '1/8th'. Previous Full Bench decisions have confirmed that rates of pay will be expressed as a percentage of the minimum hourly rate. We do not intend to deviate from that provisional view. The parties' re-drafting will not be adopted.[42]

We are not persuaded to depart from this earlier decision. We note also that the terms 'double time' and 'time and a half' are only used in the definitions section and not anywhere else in the award. It is our *provisional* view that the definitions should not be reinserted.'

[204] No submissions were received contesting our *provisional* view. We confirm our *provisional* view. The definitions will not be reinserted.

[205] The LPA submitted that the following definition be inserted:

Performers' Overtime Rate for the purposes of the clause 32.3 (Number of Performances) and Clause 34 (Overtime and penalty rates) and shall be based on the Performer's Negotiated Weekly Rate of Pay or the Negotiated Casual Rate of Pay provided that, for the purposes of this definition, where the Performer's Negotiated Weekly Rate of Pay or Negotiated Casual Rate of Pay is in excess of 133.33% of the applicable Minimum Rate then the Performer's Negotiated Weekly Rate of Pay or Negotiated Casual Rate of Pay will, for the purposes of calculating the relevant entitlements be deemed to be 133.33% of the Minimum Rate (for avoidance of doubt 133.33% means the Minimum Rate plus an additional 33.33%).

[206] LPA submitted that the inclusion of this clause reflects the provisions of the pre-reform award and provides for a cap on the amount paid for overtime and that the clause 'is essential for the better off overall test in enterprise agreements for performer's as this clause is replicated in those agreements'.

[207] At [174] of the Tranche 3 BP we said:

[42] [2018] FWCFB 1548

> 'The proposed definition amounts to a new claim, which we do not intend to entertain as part of finalising the technical and drafting process. If the LPA wishes to pursue this issue they can file an application to vary the award.'

[208] We adhere to that view.

(ii) Clause 13.3I and (d)

[209] LPA submitted that the wording of these clauses could lead to misinterpretation and ambiguity.

[210] Clause 13.3 (c) and (d) state:

> (c) **Accommodation allowance – one week (5 working days) or less** Where the employee does not accept employer-provided accommodation and the period of travel involved is one week or less the Employer shall pay an allowance of $168.51 per night.
>
> (d) **Accommodation allowance – more than one week (5 working days)** Where the employee does not accept employer provided accommodation and the period of travel involved is more than one week, the Employer shall pay an allowance of $128.56 per night up to a maximum of $642.88 per week.

[211] LPA submitted that the accommodation allowance provided in clause 13.3(c) is to apply when employees are required to travel for period of less than one week, that is from 1 to 4 nights, whilst clause 13.3(d) applies when the employee is travelling for 5 nights or more. LPA submitted that the clauses be amended as follows:

> (c) Accommodation allowance ~~– one week (five 5 working days) or less~~ 1 to 4 days
>
> Where the employee does not accept employer-provided accommodation and the period of travel involved is less than one week ~~or less~~ the Employer shall pay an allowance of $168.51 per night.
>
> (d) Accommodation allowance – more than one week (five 5 working days or more)
>
> Where the employee does not accept employer provided accommodation and the period of travel involved is ~~more than~~ one week or more, the Employer shall pay an allowance of $128.56 per night up to a maximum of $642.88 per week

[212] At [178] of the Tranche 3 BP we invited other interested parties to comment on the amendment proposed by LPA. No comments were received. We will make the amendment proposed by LPA.

(iii) Clause 14.3

[213] Clause 14.3 states:

> **14.3** Despite the provisions of clause 14.1(a), an employer must also make superannuation contributions to a superannuation fund on behalf of a performer younger than 18 years of age as if the performer were 18 (excluding extras, doubles and stand-ins) if:

(a) the ~~child performer~~ performer younger than 18 years of age is engaged on a 12 week contract or longer;

(b) the ~~child performer~~ performer younger than 18 years of age has been employed in the entertainment industry for a minimum of ~~six~~ 6 professional engagements; oI(c) the ~~child performer~~ performer younger than 18 years of age has been employed in the entertainment industry for a minimum of 30 days.

[214] Parties were asked to comment on the use of 'child performer' in the context of clause 14 Superannuation.

[215] LPA disagreed with the amendments proposed in the Exposure Draft and submitted that the existing wording should be retained and submitted:

'Performers aged 16 years and over are treated and paid as adult performers. Under the various State legislation dealing with employment of children, the legislation refers to "child employment" and such legislation specifically provides for the number of hours of work and the number of performances a child performer may do in a working week in the live performance industry.

The proposed changes will disadvantage those employees aged 16 to 18 who work full time, part time or casually and satisfy the criteria for the payment of superannuation.

In addition, clause 30.5 is still headed 'Child performers'.'

[216] At [182] of the Tranche 3 BP we invited other interested parties to comment on this issue and LPA's proposed amendment. No comments were received. We agree with the LPA and the existing wording of 'child performer' will be retained.

(iv) Clause 32.3(b)(i), (ii) and (iii)

[217] Clause 32.3(b) provides:

(i) in the case of additional performances of a substantially whole time production (excepting pantomimes), the employee will be paid 12.5% of their minimum weekly rate for each additional performance exceeding 8;

(ii) in the case of additional performances of pantomime exceeding 8 but not exceeding 12, the employee will be paid an additional 12.5% of their minimum weekly rate for the first performance exceeding 8 and then an additional 6.25% of their minimum weekly rate for each performance in excess of the ninth performance in any such week; and

(iii) in the case of performances up to one hour in duration, an additional payment of 10% of their minimum weekly rate for each performance exceeding 12

[218] LPA submitted that the inclusion of the definition of 'performers overtime rate' requires consequential amendments as follows (in red):

(i) in the case of additional performances of a substantially whole time production (excepting pantomimes), the employee will be paid 12.5% of their overtime ~~minimum weekly~~ rate for each additional performance exceeding ~~eight~~8;

(ii) in the case of additional performances of pantomime exceeding ~~eight~~8 but not exceeding 12, the employee will be paid an additional 12.5% of their overtime ~~minimum weekly~~ rate for the first performance exceeding ~~eight~~8 and then an additional 6.25% of their overtime ~~minimum weekly rate~~ for each performance in excess of the ninth performance in any such week; and

(iii) in the case of performances up to one hour in duration, an additional payment of 10% of their overtime ~~minimum weekly~~ rate for each performance exceeding 12.

[219] At [185] of the Tranche 3 BP we said:

'As we decided not to insert the proposed definition of 'performers overtime rate' we will not make the amendments proposed to clause 32.2(b).'

[220] We adhere to that view.

(v) Clause 33.3

[221] Clause 33.3 states:

~~33.5~~ 33.3 ~~Breaks following rehearsal~~

(a) Following a full rehearsal, employees must be provided with a 1.5 hour break before the commencement of another full rehearsal or performance.
~~The 1.5 hour break may be shortened to 1 hour by agreement with the majority of the cast.~~

[222] Parties were invited to comment on the deletion of clause 33.3.

[223] LPA submitted that the clause does not cover the case of breaks for casual employees and proposes the following new clause 33.3:

33.3 Casual employees

No employee will be required to work continuously in excess of four hours, or by agreement with a majority of the cast involved five hours, without a substantial break for a meal, recuperation and/or refreshment

[224] At [189] of the Tranche 3 BP we said:

'It is not immediately clear to us why the proposed amendment is necessary given that the terms of clause 33 of the Exposure Draft apply to *all* employees. Interested parties are invited to comment on this issue.'

[225] No comments were received. We adhere to the view expressed in the Tranche 3 BP and do not intend to make the amendment sought by the LPA.

(vi) Clause 33.4 Missed breaks

[226] Clause 33.4 states:

(a) Where any of the required intervals or breaks due to an employee are curtailed or not provided, overtime ~~at time and a half~~ will be paid for at the rate of 150% for the missed period.

(b) Missed break overtime will be rounded upwards, in 15 minute increments.

[227] LPA submitted that clause 33.4 is repeated at clause 34.2 and that clause 33.4 be deleted.

[228] At [196] of the Tranche 3 BP we invited interested parties to comment on the amendment proposed by LPA. No comments were received. We will delete clause 33.4.

(vii) Clause 34. Overtime and penalty rates

[229] LPA submitted that the inclusion of the definition of the 'performers overtime rate' requires amendments to clause 34 and that the clause requires amendment to address the overtime for casuals issue. The LPA's proposed amendments are in red.

34.1 Performers engaged by the week or for a longer period

(a) All time worked in excess of ~~eight~~8 hours on any one day will be paid for at 150% ~~of the minimum hourly rate~~ for the first ~~two~~2 hours and 200% ~~of the minimum hourly rate~~ after that at the performers overtime rate.

(b) Subject to 34.1(c) all time worked in excess of 38 hours in any one week will be paid at 150% ~~of the minimum hourly rate~~ for the first ~~two~~2 hours and 200% ~~of the minimum hourly rate~~ after that at the performers overtime rate.

(c) All hours worked in excess of 38 in a week as per clause 32.1(a) shall be displayed on the employee's pay slip as a negative balance and where less than 38 hours are worked in a subsequent week the difference in hours shall be added to the negative balance until this reaches zero. If at the completion of the engagement or the completion of 12 months from the first date of engagement, whichever is earlier, the balance has not reached zero, the employee will be paid at 150% at the performers overtime rate for the outstanding hours. An employee will be paid 150% ~~of the minimum hourly rate~~ at the performers overtime rate for all hours worked in excess of an average of 38 hours per week during an engagement, or during each 12 month period from the first date of engagement, whichever is the earlier. The overtime will be paid at the end of the period for which the payment is made.

34.2 General—applicable to weekly or casual engagements

Where any of the intervals or breaks due to an employee are restricted or extended beyond the hours specified under this award, the employee will be paid overtime at the rate of 150% of the ~~minimum hourly rate~~ performers overtime rate for each 15 minutes or part thereof of the restriction or extension.

34.3 Performers engaged casually other than supernumeraries

(a) An employee required to work beyond the hour of 11.30 pm or who is detained for work or any other reason beyond the hour of 11.30 pm by the employer will be paid at the rate of 8.3% of the appropriate casual call rate for such employee for each half hour or part thereof beyond 11.30 pm that the employee is required to work or is detained, in addition to any other payments for overtime, etc. and the ordinary fee applicable to such employee.

(b) If the performance call is longer than three3 hours or if the employee is detained by the employer during an engagement for more than three3 hours (excluding dressing/making up and dressing/removing make-up etc.) the employee will be paid at the rate of 16.7% of the casual rate for each half hour or part thereof in excess of three3 hours that the employee is detained by the employer.

(c) The third or any subsequent call (other than short performance calls) on any day will be paid at the rate of ~~time and a half~~150%, unless a higher penalty applies.

(d) All time worked in excess of eight hours on any one day will be paid at 150% for the first two hours and 200% after that.

[230] At [194] of the Tranche 3 BP we said:

'As we have decided not to insert the proposed definition of 'performers overtime rate' we will not make the amendments proposed.'

[231] We adhere to that view.

(viii) Clause 34.5

[232] Clause 34.5 states:

34.5 Sundays – Performers and Company Dancers

For any work performed on Sundays, including rehearsal, the minimum rates per performance or 3 hour rehearsal session will be as follows:

(a) Payment for employees engaged by the week or for a longer period

(i) Where the time worked is in addition to the employee's prescribed weekly hours of work, the employee will be entitled to an additional payment of an amount equivalent to 33.3% of the employee's minimum weekly rate.

(ii) Where the time worked is part of the employee's prescribed weekly hours of work, the employee will be entitled to an additional payment of an amount equivalent to 16.7% of the employee's minimum weekly rate provided that, the employee's hours of work in that week will be arranged to provide the employee with one complete day off duty in that week.

(b) A~~n~~ ~~employee~~ Company Dancer required by the employer to travel on a Sunday will be:

(i) given a day off in the following week; or

(ii) paid an additional 8.3% of the employee's minimum weekly rate for travel of up to 3 hours duration, and for each half hour or part thereof of travel in excess of 3 hours the employee will be paid an additional ~~100% of the~~ 1/38th of the minimum weekly rate.

(c) A Performer required by the employer to travel on a Sunday will be paid an additional 8.3% of the minimum weekly rate.

(d) Payment for employees engaged casually

A casual employee will be entitled to payment for work on Sundays as follows:

(i) for a performance, 200% of the prescribed minimum rate per performance; or

(ii) for a rehearsal, 200% the prescribed casual hourly rehearsal rate in clause 30.6 with a minimum payment as for 4 consecutive hours.

[233] At [196] of the Tranche 3 BP we invited other interested parties to comment on the redrafted clause 34.5 and LPA's submission that the clause reflects the parties proposed changes. No comments were received.

[234] We do not propose to make the change proposed by the LPA. The change proposed is a substantive departure from the current award term at clause 28.5(b) and as such goes beyond matters that are being finalised by this technical and drafting Full Bench. If LPA wishes to pursue this issue it may make an application to vary the award.

(ix) Clause 35

[235] The note at Clause 35 of the exposure draft said:

> A Full Bench has been constituted in AM2019/3 to deal with the issue of types of employment for musicians. See Statement [2019] FWC 851.

[236] LPA submitted that the note in clause 35 has been addressed and refers to the Report issued by the President on 29 November 2019 in AM2019/17.

[237] At [198] of the Tranche 3 BP we agreed with the LPA. We confirm that view and will remove the note from the Exposure Draft and the variation determination.

(x) Clause 40.2

[238] Clause 40.2 states:

'40.2 Wage-related allowances

(a) Doubling allowance

(i) Where an employee is required to double on one or more additional instruments a doubling allowance will be paid as follows:

Instrument supplied by	Rate per additional instrument per call
Musician	14.5% of the total minimum call rate
Employer	9.5% of the total minimum call rate

(ii) Percussionists

A percussionist will receive the doubling allowance in clause 0 in respect of each of the xylophone, vibraphone, tympani, and either the marimba and glockenspiel but not both.

(b) Supply of music

An employee required to supply their own music will receive the following allowance:

(i) weekly employee—**$11.21** per week; or

(ii) casual employee—**$34.50** per call.

(c) Soloists

An employee performing solo in an orchestra will receive **$6.04** per instrument per call.

(d) Setting up time

Where a drummer or electronic instrumentalist is required by the employer to move their equipment to and from their place of employment, they will receive in addition to their normal rate an allowance equal to 15 minutes of work at the ordinary time rate of pay.

(e) Employee playing in specialty entertainments

Where an engagement customarily accepted as speciality is for more than 6 days, the rate will be the appropriate rate plus a loading of **66.7%** of that rate.

(f) Broadcast, telecast, filmed or recorded

Where an employee is broadcast, telecast, filmed or recorded from a theatre or other place of entertainment, in addition to the appropriate rate of pay the employee will receive:

(i) **$120.92** per performance for a televised performance, and:

- if a Principal, the payment in clause 0 and an additional **25%**;
- for doubling**, 25%** extra per additional instrument per call; and
- for overdubbing, an additional minimum call fee,

(ii) a minimum payment of **$130.41** per radio broadcast for a call up to 3 hours in which there can be 21 minutes of finished material, and:

- if a Principal, the payment in clause 0 and an additional **25%;**
- for doubling, **25%** extra per additional instrument per call;
- for overdubbing, an additional minimum call fee; and
- for any time worked in excess of the initial 3 hour call in respect of completion of the initial 21 minutes of finished recording, the employee will be paid **150%** of the minimum hourly rate, with a minimum payment of one hour,

(iii) **$248.57** per simulcast (radio and television, single use within Australia), and:

- if a Principal, the payment in clause 0 and an additional **25%**,

(iv) **$178.54** for each audio-visual or visual recording of a performance, and

- if a Principal, the payment in clause 0 and an additional **25%**; and
- for doubling, **25%** extra per additional instrument per call;
- for overdubbing, an additional minimum call fee,

(v) **$130.41** for each audio recording of a performance for which there can be 21 minutes of finished material, and:

- if a Principal, the payment in clause 0and an additional **25%**; and
- for doubling, **25%** extra per additional instrument per call;

- for overdubbing, an additional minimum call fee;
- to record more than 21 minutes of finished material, the employee will be paid **150%** of the minimum hourly rate for a minimum of one hour.

(vi) The provisions of clause 0 of this shall not apply to an archival and/or recording as defined.'

[239] The parties were asked whether the term 'minimum call rate' should be defined. The LPA submitted that clauses 39.2 and 3 clarifies this issue.

[240] Clauses 39.2 and 39.3 states:

> **39.2** Except as provided in clause 39.6, ~~W~~weekly musicians will be engaged by the call. The hourly rate is calculated by dividing the appropriate minimum weekly ~~wage~~ rate in clause 11.1 by 24 with a minimum payment as for ~~three~~3 hours. The minimum weekly wage for musicians is 6 calls.
>
> **39.3** The minimum rate of pay for all casual employees as defined will be the total minimum hourly rate prescribed in clause 39.1 above plus 25% with a minimum payment for ~~three~~3 hours for each engagement.

[241] Clause 40.2(b) states:

> **(b) Supply of music**
>
> An employee required to supply their own music will receive the following allowance:
>
> (i) weekly employee—$11.21 per week; or
>
> (ii) casual employee—$34.50 per call.

[242] LPA submitted that the Supply of Music allowance amounts have been unintentionally reversed to provide a greater amount paid per call than paid by the week and that the clause should be amended as follows (in red):

> **40.2(b) Supply of music**
>
> An employee required to supply their own music will receive the following allowance:
>
> (i) weekly employee— ~~$11.21~~ $34.21 per week; or
>
> (ii) casual employee— ~~$34.21~~ $11.21 per call

[243] The corresponding amendment will be required in Schedule B1.1

[244] At [206] of the Tranche 3 BP we invited other interested parties to comment on the LPA's proposal. No comments were received. We agree with the LPA. It is illogical that a casual employee receives a higher allowance *per call* when required to supply their own music than a weekly employee receives *per week*. We will amend clause 40.2(b) and Schedule B.1.1 as proposed by the LPA.

(xi) Clause 43.1

[245] Clause 43.1 states:

> **43.1** All time worked on Monday to Saturday over or outside the prescribed time of any call will be paid for at 150% of the minimum rate

[246] LPA submits that in order to ensure that overtime and penalty rates apply to all employees including casual employees, clause 43.1 should be amended as follows:

> 43.1 All time worked by any employee on Monday to Saturday over or outside the prescribed time of any call will be paid for at 150% of the appropriate call rate. ~~minimum rate~~

[247] At [209] of the Tranche 3 BP we invited other interested parties to comment on this issue and the amendment proposed by LPA. No comments were received. We agree with the insertion of the words 'by any employee', but note that the expression 'call rate' is not defined and propose to retain 'minimum rate'. Parties will be given an opportunity to comment on this issue when the revised Exposure Draft and draft variation determination are published.

(xii) Clause 43.6

[248] Clause 43.6 states:

> **43.6 Sundays**
>
> (a) Except as otherwise provided in this award, all work performed on Sundays will be paid for at the following rates:
>
> (i) Weekly employees—200% of the minimum rate with a minimum payment as for 3 hours.
>
> (ii) Casual employees—200% of the minimum rate.
>
> (b) An employee who is required by their employer to travel on a Sunday will be paid $11.30 in addition to the applicable allowances in clause 13.2, unless paid the Sunday rate in clause 43.6.

[249] LPA contended that Musicians are engaged by the call, a call being 3 hours, and therefore to ensure there is no ambiguity in applying the Sunday penalty, clause 43.6(a) should be amended as follows:

> 43.6 Sundays
>
> (a) Except as otherwise provided in this award, all work performed on Sundays will be paid for at the following rates:
>
> (i) Weekly employees—200% of the appropriate call rate. ~~minimum rate with a minimum payment as for three3 hours.~~
>
> (ii) Casual employees—200% of the appropriate call rate. ~~minimum rate~~

[250] At [212] of the Tranche 3 BP we invited other interested parties to comment on this issue and the amendment proposed by LPA. No comments were received. As noted above, 'call rate' is not defined and we do not propose to make the change advanced by LPA.

(xiii) Clause 62.6

[251] Clause 62.6 states:

> **62.6 Special overtime and penalty provisions for sound and/or lighting companies**
>
> (a) Touring sound and/or lighting employees will receive a 17.5% ~~penalty~~ loading averaging component instead of overtime and penalty provisions for all purposes of this award.
>
> (b) Full-time factory sound and/or lighting employees will accrue time off instead of overtime at the rate of one hour for each hour worked in excess of the 152 hours over 28 consecutive days work cycle.

[252] LPA notes that the Exposure Draft has changed the wording of the 'penalty averaging component' to 'loading averaging component' and submits that the words 'averaging component' be deleted after the word 'loading'.

[253] To ensure that the loading applies to all employees engaged by sound and/or lighting companies, LPA submits that clause 62.6(a) be amended as follows (in red):

> 62.6 (a) All touring sound and/or lighting employees will receive a 17.5% ~~penalty~~loading ~~averaging component~~ instead of overtime and penalty provisions for all purposes of this award

[254] At [216] of the Tranche 3 BP we invited other interested parties to comment on this issue and the amendment proposed by LPA. No comments were received. We agree with LPA and will amend clause 62.6(a) as proposed.

(xiv) Clause 62.7

[255] Clause 62.7 states:

> **62.7 Special overtime and penalty provision for crewing services employees** For all work between 11.00 pm and 6.00 am, a crewing services employee will receive a 52.5% ~~penalty~~ loading payment instead of overtime and penalty provisions for all purposes of this award.

[256] LPA submits that to ensure the special provisions applying to crewing services employees apply to all crewing services employees including casual employees, the clause heading should be amended as follows (in red):

> 62.7 Special overtime and penalty provision for all crewing services employees

[257] At [219] of the Tranche 3 BP we invited other interested parties to comment on this issue. No comments were received. We will make the amendment proposed by the LPA.

(xv) Time off in Lieu of Overtime (TOIL)

[258] As reported by the President on 29 November 2019 (AM2019/17), the parties are in discussions on the appropriate wording on a TOIL term. In its initial submission the LPA noted that those discussions are continuing, and it was envisaged that a term will be submitted before 27 March 2020. No such term has been submitted. Parties are directed to file the proposed term by **4 pm on Friday 8 May 2020**.

(xvi) Conversion from fractions to decimals

[259] LPA disagrees with the conversion of fractions to decimals especially relating to the additional payments and overtime provisions for performers:

> 'As a general rule, performers engaged by the week, work 8 performances in a 6 day week. It has been a long standing award requirement and practice, to apply additional payments or overtime payments on the basis of 1/8th if it is to do with performance work, or 1/6th if it is to do with weekly payments. This has been the case since one of the first performers' award came into effect in December 1920 and has become institutionalised in the industry.
>
> Therefore, LPA respectfully submits that the use of fractions, especially 1/6th and 1/8th relating to performers be reinstated, rather than the use of decimals.'

[260] At [222] of the Tranche 3 BP we said:

> 'This issue has already been considered, and rejected, by the Group 4 Full Bench in [2018] FWCFB 1548 at [538] and we are not persuaded to depart from that view.'

[261] We adhere to that view.

[262] We propose to republish the Exposure Draft and draft variation determination to incorporate the amendments we have decided to make. We will provide interested parties an opportunity to comment on the revised documents. A conference will be convened, if necessary.

3.15 The Maritime Awards

[263] The four Maritime awards are:

- *Marine Towage Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Seagoing Industry Award 2010*

[264] Submissions in relation to the Maritime awards have been filed by:

- Maritime Industry Australia Limited (MIAL) – Submissions re the Seagoing Industry Award and Ports, Harbour and Enclosed Water Vessels Award on 17 February 2020 and then on 4 March 2020

- Australian Federation of Employers and Industries (AFEI) – Submissions re the Ports, Harbours and Enclosed Water Vessels Award on 4 March 2020

- Construction Forestry Maritime Mining Energy Union (CFMMEU – MUA Division) – Reply submission re the Ports, Harbours and Enclosed Water Vessels Award

- Construction Forestry Maritime Mining Energy Union (CFMMEU – MUA Division) – Reply submission re the Seagoing Industry Award

[265] In the Tranche 3 BP, we confirmed that the Maritime Exposure Drafts will be updated once the Substantive Issues Full Bench, the Payment of Wages Full Bench and the Overtime for Casuals Full Bench issue final variation determinations.

[266] We note that the Substantive Issues Full Bench published a decision and final variation determination on 24 March 2020[43] in respect of the Marine Towage Award, the Ports, Harbours and Enclosed Water Vessels Award and the Seagoing Award. We will update the Exposure Drafts and variation determinations in respect of these awards to reflect the variations made by the Substantive Issues Full Bench.

3.15.1 Marine Towage Award 2010

[267] In a statement issued on 6 December 2019,[44] the Overtime for Casuals Full Bench (AM2017/51) set out the process for finalising each of the matters before it. In relation to the Marine Towage Award the Full Bench confirmed that the issues would be determined on the basis of written submissions received from the parties. No final decision has been issued.

[268] The Exposure Draft and variation determination will be varied to reflect the final determination to be issued by the Overtime for Casuals Full Bench.

[269] The frequency of payment of wages at clause 15 remains outstanding and is before the Payment of Wages Full Bench (AM2016/8). The Exposure Draft and variation determination will be varied to reflect the final determination of the Payment of Wages Full Bench.

[270] In its initial submission, MIAL submitted that the rates applying to shiftworkers at clause 19 of this award remain outstanding. In the Tranche 3 BP we said (at [237]):

> 'It does not appear that this issue has been raised previously. MIAL is requested to identify the relevant submissions dealing with this issue.'

[271] No submission was filed by MIAL and we assume that the issue in respect of the rates applying to shiftworkers is not pressed.

[272] There are no remaining drafting and technical issues in respect of this award.

3.15.2 Marine Tourism and Charter Vessels Award 2010

[273] This award is also the subject of other proceedings, namely:

- AM2017/51 – Overtime for casuals; and
- AM2016/8 – Payment of wages.

[274] The Exposure Draft and variation determination will be amended to reflect the final determinations of those Full Benches.

---

[43] [2020] FWCFB 1450

[44] [2019] FWC 8318

[275] There are no remaining drafting and technical issues in respect of this award.

3.15.3 Ports, Harbours and Enclosed Water Vessels Award 2010

[276] This award is also the subject of other proceedings, namely:

- AM2017/51 – Overtime for casuals; and
- AM2016/8 – Payment of wages.

[277] The Exposure Draft and variation determination will be amended to reflect the final determinations of those Full Benches.

[278] The MIAL and AFEI made submissions in relation to the Ports Award.

[279] AFEI raised three issues about the Exposure Draft and variation determination as set out below.

(i) Coverage

[280] Clauses 4.2 and 4.3 provide as follows:

> **'4.2** For the purpose of clause 4.1, ports, harbours and enclosed water vessels industry means the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline or at sea on activities not covered by the above awards.
>
> **4.3** The award does not cover employers and employees wholly or substantially covered by the following awards:
>
> **(a)** the *Dredging Industry Award 20XX*;
>
> **(b)** the *Maritime Offshore Oil and Gas Award 2020*;
>
> **(c)** the *Marine Tourism and Charter Vessels Award 20XX*;
>
> **(d)** the *Marine Towage Award 20XX*;
>
> **(e)** the *Port Authorities Award 2020*;
>
> **(f)** the *Seagoing Industry Award 20XX*; and
>
> **(g)** the *Stevedoring Industry Award 2020*.'

[281] AFEI submits that the expression 'the above awards' should be amended to read 'the awards below' as the awards in question are in clause 4.3.

[282] At [253] of the Tranche 3 BP we agreed with AFEI and proposed to amend the Exposure Draft and variation determination accordingly. This issue has now been overtaken by the variation determination issued by the Substantive Issues Full Bench in AM2014/5, which inserted new clauses 4.2 and 4.3.

(ii) Casual loading

[283] Clause 11.2 of the Exposure Draft states:

11.2 Casual loading

(a) For each ordinary hour worked, a casual employee must be paid:

(i) the ordinary hourly rate; and

(ii) a loading of 25% of the ordinary hourly rate, for the classification in which they are employed.

(b) The casual loading incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shiftwork rates ~~allowances~~.

[284] The comparable provision in the current award is clause 10.3(a), which provides:

10.3 Casual employment

(a) A casual employee is an employee engaged as such.

(b) A casual employee working within the ordinary hours of work pursuant to clause 18 will be paid per hour for the work performed plus 25% loading which incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances.

[285] AFEI submitted that the Exposure Draft omits the expression 'within the ordinary hours of work pursuant to clause 18' which appears in the current clause 10.3(a). AFEI submits:

'This omission in the exposure draft involves a substantive change from the current Award, and if adopted, would significantly increase the overall cost of casual employment particularly for ordinary hours on shiftwork and weekends.'

[286] AFEI proposed that the clause 11.2 of the Exposure Draft be amended as follows:

- in clause 11.2(a) after the words 'for each ordinary hour worked' insert the words '*pursuant to clause 12.2'*; and

- in the event that the Commission adopts the AFEI parties proposed amendment in paragraph 3.B of this submission, instead insert the words '*pursuant to clause 12.2(a)*.'

[287] at [258] of the Tranche 3 BP we invited other interested parties to comment on AFEI's proposed amendments.

[288] In reply, the CFMMEU (MUA Division) submits that:

'AFEI's complaint[45] that the words "pursuant to clause 18" have been left out of clause 11.2 fails to disclose that the issue of whether casual loading is payable when casuals work overtime is before the Full Bench in AM2017/51. It is notable that the wording of clause 11.2 has been in the exposure draft since 15 January 2016.

[45] AFEI submission 5 March 2020 at paras. 5-7

> The proposed amendments set out in paragraph 7 (of the AFEI submission] should not be made at this time as the issue will be determined in AM2017/51.'

[289] We agree with the CFMMEU (MUA Division). The Exposure Draft and variation determination will be amended to reflect the outcome in Matter AM2017/51.

(iii) All-purpose allowances

[290] the third issue concerns clause 16.2(a) of the Exposure Draft which provides:

> **(a) All-purpose allowances**
>
> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave. The following allowances are paid for all purposes under this award:
>
> (i) dual capacity allowances (clause 16.2(d));
>
> (ii) towing allowance—towing or carrying explosives (clause 16.2(m)(i)); and
>
> (iii) towing allowance—towing non self-propelled bunker barges (clause 16.2(m)(ii)).

[291] AFEI contended that the dual capacity allowance should not be included in clause 16.2(a) as the current award does not identify dual capacity allowances as all purpose allowances. AFEI submits:

> 'The inclusion of the dual capacity in clause 16.2(a) is inconsistent with clause 14.4 of the current award and clause 16.2(d) of the exposure draft which clarify that it is only treated as part of the ordinary rate in specific circumstances, that is 'for the purpose of calculating overtime, annual leave, sick leave and long service leave'.'

[292] At [260] of the Tranche 3 BP we posed the following question for all parties: Is the deletion of clause 16.2(a)(i) opposed by any other interested party?

[293] The CFMMEU (MUA Division) agrees that the dual capacity allowance is not an all-purpose allowance and the application of that allowance is correctly prescribed in clause 16.2(d).

[294] We will delete the reference to dual capacity allowances in clause 16.2(a)(i) and renumber (ii) and (iii).

[295] There is an outstanding issue concerning the rates that apply to shiftworkers.

[296] The MIAL referred to an outstanding issue in relation to the rates that apply to shiftworkers that was before the Group 3 technical and drafting Full Bench. AFEI also raised this issue in their submission.[46] This issue was the subject of a separate Statement[47] published on 20 March 2020.

---

[46] AFEI submission, 5 March 2020

[47] [2020] FWCFB 1510

[297] The 20 March 2020 Statement noted that this issue has now been transferred from the Group 3 awards Full Bench to this Full Bench. At [27] of that Statement we said:

> 'We propose to determine the issue on the papers having regard to the above submissions. If any party opposes that course or seeks an opportunity to file further submissions they should advise the Commission in writing by 4pm Friday, 3 April 2020.'

[298] No submissions were received opposing the course we proposed and no party sought an opportunity to file a further submission. We will issue a decision dealing with this issue in due course.

[299] There are no other outstanding technical and drafting issues in respect of this award.

3.15.4 Seagoing Industry Award 2010

[300] As we have mentioned, the outstanding coverage issues before the Substantive Issues Full Bench were finalised on 24 March 2020. The Exposure Draft and variation determination will be varied to reflect the final determination issued.

[301] There was also an outstanding matter before the NES inconsistencies Full Bench. The Full Bench issued a decision on 12 January 2018[48] dealing with the question of whether clause 27 of the award is inconsistent with the NES. A draft variation determination was issued with that decision. Interested parties had 28 days to comment on the draft determination. Submissions were received from MIAL[49] and the MUA[50] (as it then was). A decision[51] and final variation determination[52] were issued on 20 March 2020. The Exposure Draft and variation determination will be amended to incorporate the 20 March 2020 variation determination.

[302] There are two remaining issues.

(i) Clause 8 and Schedule A

[303] In its initial submission of 4 March 2020, MIAL confirmed that it is pressing its claim that the conditions set by the Seagoing Award in relation to vessels granted a temporary licence should be in a section headed 'Part B' rather than the proposed 'Schedule A'. MIAL advanced the following submission in support of its view:

> 'The intention of Part B is to ensure that international operators employing international crew operating temporarily in Australia comply with Australian standards. Artificially amending terminology will only result in confusion.
>
> It is unclear how the proposed name change is necessary to meet the modern awards objective, which require consideration of the likely impact of any exercise of modern award powers on

[48] [2018] FWCFB 129

[49] MAIL submission, 12 February 2018

[50] MUA submission, 14 February 2018

[51] [2020] FWCFB 1514

[52] PR717671

> business, including on productivity, employment costs and the regulatory burden, as well as the need to ensure a simple, easy to understand, stable and sustainable modern award system.[53] MIAL believes the proposed name change has the potential to cause confusion and uncertainty for companies, which are usually based outside of Australia, who are obligated to apply it.
>
> MIAL stated that it receives queries from international companies on the requirements around Part B. It is unnecessary and unwarranted to change terminology which has the very real potential to confuse operators who do not regularly engage in Australia's industrial relations system.'
>
> MIAL's position is that it is appropriate and desirable to retain the name, Part B.' [54]

[304] The CFMMEU (MUA Division) opposes the claim submitting that:

> 'The only basis for pressing this claim articulated in the assertion that there is a potential to cause confusion. No factual basis is provided in support of this assertion.'[55]

[305] The CFMMEU (MUA Division) maintains its position that it is unaware of anyone who will be confused by the rearrangement of the Seagoing Award:

> 'The change would not cause confusion for anyone who reads the entirety of the award to ensure they are complying with all their obligations. It is also relevant that Part B of the Seagoing Award does not contain the entirety of the obligations in relation to vessels granted a temporary licence. Other obligations are found in clauses 1-9 that appear before Part A.'[56]

[306] We are not persuaded to make the change sought by MIAL. The submission put is based on a belief that 'the proposed name change has the *potential* to cause confusion and uncertainty for companies'. We are not persuaded that the changes for Part B to Schedule A will cause confusion and uncertainty. The change is consistent with the approach taken in modern awards generally.

(ii) Preamble to Schedule A 4.

[307] MIAL maintains its claim that the preamble to Schedule A be amended as follows

> 'The following provisions are to apply to vessels ~~granted~~ operating under a temporary licence under the *Coastal Trading (Revitalising Australian Shipping) Act 2012* (Cth)'

[308] MIAL advances the following submission in support of its position:

> 'MIAL maintains its position that the wording in the preamble under Part B of the Seagoing Award should be changed to reflect that a vessel *operates* under a temporary licence, rather than being 'granted' one.

---

[53] Sections 134(1)(f) and 134(1)(g) of the Fair Work Act 2009 (Cth)

[54] MIAL submission 4 March 2020 at paras 7-10

[55] CFMMEU (Maritime Division) submission 7 April 2020 at para. 2

[56] CFMMEU (Maritime Division) submission 7 April 2020 at para. 3

> This is because the Minister grants an application for a temporary licence and that licence is granted to the person who applies for the temporary licence, being the owner, charterer, master or agent of the vessel, or a shipper, rather than the vessel itself.
>
> Amending the Preamble to 'operating' under a temporary licence would be more reflective of the *Coastal Trading (Revitalising Australian Shipping) Act 2012* and the practicalities of how temporary licenses operate and to whom they are granted.'[57] (footnotes omitted)

[309] The CFMMEU (MUA Division) submits that this claim is contrary to the determination of the Full Bench in *AMOU v CSL Australia Pty Limited*; *V Ships Australia Pty Limited*[58] that the wording of the Seagoing Award should not narrow the wording appearing in the Fair Work Regulations 2009. Section 33(3) of the Fair Work Act 2009 enables regulations to extend the Act. It provides:

> Extensions prescribed by regulations
>
> (3) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, to or in relation to the exclusive economic zone or to the waters above the continental shelf, then this Act extends accordingly.

[310] Regulation 1.15E provides:

> **1.15E Extension of Act to the exclusive economic zone and the continental shelf—ships**
>
> (1) For subsection 33(3) of the Act, the Act is extended to and in relation to each of the following ships in the exclusive economic zone or the waters above the continental shelf:
>
> (a) an emergency licensed ship;
>
> (b) a general licensed ship;
>
> (c) a temporary licensed ship;
>
> (d) a transitional general licensed ship.
>
> (2) For subsection 33(3) of the Act, the Act is extended to and in relation to a majority Australian-crewed ship in the exclusive economic zone or the waters above the continental shelf.
>
> Note: The extension of this Act to emergency licensed ships, general licensed ships, temporary licensed ships, transitional general licensed ships and majority Australian-crewed ships in the exclusive economic zone and the waters above the continental shelf (including provisions relating to compliance and enforcement, administration and right of entry by reason of the extension of the rest of the Act, so far as it relates to the specified provisions) is subject to:
>
> (a) Australia's international obligations relating to foreign ships; and
>
> (b) the concurrent jurisdiction of a foreign State

[311] The term 'temporary licensed ship' is defined in regulation 1.15B as:

> **temporary licensed ship** means a ship:
>
> (a) that is used to undertake a voyage authorised by a temporary licence; and

---

[57] MIAL submission 4 March 2020 at paras 11-13

[58] [2013] FWCFB 8338

(b) to which one of the following applies:

(i) within 12 months before commencing the voyage, the ship commenced at least 2 other voyages authorised by a temporary licence;

(ii) within 12 months before commencing the voyage: (A) the ship commenced at least one other voyage authorised by a temporary licence; and (B) was issued with a single voyage permit;

(iii) within 12 months before commencing the voyage, the ship was issued with at least 2 single voyage permits;

(iv) within 15 months before commencing the voyage, the ship was issued with a continuous voyage permit.

[312] The CFMMEU (MUA Division) contends that the use of the words 'operating under a temporary' are narrower than the words of the Fair Work Regulations 2009 and should not be adopted. The Commission should not be giving the wording of the Fair Work Regulations 2009 that adopts one of the possible interpretations available.

[313] We do not propose to grant MIAL's claim. The preamble to Schedule A in the Exposure Draft and draft variation determination is in the same terms as the preamble to Part B in the current award. The amendment proposed by MIAL is contested on the basis that it amounts to a substantive change and the process we are presently engaged in is finalising technical and drafting issues. If MIAL wishes to pursue this matter further, it should make an application to vary the award once the varied award commences operation.

[314] There are no other technical and drafting issues in respect of this award.

3.16 Miscellaneous Award 2010

[315] As part of the AM2017/51 Overtime for Casuals proceedings, United Voice (now the UWU) proposed to vary the overtime clause to introduce overtime provisions for casual employees into the Miscellaneous Award 2010. The matter was subject to a hearing before the Full Bench on 29, 30 and 31 July 2019.

[316] In its decision published 8 October 2019, the Full Bench agreed with the Union stating the Miscellaneous Award is 'confusing and ambiguous' and stated a *provisional* view that a new clause be introduced into the Miscellaneous Award:

'[52] Our provisional view is that clause 22.1 should be varied to provide as follows:

22.1 Overtime

All time worked in excess of:

(a) an average of 38 hours per week, or the daily hours prescribed in clause 20.2, by a full-time employee or casual employee; or

(b) in excess of the agreed number of hours per week pursuant to clause 10.3(b), or the daily hours prescribed in clause 20.2, by a part-time employee;

> is overtime and must be paid at the rate of 150% of the relevant minimum wage for the first three hours and 200% of the relevant minimum wage thereafter.
>
> [53] A draft determination to give effect to the variation will be published in due course and interested parties will be given an opportunity to comment upon it.'

[317] To date, a draft determination has not been published and parties have not been able to comment on the insertion of the proposed clause nor on whether overtime provisions should apply to the casual loading.

[318] ABI has indicated that it will be submitting in proceedings AM2017/51 that a casual loading does not apply to overtime in the Miscellaneous Award.

[319] Clause 11.2 of the Exposure Draft in the Miscellaneous Award states as follows:

> '**11.2 Casual loading**
>
> (a) For each hour worked, a casual employee must be paid:
>
> (i) the minimum hourly rate; and
>
> (ii) a loading of 25% of the minimum hourly rate,
>
> for the classification for which they are employed.
>
> (b) The casual loading is instead of the paid leave to which full-time employees are entitled under the NES and this award' (emphasis added).

[320] In its initial submission, ABI submitted that this drafting 'appears to infer that a casual loading will be payable during overtime, which departs from the existing drafting of the Miscellaneous Award and the position of ABI in proceedings 2017/51' and that until the Full Bench has determined proceedings 2017/51 either:

(a) the drafting pertaining to the casual loading should be maintained in its original form (as currently appears in the Miscellaneous Award); or

(b) the Exposure Draft for the Miscellaneous Award should not be determined and published in its new form.

[321] At [272] of the Tranche 3 BP, we expressed the *provisional* view that option (a) proposed by ABI be adopted.

[322] In its reply submission, Ai Group agreed with ABI's position that clause 11.2 of the Exposure Draft departs from the current award in that it implies that a casual loading will be payable during periods of overtime. Ai Group also agrees with our *provisional* view. The UWU submitted, in essence, that the Full Bench dealing with Matter AM2017/51 'is seised with this issue, those proceedings are the appropriate forum where this matter should be resolved'. The UWU opposed any alternation to the text of the Exposure Draft, pending the outcome in Matter AM2017/51.

[323] We have decided to confirm our *provisional* view that until the question of the entitlements afforded to casual employees during periods of overtime has been resolved in Matter AM2017/51, the drafting pertaining to the casual loading should be maintained as reflected in the current award.

[324] There are no remaining drafting and technical issues in respect of this award.

3.17 Nurses Award 2010

[325] Ai Group has filed an application (AM2020/1) to vary the Nurses Award, regarding the quantum of the casual loading payable. Ai Group seeks 'a determination retrospectively varying' the Award so that it expressly requires, with respect to casual employees:

> (a) The Saturday and Sunday penalty rates prescribed by clause 26 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).
>
> (b) The overtime rates prescribed by clause 28 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).
>
> (c) The public holiday penalty rates prescribed by clause 32.1 of the Award are calculated on the minimum hourly rate prescribed by the Award and not on a rate that includes the separate casual loading prescribed by clause 10.4(b).[59]

[326] The Ai Group application was partially in response to an ANMF submission of 13 June 2019[60] concerning the version of the Exposure Draft of the Award published on 22 February 2019.[61] The ANMF submission concerned the interpretation of the Award in light of the Full Bench decision in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care.*[62]

[327] Directions have been issued in AM2020/1 and it is listed for hearing on 1 September 2020.

[328] Ai Group and the ANMF both submit that the Commission should defer finalisation of the Exposure Draft and draft variation determination until AM2020/1 has been determined.

[329] At [278] of the Tranche 3 BP we agreed to the deferral of the finalisation of the Exposure Draft and draft variation determination until the claim in matter AM2020/1 has been determined. In doing so we noted that the claim in AM2020/1 only impacts on a limited number of clauses and schedules and saw no reason why the process of resolving any issues cannot proceed in respect of the clauses in the Exposure Draft and draft variation determinations which are unrelated to AM2020/1.

---

[59] Ai Group, Application to vary Nurses Award 2010, (14 January 2020) (AM2020/1)

[60] ANMF submission 13 June 2019

[61] Exposure Draft – Nurses Award – revised 22 February 2019

[62] [2019] FWCFB 1716

[330] At [280] of the Tranche 3 BP we proposed that:

> 1. Ai Group and the ANMF are to file a joint note indicating the terms of the Exposure Draft and draft variation determination which are related to AM2020/1.
>
> 2. In July 2020 a revised Exposure Draft and draft variation determination will be published (to reflect any changes necessary as result of the Annual Wage Review decision) and a mention hearing held to set a timetable for parties to make submissions in relation to the clauses which are unrelated to AM2020/1.

[331] Interested parties were invited to comment on this proposal. ABI, Ai Group and the ANMF support the proposal. In addition, the ANMF seeks clarity as to the timeframe for providing the joint note. The joint note is to be filed by **4pm** on **Friday 22 May 2020.**

3.18 Professional Employees Award 2010

[332] Clause 2.4 has been amended to commence with the words '***Academic schedule*** *means'*, followed by a list of qualifications. ABI submitted that the qualifications form part of the academic schedule, but do not constitute a meaning and on that basis proposed that the word 'means' is replaced with the word 'include.'

[333] At [285] of the Tranche 3 BP we expressed the *provisional* view that the amendment proposed be adopted.

[334] In its reply submission, ABI withdraws this proposal:

> 'Since making this submission our clients have spoken with other interested parties who have raised concerns about unintended consequences that may arise from the use of the word '*include'*.
>
> To avoid any unintended consequences, ABI and NSWBC no longer presses this matter and submit that the Commission should not adopt the provisional view expressed at [285].'[63]

[335] We note that the proposed change has been withdrawn and accordingly we do not adhere to our *provisional* view.

[336] In the event that Ai Group's submission in respect of the deferral of the finalisation of the Nurses Award was accepted then Ai Group submitted that the reference to '20XX' in clause 4.2(d) Coverage should be replaced with '2010.'

[337] At [287] of the Tranche 3 BP we agreed with Ai Group's submission. We adhere to that view and will amend the Exposure Draft and variation determination accordingly.

[338] A question is posed in Schedule A of the Exposure Draft about whether APESMA's claim concerning Engineering Technologists is pressed. APESMA advised Ai Group that the claim is no longer being pressed as part of the Review. On that basis, we noted (at [289] of the Tranche 3 BP) that APESMA's claim is no longer pressed as part of the Review.

---

[63] ABI Reply submission 7 April 2020 at paras 63-64

[339] There are no remaining drafting and technical issues in respect of this award.

3.19 Racing Clubs Events Award 2010

[340] In its initial submission the AWU submitted that it had been agreed[64] that casual employees are paid their 25% casual loading on a cumulative basis when overtime is worked and on that basis a casual overtime rates table can be inserted into Schedule A.2.

[341] At [291] of the Tranche 3 BP we invited other interested parties to comment on the AWU's proposal. No submissions were received. A casual overtime rates table will be inserted into Schedule A.2.

[342] There are no remaining drafting and technical issues in respect of this award.

3.20 Registered and Licensed Clubs Award 2010

[343] ABI, CAI and CMMA made submissions in relation to this award. ABI's initial submission raised four issues.

(i) Clause 4.1 - Coverage

[344] Clause 4.1 states that:

> 'This industry award covers employers of employees engaged in the performance of all or any work in or in connection with or for clubs registered or recognised under State, Territory or Commonwealth legislation and their employees in the classifications within Schedule A—Classification Definitions, to the exclusion of any other modern award.'

[345] Clause 4.2 goes on to define '*club'* as:

> 'any club which is registered and licensed under the provisions of relevant State or Commonwealth Statutes (Liquor and/or Gaming Acts, Associations' Incorporation Acts or Corporations Acts) and which is established and operates on a not-for-profit basis for the benefit of members and the community.'

[346] ABI submitted that the words 'registered or recognised under State, Territory or Commonwealth legislation' in clause 4.1 are superfluous given the requirement under clause 4.2 for a club to be 'registered and licensed under the provisions of relevant State or Commonwealth Statutes (Liquor and/or Gaming Acts, Associations' Incorporation Acts or Corporations Acts)'.

[347] At [296] of the Tranche 3 BP we expressed the *provisional* view that the words 'registered or recognised under State, Territory or Commonwealth legislation' be deleted from clause 4.1. The CMAA and UWU agreed with our *provisional* view.

---

[64] See [1.2] of this ABI correspondence: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-corr-abinswbc-101019.pdf and [6] of this FWC Statement: https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc8318.htm at [6].

[348] We confirm our *provisional* view and will delete the words 'registered or recognised under State, Territory or Commonwealth legislation' from clause 4.1.

(ii) Clauses 4.6 and 4.7 - Coverage (On-hire and Group Training)

[349] Clause 4.6 states that the 'award covers any employer which supplies labour on an on-hire basis in the clubs industry' (emphasis added). Similarly, clause 4.7 states that the '*award covers employers which provide group training services for apprentices and/or trainees engaged in the clubs industry'* (emphasis added).

[350] The term '*clubs industry'* is not a defined term in the award.

[351] ABI submitted that a relevant definition could be inserted by amending clause 4 as follows:

> '4.1 This industry award covers employers throughout Australia who are engaged in the clubs industry in respect of work by their employees in a classification in this award and their employees engaged in the classifications within Schedule A— Classification Definitions, to the exclusion of any other modern award.
>
> 4.2 Definition of clubs industry
> For the purposes of clause 4 **club industry** means the performance of all or any work in or in connection with or for clubs.
>
> 4.3 **club** means any club which is registered and licensed under the provisions of relevant State or Commonwealth Statutes (Liquor and/or Gaming Acts, Associations' Incorporation Acts or Corporations Acts) and which is established and operates on a not-for-profit basis for the benefit of members and the community.
>
> 4.4 This award covers …'

[352] At [300] of the Tranche 3 BP we invited interested parties to comment on ABI's proposal. The CMAA and UWU agreed with ABI's proposal.

[353] We agree with the change proposed by ABI and will amend clause 4 as proposed.

(iii) Clause 11.2 - Casual Loading

[354] Clause 11.2 refers to 'the ordinary hourly rate prescribed in clause 0' and ABI submits that this should be a reference to clause 24.1.

[355] At [302] of the Tranche 3 BP we agreed with ABI. No party expressed a contrary view. We adhere to our view and will amend clause 11.2 accordingly.

(iv) Clause 11.3 - Casual Loading

[356] Parties were asked whether a maintenance and horticultural employee may be engaged on a casual basis; and if so, do the percentages in clauses 24.1 or 24.2 apply?

[357] ABI submitted that:

> '56. Nothing in clause 11.1 excludes maintenance and horticultural employees from the definition of a casual employee.
>
> 57. Maintenance and horticultural employees are clearly excluded from the rates in clause 24.1.
>
> 58. In Submissions filed on 18 January 2017,[65] ABI and NSWBC submitted that maintenance and horticultural employees may be engaged on a casual basis and that the rates in clause 24.2 would apply save for the fact that Monday to Friday and Saturday before noon would be paid at 125%.
>
> 59. We do not oppose the addition of a casual employee row to the table in clause 24.2 as suggested by the AWU at paragraph 3.3 of their Submissions of 20 January 2017.'[66]

[358] At [305] of the Tranche 3 BP we invited interested parties to comment on ABI's submission. No comments were received. We will amend the Exposure Draft and variation determination to provide that maintenance and horticultural employees may be engaged on a casual basis and to add a casual employee row to the table in clause 24.2.

(v) Clause 15.8 - Deferral of rostered days off

[359] Parties are asked whether clause 15.8(g) is still required. This clause contains a transitional provision that ceased to have effect on 1 January 2013.

[360] ABI submitted that clause 15.8(g) is no longer required and should be removed.

[361] At [308] of the Tranche 3 BP we agreed with ABI. No party expressed a contrary view. We adhere to our view and will delete clause 15.8(g).

[362] As we noted in the Tranche 3 BP, the submissions filed by CAI and CMAA are directed at some outstanding substantive issues in relation to this award and will be determined by a different Full Bench.

[363] There are no remaining drafting and technical issues in respect of this award.

3.21 Security Services Industry Award 2010

[364] Initial submissions were filed by ABI and ASIAL in relation to the Security Award. Both submissions concerned overtime for casuals.

[365] As part of the AM2017/51 Overtime for Casuals proceedings, United Voice (now UWU) proposed to vary the overtime clause to introduce overtime provisions for casual employees into the *Security Services Industry Award 2010*. The matter was subject to a hearing before the Full Bench on 29, 30 and 31 July 2019. In the decision,[67] the Full Bench stated:

---

[65] ABI/NSWBC Submissions dated 18 January 2017
[66] AWU Submissions dated 20 January 2017

[67] [2019] FWCFB 6953

> '[63] It is not in dispute that casual employees are not currently entitled to receive the casual loading when being paid overtime penalty rates, and the above variation is not intended to disturb that position.'

[366] ABI submitted that having regard to the Full Bench decision, the casual loading is not payable during overtime.

[367] The Exposure Draft states as follows:

> '**11.2 Casual loading**
>
> (a) An employer must pay a casual employee for each hour worked a loading of 25% in addition to the minimum hourly rate otherwise applicable under Table 4-Minimum rates.
>
> (b) The casual loading is paid in addition to any penalty rates…' (emphasis added).

[368] ABI submitted that clause 11.2 'appears inconsistent with the determination in decision [2019] FWCFB 6953 and should be amended'.

[369] ASIAL's submission appears to make a similar point. ASIAL seeks the retention of the word 'ordinary' on the basis that its removal would 'disturb that position' and 'would create ambiguity and lead to disputation'.

[370] At [316] of the Tranche 3 BP we invited interested parties to comment on ABI's proposal.

[371] In its reply submission the UWU submits:

> 'The Full Bench in AM2017/51 in the *Overtimes for Casuals Decision* of 8 October 2019 observed:
>
> > [63] It is not in dispute that casual employees are not currently entitled to receive the casual loading when being paid overtime penalty rates, and the above variation is not intended to disturb that position. A draft determination to give effect to the variation will be published in due course and interested parties will be given an opportunity to comment upon it.'
>
> This conclusion is inevitable due the text of clause 23.3 of the current award which reads where 'an employee works overtime the employer must pay to the employee the ordinary time rate for the period of overtime together with a loading as follows … ' and not something arising from a claim or the review of the awards within this review.
>
> The Security Award is also awaiting a draft determination to be issued to reflect the *Overtime for Casuals Decision* that the entitlement of casual employee to overtime be recast.7 This issue is clearly sign posted at clause 19.3 of the exposure draft.
>
> On 29 July 2019, in our submission filed in the overtime for casuals common issue we:
>
> > … withdraw our claim concerning seeking to have the casual loading not absorbed by the overtime penalty. United Voice is shortly to file a variation to this award pursuant

> to section 157 of the Fair Work Act 2009 ('the Act') which is responsive to the judgment of the Full Federal Court in United Voice v Wilson Security Pty Ltd [2019] FCAFC 66.
>
> The non-payment of the casual loading in this award is a long-standing feature of the instrument, we and no other party in this review has made any claim concerning the matter. We place on record that there is no impediment to the UWU seeking to vary the award in the immediate future to remedy this situation by a variation pursuant to section 158 of the Act. Item 27 '*Dismissing applications'* in Part 5 of Schedule 1 of the Act could not be said to be relevant to any future application under 158 of the Act concerning this matter by the UWU.'[68] (footnotes omitted)

[372] While not entirely clear, we take it that the UWU does not oppose ABI's proposal. We agree with ABI and will amend the Exposure Draft and variation determination accordingly.

[373] There are no remaining drafting and technical issues in respect of this award.

3.22 Telecommunications Services Award 2010

[374] In its initial submission, Ai Group raised a number of minor drafting issues:

- In the title and clauses 4.5(b) and 15.6 20XX should be replaced by 2020
- Clause 17 of the Exposure Draft corresponds to clause 15 in the current award, which has been varied since the Exposure Draft was published (see PR716768) and hence the Exposure Draft requires updating

[375] At [320] of the Tranche 3 BP we agreed with Ai Group. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and variation determination accordingly.

[376] Ai Group also raised three other issues.

(i) Clause 2: Definitions – ordinary hourly rate

[377] The definition of 'ordinary hourly rate' states:

> **ordinary hourly rate** means the hourly rate for the employee's classification specified in clause 15.1, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes.

[378] Ai Group submitted that the definition is 'problematic' as it requires the calculation of the ordinary hourly rate by reference to the rates contained in clause 15.1 which excludes employees who are not entitled to those rates, such as employees to whom clause 15.2 applies (junior employees) and clause 15.3 applies (apprentices).

[379] Ai Group proposed that the words 'clause 15.1' should be replaced with 'this award'.

---

[68] UWU Reply submission 9 April 2020 at paras 17-21

[380] At [325] of the Tranche 3 BP we invited interested parties to comment on Ai Group's proposed amendment.

[381] ABI supports Ai Group's proposed amendment.

[382] The CPSU submits that it:

> 'understands the AiG's view that a reference to clause 15.1 could be seen as excluding clause 15.2 or 15.3. But we say the reference should be to clause 15 generally, not just 'this award'.'[69]

(i) (ii) Clause B.2.4: Full-time and part-time employees - overtime

[383] The rates at B.2.3 apply to full-time and part-time employees who are not performing shiftwork when working overtime.

[384] The rates at B.2.4 are headed 'full-time and part-time employees – overtime' yet the rates set out therein appear to be the same as the rates at B.2.3. Ai Group submitted that the distinction between the two sets of rates is not clear and suggests that B.2.4 is deleted.

[385] At [327] of the Tranche 3 BP we noted that the issue raised may also be resolved by amending the heading of B.2.4 to read 'Full time and part time employees – shiftworkers – overtime rates' and invited interested parties to comment on this issue.

[386] Ai Group did not oppose the Commission's proposed course of action.

[387] ABI submits that the issue identified should be rectified in the manner suggested by the Commission and notes that the rates in B.2.4 contain different public holidays rates from those in B.2.3. ABI submits that the purpose of the footnote in question is primarily to explain the absence of particular rates that would not have applied to certain classifications due to exclusions arising out of the former clause 17.

[388] The CPSU submits that whether B.2.3 or B.2.4 is removed, the name of the table that remains should be 'full and part time employees – overtime'

> 'this is because there is not a need to distinguish shiftworkers from workers other than shiftworkers as they have a similar entitlement to overtime.'[70]

(iii) Schedule B: certain classifications exempt from various entitlements

[389] Ai Group refers to footnote 1 to each of the table of rates set out in Schedule B. Footnote 1 applies to certain classifications and says:

> 'See clause 17 – Annual salary arrangements for higher classifications in relation to award provisions that do not apply to persons in these classifications.'

[69] CPSU Reply submission 7 April 2020 at para. 3

[70] CPSU Reply submission 7 April 2020 at para. 4

[390] While under the annualised salary clause that previously applied, certain employees were exempted in all circumstances from certain award entitlements, Ai Group contends that as a consequence of the introduction of new annualised wage arrangements (effective 1 March 2020), this will no longer be the case.

[391] Ai Group submitted that the relevant tables and footnotes require revisiting in light of the new annualised salary clause.

[392] At [332] of the Tranche 3 of the BP we agreed with Ai Group's submission but noted that it may be sufficient to simply amend the footnote, as follows:

> 'An employer may pay a full-time employee employed in a particular classification, an annualised wage in satisfaction of any or all of the award provisions listed in clause 15.'

[393] At [333] of the Tranche 3 BP interested parties were asked to comment on the revised footnote above and whether any other changes are required.

[394] The CPSU agrees with the proposal put by the Commission to amend the footnote.

[395] Ai Group supports the variation made to the footnote but suggests that it remains necessary to revisit the rates included in the tables for the following classifications:

- Principal Customer Contact Leader;
- Telecommunications Associate; or
- Clerical and Administration Level 5.

[396] Ai Group notes that many of the rates for the above classifications were left blank on account of the fact that the former annualised salary clause functioned as an exemption from payment of certain overtime and penalty rates. As the current annualised wage arrangement provision merely allows for these entitlements to be substituted by way of an annualised salary, Ai Group submits that it is necessary for overtime and penalty rates for these classifications to be included in Schedule B.

[397] ABI supports the revised footnote proposed by the Commission but submits that further variations will be required to the rates tables as the annualised salary provisions no longer automatically exempt certain classifications from the rates in question. ABI proposes that these rates should be calculated and added to the relevant tables in Schedule B.

[398] A conference will be convened shortly to discuss the issues that remain in dispute.

3.23 Textile, Clothing, Footwear and Associated Industries Award 2010

[399] The initial submissions of ABI, Ai Group and the CFMMEU – MD in relation to the TCF Award are summarised at [334] – [365] of the Tranche 3 BP. A conference of interested parties was convened to attempt to narrow the issues in contention. The conference was held on 3 April 2020 and was attended by Ai Group and the CFMMEU – MD. Commissioner Bissett published a Report on the outcome of the conference on 8 April 2020.

[400] We turn first to the matters agreed at the 3 April 2020 conference.

(i) Calculation of overtime for casuals

[401] The TCF Award is currently the subject of dispute regarding the calculation of overtime for the casual loading in the proceedings AM2017/51. The Commission invited parties to file submissions on 14 October 2019. Submissions were filed by ABI and NSWBC on 12 November 2019[71] stating that the calculation of overtime for casual employees is on a cumulative basis. On 9 December 2019, the CFMMEU – MD [72] submitted that it is to be calculated on a compounding basis. The matter has been reserved by the Full Bench and has not yet been decided.

[402] Clause 11.9 of the Exposure Draft states as follows:

> '11.9 Casual loading
>
> For each hour worked, a casual employee must be paid:
>
> (a) the ordinary hourly rate; and
>
> (b) a loading of 25% of the ordinary hourly rate,
>
> prescribed for the relevant classification in which they are employed.'

[403] ABI submits that the exclusion of the word "ordinary" from 11.9(a) may infer that the casual loading in the TCF Award should be calculated on a compounding basis and that until the Full Bench has determined Matter AM2017/51, either:

(a) the drafting pertaining to the casual loading should be maintained in its original form (as currently appears in the TCF Award); or

(b) the Exposure Draft for the TCF Award should not be determined and published in its new form.

[404] At [338] of the Tranche 3 BP we expressed the *provisional* view that option (a) proposed by ABI be adopted. The parties at the conference agreed with our *provisional* view. We confirm our *provisional* view and accordingly, the draft variation determination in respect of the TCF Award will not be finalised until the Full Bench in AM2017/51 has determined the issues before it in respect of this award.

(ii) Minor drafting issues

[405] A number of minor drafting errors were identified in the submissions.

[406] ABI raised an issue in clause 18.4(f). The words '*five and a half'* have been replaced with '*51/2'*. ABI submits that this appears to be an error and that '1/2' should be replaced with the '½' symbol, as it has in other Exposure Drafts.

[407] Ai Group raises the following minor drafting issues:

---

[71] ABI/NSWBC submissions dated 12 November 2019

[72] CFMMEU-MD submissions dated 9 December 2019

- replacing 20XX with 2020 in the title and in clause 4.5 and 19.11;
- the definition of 'all purposes' has been deleted from clause 2 and should be retained as certain allowances in the award are designated as 'all purpose' allowances;
- in clause 11.1[1](g) the first reference to 'clause 11.11(c)' should be replaced with 'clause 11.11(g), consistent with the current clause 14.10(g);
- in clause 18.4(f) a space should be added between '5' and '½';
- in clauses 28.4(a) and (b) 'ordinary rate' should be replaced with 'ordinary hourly rate' which is a defined term; and
- clause C.3.3 the rates under 'Monday to Friday – 12 hour shift, first 10 hours' are incorrect and should be the same as the rates in the second column.

[408] The CFMMEU – MD identified the following minor errors:

- in clause 2 (Definitions) include 'textile industry has the meaning given in clause 4.2';
- in clause 4.7, the reference to clause 4.6(c) is an error and the last sentence of clause 4.7 should be amended to read 'clause 4.7 operates subject to the exclusions from coverage in this award';
- clause 7.2(h) be amended to: '(h) substitution of public holidays or part-day public holidays by agreement';
- clause 11.11(g), the reference to 'in accordance with clause 11.1(c)' should be amended to 'in accordance with clause 11.11(g)';
- clause 28.3(c)(i), contains a typographical error in the second line, the word 'of' after the words 'ordinary hourly rate' should be deleted;
- clauses 32.3(a) and 32.5(d), delete 'Schedule H—Agreement to take Annual Leave in Advance' and insert 'clause 2 (Definitions)'; and
- clause 43.4(d) omits the entitlement to redundancy pay for employees with continuous service of 4 years and over and should be amended to include : 'At least 4 years and over—8 weeks'.

[409] In the Tranche 3 BP (at [340] and [342]) we agreed with ABI, Ai Group and the CFMMEU – MD. The parties at the conference raised no objection to the proposed amendments. We will amend the Exposure Draft and the variation determination to correct the errors noted above.

(iii) Coverage clauses

[410] Clause 4.7 states:

'This award covers any employer which supplies labour on an on-hire basis in the textile industry, clothing industry, bag making industry, button making industry, footwear industry and allied manufacturing and fabricating industries (as defined is clause 4.2) ~~set out in clause 4.2 0~~ in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in those industries. ~~This subclause~~ Clause 4.6(c) operates subject to the exclusions from coverage in this award.'

[411] Ai Group submits that clause 4.7 should be replaced by the following:

4.7 This award covers any employer which supplies labour on an on-hire basis in any of the industries set out in clause 4.1 (as defined in clause 4.2) in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in those industries. Clause 4.7 operates subject to the exclusions from coverage in this award.

[412] Clause 4.8 states:

4.8 This award covers employers which provide group training services for apprentices and/or trainees engaged in the textile industry, clothing industry, bag making industry, button making industry, footwear industry and allied manufacturing and fabricating industries as ~~industry and/or parts of industry set out at~~ defined in clause 4.2 ~~0~~ and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. ~~This subclause~~ Clause 4.7 operates subject to the exclusions from coverage in this award.

[413] Ai Group submits that clause 4.8 should be replaced by the following:

4.8 This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 (as defined by clause 4.2) and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. Clause 4.8 operates subject to the exclusions from coverage in this award.

[414] At [347] of the Tranche 3 BP we expressed the *provisional* view that the Exposure Draft and variation determination be amended as proposed by Ai Group. The parties at the conference agreed with our *provisional* view. We confirm our *provisional* view and will amend the Exposure Draft and variation determination accordingly.

(iv) Clause 18.2 – meal breaks

[415] Clause 18.2 of the TCF Award Exposure Draft provides:

'**18.2 Meal breaks—shiftworkers in the textile industry**

(a) Where 2 eight hour or 3 eight hour shifts are worked, instead of the meal break provided in clause 18.1**,** the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked.

(b) 7 day continuous shiftworkers are entitled to a paid 20 minute meal break during each shift.'

[416] Clauses 38.1 and 38.2 of the TCF Award currently provide:

> '**38.1 Meal break**
>
> **(a)** A meal interval of not less than 30 minutes and not more than one hour must be allowed each shift or day.
>
> **(b)** If the employer requires an employee (other than a maintenance employee who is required to work through a meal break to rectify a mechanical breakdown) to work through a meal break, the employee must be paid at overtime rates (clause 39) until the break is taken.
>
> **(c)** No employee will be required to work for more than five hours without a meal break unless an employer and a majority of employees in an enterprise or part of an enterprise concerned agree to work in excess of five hours but less than six hours without a meal break, provided such agreement is in accordance with clause 8.3.
>
> **38.2 Meal Breaks and Shift Workers (textile industry)**
>
> Shift workers in the textile industry are entitled to meal breaks in accordance with clause 38.1, and as follows:
>
> **(a)** Where two eight hour or three eight hour shifts are worked, in lieu of the meal break provided in clause 38.1(a), the employer has the discretion to, as opportunity offers, provide the shift worker a 20 minute paid crib break per shift which shall be counted as time worked.' (emphasis added)

[417] Clause 18.2 of the Exposure Draft has deleted the opening paragraph (as highlighted above) of the current clause 38.2. The CFMMEU – MD submits that the deletion constitutes a diminution of a current condition;

> 'Clause 38.1 of the TCF Award contains 3 elements – 38(a), (b) (c) including an entitlement to an unpaid meal break of not less than 30 minutes per day. The deletion in the TCF Award ED of the opening paragraph to clause 38.2 changes the effect of the provision for shiftworkers in the textile industry including with respect to (c) and has potentially unintended consequences.'[73]

[418] The CFMMEU – MD notes that the current formulation of clause 38.2 was inserted into the award as a result of two Full Bench decisions issued in context of the previous 2012 Transitional Review and the 2014 Review of Modern Awards, as follows:

- (Transitional Review) [2013] FWCFB 5729[74]
- (4 Yearly Review) [2014] FWCFB 2831[75]

---

[73] CFMMEU (Manufacturing Division) submission, 6 March 2020, at para 33.

[74] Sch. 5, Item 6 – Transitional Review of Modern Awards – Textile, Clothing, Footwear and Associated Industries Award 2010; [2013] FWCFB 5729 (4 October 2013); Hamberger SDP; Smith DP; Lee C. and Determination (PR542901) at item 24.

[75] S.156 – 4 yearly review of modern awards – Textile, Clothing, Footwear and Associated Industries Award 2010; [2015] FWCFB 2831 (11 May 2015); Watson DP; O'Callaghan DP; Cribb C and Determination (PR563434) at item 8.

[419] The terms of the current clause 38.2 (including the opening paragraph) was part of a range of matters about which the TCFUA, ABI and AIG reached consent about and which were adopted by the Full Bench in the Transitional Review decision. That Full Bench held:

> 'The Full Bench has considered the terms of the draft determination proposed by the TCFUA, ABI and AIG in so far as it deals with the non-outwork matters and technical amendments. We are satisfied that the proposed amendments are consistent with the modern awards objective in s.134 of the Act. Further, we are satisfied the amendments proposed will allow the award to operate more effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Accordingly, we think it appropriate to amend the award consistent with the terms of the draft determination provided by the TCFUA on the 4 July 2013.'[76]

[420] The further amendment to clause 38.2 of the TCF Award was determined by the 4 yearly award Full Bench.[77] The CFMMEU – MD submits that clause 18.2 be amended to include the current text (as underlined below) in clause 38.2, as follows:

> Shift workers in the textile industry are entitled to meal breaks in accordance with clause 38.1, and as follows:
>
> (a) Where 2 eight hour or 3 eight hour shifts are worked, instead of the meal break provided in clause 18.1, the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked.
>
> (b) 7 day continuous shiftworkers are entitled to a paid 20 minute meal break during each shift.

[421] At [362] of the Tranche 3 BP we invited other interested parties to comment on the amendment proposed by the CFMMEU – MD.

[422] Ai Group has no objection to the amendment proposed by the Union. ABI opposes the proposed amendment, submitting that:

> 'Our clients acknowledge that clause 18.2 (a) of the exposure draft is derived from the existing award clause 38.2, which operates in conjunction with award clause 38.1.
>
> Clause 18.2 (b) of the exposure draft, however, is derived from existing award clause 37.4 (b) which states:
>
> > *Twenty minutes must be allowed each shift for a meal, which will be counted as time worked.*
>
> ABI and NSWBC submit that this twenty minute paid meal break is intended to be taken in lieu of the unpaid meal break in award clause 38.1.
>
> The proposed amendments would therefore result in a substantive change with employees receiving two meal breaks per shift.
>
> Our clients propose that the clause 18.2 should be amended as follows: (a) Shift workers in the textile industry (other than 7 day continuous shiftworkers) are entitled to meal breaks in accordance with clause 18.1. Where 2 eight hour or 3 eight hour shifts are worked, instead of

[76] [2013] FWCFB 5729 at [67].

[77] [2015] FWCFB 2831 at [123] – [129]

> the meal break provided in clause 18.1, the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked. (b) 7 day continuous shiftworkers in the textile industry are entitled to a paid 20 minute meal break during each shift. This entitlement applies instead of the unpaid meal break prescribed by clause 18.1.'[78]

[423] We return to this issue shortly.

(v) The Outworker Schedule

[424] The CFMMEU – MD opposes the change in the clause numbering of the Outwork Schedule from its current 'Schedule F' to 'Schedule E' for the reasons set out at [70] to [87] of its submission.

[425] At [364] of the Tranche 3 BP we expressed the *provisional* view that the schedule numbering in the Exposure Draft should be reversed (as proposed by the CFMMEU – MD from 'Schedule E—Outwork and Related Provisions' and 'Schedule F—Apprentices' to:

- Schedule E—Apprentices
- Schedule F—Outwork and Related Provisions.

[426] Consequential changes to other clauses in the Exposure Draft will also be necessary (see [90] of the CFMMEU – MD's submissions.

[427] Ai Group has no objection to the reversal of Schedules E and F. ABI expresses no view on the matter. We confirm our *provisional* view and will amend the Exposure Draft and variation determination accordingly.

(vi) Other Schedules

[428] These matters relate to rate of pay due to casual employees who work on a public holiday (clause 43.2). Public holiday rates and other penalty rates for casual employees are contained in the tables at C.4.1, C.5.1, C.5.2 and C.5.3 in Schedule C. The rates in the tables are based on a cumulative method of calculation and not a compounding. The CFMMEU – MD says the rates should be compounding.

[429] The CFMMEU – MD and AiGroup acknowledge that the question of the method by which the public holiday rate should be calculated may not develop clarity until such time as the Full Bench in AM2017/51 hands down its decision.

[430] The parties have agreed that the most sensible approach (as has been used in relation to casual overtime rates) is to delete those columns in C.4.1, C.5.1, C.5.2 and C.5.3 which purport to specify casual employee rates for anything but ordinary hours (in effect deleting C.5.1, C.5.2 and C.5.3 and the public holiday column in C.4.1).

[78] ABI submission 7 April 2020 at paras [75]-[79]

[431] The CFMMEU-MD propose, and the Ai Group agree, that this matter should be re-visited following the determination by the Full Bench in AM2017/51 in relation to the TCF Award.

[432] We agree with the course proposed.

(vii) Clause 19 - Minimum Rates

[433] Clause 19 of the Exposure Draft states (relevantly):

19. Minimum rates

An employer must pay employees the following minimum rates for ordinary hours worked by the employee:

19.1 General rates

Employee Classification/Skill Level	**Minimum weekly rate (full-time employee)**	**Minimum hourly rate**
	$	**$**
Trainee	740.80	19.49
Skill level 1	762.10	20.06
Skill level 2	791.30	20.82
Skill level 3	818.50	21.54
Skill level 4	862.50	22.70
Skill level 5 and thereafter	916.60	24.12

[434] At the 3 April 2020 conference the CFMMEU-MD expressed concern with the inclusion of the words 'worked by the employee' in the context of other clauses which provide minimum of 3 hours on any day for a part-time employee (clause 10.6) and minimum 3 hour payment for a casual employee (clause 11.4). CFMMEU-MD proposed to add a note that clause 19 does not affect the minimum engagement or minimum payment.

[435] Ai Group did not consider that the variation proposed by the CFMMEU – MD was necessary. We agree with Ai Group. Clause 19 and the relevant minimum engagement and payment provisions operate in conjunction with one another and the insertion of additional footnotes at clause 19, as proposed by the CFMMEU – MD, would unnecessarily duplicate the terms and effect of the minimum engagement and payment provisions.

[436] A further conference will be convened after the Overtime for Casuals Full Bench (AM2017/51) has determined the outstanding issues in respect of this award. The contested issue in relation to clause 18.2 – meal breaks will also be discussed at that conference.

3.24 Timber Industry Award 2010

[437] ABI, Ai Group and the CFMMEU – MD made initial submissions in respect of this award. A conference of interested parties was held on 1 April 2020 and was attended by Ai

Group and the CFMMEU – MD. Commissioner Bissett published a Report on the outcome of the conference on 15 April 2020.

[438] In clause D.3, parties were asked whether the public holiday penalty rate for casual workers should be limited to the General Timber Stream.

[439] ABI submitted that, based on the current wording of the Exposure Draft, casual employees are not entitled to public holiday loadings, unless they are in the General Timber Stream:

> '78. This is because, clause 27.1(d) prescribes the public holiday penalty for casual employees. This clause is clearly limited to employees in the General Timber Stream.
>
> 79. Clause 27.1(c) also prescribes a public holiday penalty, but it expressly limited to weekly employees and so does not apply to casual employees, whether in the General Timber Stream or not.
>
> 80. Further to this, the Saturday and Sunday payments prescribed in clauses 27.1(a) and (b), are also expressly limited to weekly employees and do not apply to casual employees.
>
> 81. The Saturday and Sunday rates in the table at clause D.3.1 should be amended to reflect this.'

[440] At [370] of the Tranche 3 BP we invited interested parties to comment on the issue raised by ABI and the solution proposed.

[441] HIA agreed with ABI's comments and submits that clause D.3.1 should be amended to provide public holiday rates only for casual employees in the General Timber Stream and remove the Saturday and Sunday rates currently specified.

[442] The CFMMEU – MD oppose ABI's submission:

> 'We note at the outset that there is no actual definition of 'weekly employees' in the Timber Award 2010. However, even on the assumption that the expression 'weekly employees' was intended to exclude casual employee, we submit that this does definitively determine the respective issues.
>
> Clause 12.2 (Casual employment) of the Timber Award provides as follows:
>
> > *12.2 Casual employment*
> >
> > (a) A casual employee will be paid per hour 1/38th of the award ate applicable for the work performed plus a loading of 25% of the applicable rate of pay.
> >
> > (b) A casual employee who works in excess of the ordinary hours fixed for weekly employees on any day will be paid at the appropriate overtime rate provided in clause 30 – Overtime, Saturday, Sunday and public holiday payments-day work an shiftwork based on their ordinary rate of pay (including the loading provided for in clause 12.2(a). [added emphasis]
> >
> > (c) A casual employee engaged for any part of any day will be entitled to a minimum of fours hours' pay per day whether the casual employee is required to work for four hours or not.

Clause 12.2 of the Timber Award is silent as to whether casual employees are (generally) excluded from an entitlement to penalty payments on public holidays and for work undertaken on Saturdays and Sunday.

It is the case that employees in the General Timber Stream expressly have an entitlement to public holiday penalty rates (see clause 30.7(b) of the Timber Award or clause 27.1(c) of the Exposure Draft). However, arguably, clause 30.7(b) is intended to carve out a different regime of penalty payments for casual employees in the General Timber Stream (reflecting the position in the pre-modern award) rather than operating to the effect that casual employees in the other two streams (i) Wood and Timber Stream; and (ii) Pulp and Paper Stream, have no entitlement to public holiday penalty rates.

Further, clause 12.2 of the Timber Award therefore expressly provides a casual employee an entitlement to overtime rates (as set out in clause 30) for all work undertaken on any day in excess *'of the ordinary hours fixed for weekly employees'*.

Clause 30.1 (Payment for working overtime) of the Timber Award provides a general entitlement for all employees (including casuals) working overtime in relation to ordinary hours, expressed as follows (in part):

> *30.1 Payment for working overtime*
>
> (a) All time worked by employees outside of the spread of hours prescribed in clause 27 – Hours of work or in excess of the ordinary daily number of hours prescribed in clause 27, will be paid for at the rate of time and a half for first two hours and double time thereafter.
>
> (b) In computing overtime each day's work will stand alone.
>
> (c) For the purpose of this clause ordinary hours will mean the hours fixed in an establishment in accordance with 27 – Hours of Work.

Clause 27.2 makes provision for ordinary hours of all employees, by agreement, to be worked on any day of the week, including Saturday and Sunday inclusive. This applies to both day workers (27.2(b)) and shiftworkers (27.3(b)).

As such, if a casual employee's ordinary hours include hours on a Saturday or Sunday, and they work additional hours on that day, we submit, at a minimum, they would be entitled to overtime payments of time and half for the first two hours, and double time thereafter for such additional hours.'[79]

[443] The CFMMEU raised 14 issues in respect of the Exposure Draft.

(i) Clause 2 (Definitions)

[444] Clause 2 (Definitions) includes a definition of 'stand by' as follows:

> **stand-by** means all times between 10:00am and 6:00pm on a Saturday, Sunday or public holiday during which period a fire fighting employee will be available, either at home or at such other place as is mutually agreed between the employer and the employee, in readiness for an immediate call to work.

[445] Clause 3 of the current award does not contain a definition of 'stand-by'. Rather, the definition is found in clause 13.3(p) of the Timber Award, which states:

[79] CFMMEU-MD Reply submission 9 April 2020 at paras. 19-26

(p) Stand-by

(i) **Stand-by,** except for the times as provided in clause 13.3(p)(iii), means all times between 10.00 am and 6.00 pm on a Saturday, Sunday or public holiday during which period an employee will be available either at home or at such other place as is mutually agreed between the employer and the employee in readiness for an immediate call to work. Whenever an employee is advised that the employee is required to be on stand-by, payment for stand-by will be made unless the employee is notified by 3.00 pm on the last normal working day on which the employee worked that the employee is not required to be on stand-by. Provided that where an employee is advised that the employee is required to be on stand-by on a weekend, a minimum payment of one day stand-by will be made.

(ii) An employee required by the employer to stand-by will be paid 1.0116% of the standard rate per hour. Provided that if the employee is called upon to perform fire fighting work on any day that the employee is on stand-by, the employee will be paid for all time worked at the appropriate prescribed rate in addition to any entitlement for stand-by performed on that day.

(iii) During the period in which daylight saving is in force, an employer may on any normal weekday, Monday to Friday inclusive, which has a high fire danger rating, place an employee on stand-by at the cessation of the normal working time for that day.

(iv) Notification that an employee is required to go on stand-by will be made prior to the cessation of work for the day and/or the employee's departure from the place where the employee normally ceases work for the day. Payment will be made from the normal time of cessation of work at the rate as provided in clause 13.3(p)(ii).

[446] The CFMMEU submitted that inclusion of the definition of 'stand by' in the Exposure Draft originates from clause 14 (Fire fighting employees), specifically clause 14.3(p) which provides:

> **stand-by** means all times between 10:00am and 6:00pm on a Saturday, Sunday or public holiday during which period a fire fighting employee will be available, either at home or at such other place as is mutually agreed between the employer and the employee, in readiness for an immediate call to work (except for the times as provided in clause 14.3(p)(iv)). [emphasis added]

[447] The CFMMEU submitted that the definition of 'stand by' in the substantive provision is qualified by the additional sentence as outlined above and that, for consistency, the definition of 'stand-by' in clause 2 should also contain the qualification in clause 14.3(p).

[448] At [377] of the Tranche 3 BP we invited interested parties to comment on the issue raised by CFMMEU and the solution proposed.

[449] Ai Group does not oppose the amendment proposed by the CFMMEU.

[450] HIA submits:

> 'HIA does not oppose the CFMMEU solution that the definition of standby in clause 2 should also contain the qualification of clause 14.3(p). However, it is preferred that a definition of 'standby' not be included in the Timber Award general definitions of clause 2, but rather is restricted to clause 14 – Firefighting employees, as that is the group of employees to which the definition has relevance.
>
> Whilst the proposed definition of 'standby' in clause 2 does note that it relates only to firefighting employees, including this definition in clause 2 and in clause 14.3(p) is an unnecessary duplication that has the potential to lead to unnecessary confusion for the modern award reader.'[80]

[451] We agree and will make the amendment proposed by the CFMMEU.

(ii) Clause 16 (Classifications)

[452] The CFMMEU submitted that there is missing text in the opening sentence of clause 16 after the word 'Minimum'.

> 16.1 The definitions of the classification levels in clause 20 – Minimum, are contained ….'

[453] The CFMMEU also submitted that clause 16 be amended as follows:

> 16.1 The definitions of the classification levels in clause 20 – Minimum <u>Rates</u>, are contained ….'

[454] At [380] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(iii) Clause 18 (Rostering arrangements)

[455] Clause 18.1 provides:

> **18.1 Rostered days, or shifts, off**
>
> (a) Notwithstanding provisions elsewhere in this award and subject to clause 34.2, the employer and the majority of affected employees may agree to establish a system of rostered days off to provide that an employee may elect, with the consent of the employer to:
>
> (i) take a rostered day, or shift, off at any time;
>
> (ii) take rostered days, or shifts, off in part day amounts; or
>
> (iii) accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to reasonable notice by the employee or the employer.
>
> (b) Once a decision has been taken to introduce a system of rostered day off flexibility, in accordance with clause 18.1, its terms must be set out in the time and wages records.
>
> (c) An employer must record rostered day off arrangements in the time and wages record each time this provision is used.

[80] HIA Reply submission 7 April 2020

[456] Clause 27.9 of the current award contains an essentially identical provision except for one additional term at clause 27.9(b):

> **27.9**
>
> **(b)** Clause 27.9(a) is subject to the employer informing each union which has members employed at the particular enterprise of its intention to introduce an enterprise system of rostered day off flexibility and providing a reasonable opportunity for the union to participate in negotiations.

[457] The CFMMEU submitted that the rationale for the removal of this term, is unclear and it may have simply been deleted in error. The CFMMEU submitted that clause 27.9(b) is a substantive provision and its deletion represents a diminution of a current beneficial condition for employees covered by the award and the term should re-inserted into clause 18.1 of the Exposure Draft.

[458] At [384] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(iv) Clause 18.4 – Rostered days or shifts off – substitute days or shifts

[459] Clause 18.4(a) (Rostered day off not to coincide with public holiday) provides at 18.4(a) (i) as follows:

> (a) Rostered day off not to coincide with public holiday
>
> (i) In cases where, by virtue of the arrangement of the ordinary hours of work, the employee is entitled to a day, or shift, off during the work cycle, the weekday to be taken off must not coincide with a public holiday fixed in accordance with the NES or clause 31 – Community service leave. [emphasis added]

[460] The CFMMEU submitted that the reference to '*clause 31 – Community service'* leave is incorrect and the correct reference is '*clause 33 – Public Holidays'*.

[461] At [387] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(v) Clause 19.5 – Paid crib breaks – continuous work

[462] Clause 19.5 provides:

> **19.5 Paid crib breaks – continuous work**
>
> Where a shift roster provides for continuous work, a 20 minute paid crib break will be allowed to shiftworkers each shift and will be counted as time worked. The crib break will be taken at a time and in a method agreed upon between the employer and the individual employee or majority of affected employees so as to meet the needs of the establishment. [emphasis added by the CFMMEU]

[463] The equivalent award provision is clause 29.5 of the current award which provides:

> **29.5**
>
> Where a shift roster provides for continuous shifts over 24 hours of the day a 20 minute paid crib break will be allowed to shiftworkers each shift which will be counted as time worked. Such crib will be taken at a time and in a method agreed upon between the employer and the employee or majority of employees concerned so as to meet the needs of the establishment. [emphasis added by the CFMMEU]

[464] The CFMMEU contended that there is potentially an intended consequence in the change of terminology from 'continuous shifts over 24 hours of the day' at clause 29.5 of the Timber Award, as compared to 'continuous work' at clause 19.5 of the Exposure Draft.

[465] In the Exposure Draft, the expression 'continuous work' is defined in clause 2 (Definitions) as follows:

> Continuous work means work carried on with consecutive shifts of persons throughout the 24 hours of each of at least 6 consecutive days without interruptions except during breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer. [emphasis added by the CFMMEU]

[466] The CFMMEU submitted that in clause 19.5, the use of the term 'continuous work' (as defined in clause 2), constitutes an additional qualifier of 'at least 6 consecutive days' which currently does not exist under clause 29.5 of the Timber Award.

[467] The CFMMEU submitted that the terminology in clause 19.5 should be amended to reflect the existing terminology in clause 29.5 of the Award, thus making it consistent with the current condition.

[468] At [394] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(vi) Clause 20.4 – Adult apprentices

[469] Clause 20.4(a) (Adult apprentices in the Wood and Timber Furniture Stream) at 20.4(a)(ii) provides a table of applicable adult apprentices' rates of pay for employees who commenced on or after 1 January 2014. The second column of the table has a heading *'% of Level 5 adult ordinary hourly rate'*. [emphasis added by the CFMMEU]

[470] The equivalent provision in clause 17.6(a)(ii) of the Timber Award contains a heading titled '% of level 5 minimum weekly wage'.

[471] The CFMMEU submitted that it is not clear whether the change in terminology of the heading in the second column of clause 20.4(a)(ii) is intentional or an error.

[472] At [398] of the Tranche 3 BP we said:

> 'It appears that the change in terminology of the heading was made in error. It is our *provisional* view that the heading in the second column of clause 20.4(a)(ii) be amended to reflect that in the current modern award.'

[473] No party opposed our *provisional* view. We confirm our *provisional* view and will amend the heading in the second column of clause 20.4(a)(ii) to read '% of Level 5 minimum weekly wage'.

(vii) Clause 22.12 – Wet places allowance

[474] Clause 22.12 – Wet places allowances provides (in part):

> (a) All allowance of $0.52 per part of day or shift is payable to an employee who is required to work in any place where clothing or boots become saturated, whether by water, oil or otherwise, for the part of the day or shift as they are required to work in wet clothing or boots. [emphasis added by CFMMEU]

[475] Clause 22.12(a) introduces a qualification 'required to work' which currently does not exist in the equivalent provision in the current award, which provides (at clause 21.15) as follows:

> (a) An employee working in any place where clothing or boots become saturated, whether by water, oil or otherwise, will receive an allowance of 0.06% of the standard rate whilst so engaged.

[476] The CFMMEU submitted that the introduction of the qualifier in clause 22.12(a) arguably changes the meaning of the clause, is not necessary and does not reflect the current, substantive provision in the award and the words 'required' should be deleted from clause 22.12(a) of the Exposure Draft.

[477] At [402] of the Tranche 3 BP we agreed with the CFMMEU.

[478] Ai Group opposed the change proposed by the CFMMEU. This issue was the subject of a conference on 1 April 2020 and subsequent discussions between Ai Group and the CFMMEU. Ai Group and the CFMMEU – MD have agreed that clause 22.12(a) be amended to read:

> '(a) An employee working in any place where clothing or boots become saturated, whether by water, oil or otherwise, will receive and allowance of $0.52 whilst so engaged.

[479] We will incorporate the proposed amendment in the revised Exposure Draft and draft variation determination. Interested parties will have an opportunity to comment.

(viii) Clause 23.7 – Protective clothing, footwear and covering allowance

[480] Clause 23.7(a) – Allowance for the supply of clothing, provides as follows:

> (i) Where an employee is required to wear protective clothing and equipment covered by this award; the employer must reimburse the employee for the cost of purchasing that clothing and equipment.

[481] The CFMMEU submitted, grammatically, the use of the semicolon after the word 'award' above is unnecessary and should be replaced with a comma instead.

[482] At [405] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(ix) Clause 23.13 – Travelling allowance – bushworkers other than pieceworkers

[483] Clause 23.13 provides:

> (a) Each employee in the bush will have a fixed starting place which will be the existing starting place.
>
> (b) An employer and the employee may agree to a new starting place in the bush. Between the starting place and the work for all the time in excess of half an hour back from the work to the starting point.
>
> (c) When an employee has a fixed starting place in the bush the employee will be paid at the employee's ordinary hourly rate for all time occupied in travelling between the starting place and the work and for all time in excess of half an hour back from the work to the starting point. [emphasis added by CFMMEU]

[484] The CFMMEU submitted that the terminology in clause 23.13 of the Exposure Draft is identical to the equivalent provision, clause 21.23(d) of the Timber Award, except in 2 respects.

[485] Firstly, clause 23.13(b) has substituted the word 'may' for 'will' in the award.

[486] The CFMMEU submitted that the change is material and potentially affects the meaning of the substantive term. Under clause 21.23(d) of the Timber Award, 21.23(d)(ii) is explicit (in the use of the word 'will') that any change to the 'fixed starting place' must be by agreement between the employer and the employees. It contends that this is not so clear under clause 23.13(b) of the Exposure Draft.

[487] Secondly, clause 21.23(d)(ii) of the current award requires agreement of the 'employer and the employees' (i.e. majority agreement) rather than under clause 23.13(b) of the Exposure Draft which requires agreement of the 'employer and the employee'. The CFMMEU contended that this is a material change, particularly given the context and purpose of this award provision – the entitlement to a travelling allowance for bushworkers (other than pieceworkers) and submits that the existing wording in clause 21.23(d) of the Timber Award should be reinserted.

[488] At [411] of the Tranche 3 BP we expressed the *provisional* view that the Exposure Draft and variation determination revert to the current award provision as proposed by the CFMMEU.

[489] No party opposed our *provisional* view. We confirm our *provisional* view and will amend the Exposure Draft and variation determination to reflect the terms of clause 21.23 of the current award.

(x) Clause 26.15 – Time off instead of payment for overtime

[490] Clause 26.15 contains the (modified) model award TOIL term.

[491] The CFMMEU submitted that the existing additional term in the current award – clause 32 (Make-up time) appears not have been included in the Exposure Draft.

[492] Clause 32 of the current award provides as follows:

> **32. Make-up time**
>
> 32.1 Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of make-up time provided that:
>
> (a) an employee may elect, with the consent of the employer, to work make-up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award;
>
> (b) an employee on shiftwork may elect, with the consent of their employer, to work make-up time under which the employee takes time off ordinary hours and works those hours at a later time, at the shiftwork rate which would have been applicable to the hours taken off.

[493] The CFMMEU contended that the basis upon which clause 32 of the Timber Award has not been included is not apparent and at the time of the insertion of the model TOIL term in the Timber Award, both clauses (clauses 31 and 32) were intended to co-exist.

[494] Clause 32 of the Timber Award providing for make-up time currently appears under the rostering arrangements provision in clause 18.6 of the Exposure Draft. At [416] of the Tranche 3 BP we said that we 'do not propose to make any further amendments'. We confirm that view.

(xi) Clause 27.2 – Shiftwork arrangements

[495] Clause 27.2 (b) (Changes to shifts), provides (in part):

> **(b)** Changes to shifts
>
> (i) Consultation
>
> Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must comply with clause 34.2. [emphasis added]

[496] The CFMMEU submitted that the formulation in clause 27.2(b)(i) is a new term which currently does not exist in the current award.

[497] The reference to 'clause 34.2' in clause 27.2(b)(i) is a reference to the '*Consultation about changes to rosters or hours of work*' model award term.

[498] However, the CFMMEU submitted that:

> 'it is also apparent that clause 34.1 (Consultation regarding major workplace change) in the ED is also relevant. This is because the definition of '*Significant effects*' in clause 34.1 also includes

'*the alteration of hours of work'*. As such, it would seem appropriate that in clause 27.2(b)(i) there should be a reference to both clause 34.1 and 34.2.'

[499] Ai Group opposed the change proposed by the CFMMEU. This issue was the subject of a conference on 1 April 2020 and subsequent discussions between Ai Group and the CFMMEU. In its reply submission the CFMMEU – MD indicated that it was open to further discussions with Ai Group in order to resolve this issue. Ai Group and the CFMMEU – MD have agreed that the clause not be amended.

(xii) Clause 28.11 – Annual leave in advance

[500] The Note under clause 28.11(b) provides:

NOTE: An example of the type of agreement required by clause 28.11 is set out at Schedule I – Piece Rates for Workers in Specified Districts. There is no requirement to use the form of agreement set out at Schedule I – Piece Rates for Workers in Specified Districts. [emphasis added]

[501] The CFMMEU submitted that the references to Schedule I in clause 28.11(b) would appear to be an error and the correct references should be to 'Schedule J – Agreement to take annual leave in advance.'

[502] At [424] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(xiii) Clause 29.3 – Cashing out of personal/carer's leave

[503] Clause 29.3 reflects the terms of clause 34.4(a)(i) and (ii) of the current award which deal with the subject matter of cashing out of personal/carer's leave for the 'General Timber Stream' and the 'Wood and Timber Furniture Stream.'

[504] However, the existing clause 34.4(b) which deals with the payment of accrued personal/carer's leave for the 'Pulp and Paper stream' (in circumstances when an employee's employment ceases) has not been included in the Exposure Draft. Clause 34.4(b) provides as follows:

34.4

(b) In the Pulp and Paper stream, payment of excess accrued sick leave will be made to an employee, of a deceased employee's estate, in respect of accumulated entitlement upon:

(i) retirement due to age or incapacity;

(ii) termination of employment after ten years continuous service for other reasonable cause; or

(iii) death whilst an employee of the business.

[505] The CFMMEU submitted that clause 34.4(b) is a substantive provision; its non-inclusion in the Timber Award represents a significant diminution of an existing award entitlement and that it should be included in the Exposure Draft.

[506] At [428] of the Tranche 3 BP we agreed with the CFMMEU. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and draft variation determination accordingly.

(xiv) Schedules

[507] Clause 37 of the current award provides as follows:

> **37. Principles relating to the schedules to this award**
>
> 37.1 The schedules to this award describe special rates and conditions for employees working in various industry sectors. The schedules describe conditions and arrangements for each sector that are unique to each sector.
>
> 37.2 The main body of the award describes conditions and arrangements that are common for all sectors.
>
> 37.3 The provisions of the main body of this award, as varied, will apply to persons performing work provided for in these schedules unless such provisions are inconsistent with the provisions of this clause.

[508] Clause 37 has not been replicated in the Exposure Draft.

[509] Whilst the CFMMEU acknowledged that clause 37 may no longer be relevant (in its totality), it submitted that its complete deletion may have unintended consequences. The CFMMEU submitted further that clause 37 remains an important provision and in principle, a term to this effect should be included in the Exposure Draft for the avoidance of doubt.

[510] At [432] of the Tranche 3 BP we said:

> 'In a decision issued on 23 October 2015[81] a Full Bench decided to remove clause 37 from the award and we do not propose to reinsert it into the Exposure Draft.'

[511] We confirm that view.

[512] We note that on 20 March 2020 the Overtime and Casual Employment Full Bench issued a decision[82] and variation determination[83] finalising the casual conversion clause in the Timber Award. We confirm that the Exposure Draft and variation determination will be updated to incorporate the casual conversion determination.

[513] We propose to republish the Exposure Draft and draft variation determination to incorporate the amendments we have decided to make. We will provide interested parties an opportunity to comment on the revised documents. A conference will be convened to discuss any outstanding issues.

---

[81] [2015] FWCFB 7236 at [306] – [307]

[82] [2020] FWCFB 1515

[83] PR717674

3.24 Wine Industry Award 2010

[514] Ai Group, the SA Wine Industry Association and the AWU filed initial submissions in relation to this award.

[515] Ai Group raised the following drafting errors:

- Replacing 20XX with 2020 in the title and in clauses 14.6 [15.9], 17.6(c) and (d)
- Clause 20.1(b) is a duplicate of clause 20.1(a) and should be deleted.

[516] At [440] of the Tranche 3 BP we agreed with Ai Group. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and variation determination accordingly.

[517] Ai Group raised two other issues.

(i) Clause 17.4 Piecework rates

[518] Clause 17.4 states:

> **17.4** The following clauses of this award do not apply to an employee on a piecework rate:
>
> (a) clause 13—Ordinary hours of work and rostering;
>
> (b) clause 19.3(c)—Meal allowance;
>
> (c) clause 23.3—Shiftworkers;
>
> (d) clause 23.1—Day workers; and
>
> (e) clause 22—Overtime.

[519] Clause 23.4 of the current award states:

> **23.4**The following clauses of this award do not apply to an employee on a piecework rate:
>
> (a) clause 24.3 – Meal allowance; and
>
> (b) clause 28 – Ordinary hours of work and rostering; and
>
> (c) clause 30 – Overtime and penalty rates

[520] Ai Group noted that clause 17.4 omits any reference to public holiday penalty rates and as a result, the Exposure Draft deviates substantially from the current clause 23.4. Ai Group proposed that this issue be resolved by deleting clause 17.4(d) and amending clause 17.4(c) so that it reads 'clause 23 – Penalty rates'. At [445] of the Tranche 3 BP we agreed with Ai Group. However, as noted by the AWU, our acceptance of Ai Group's submission is inconsistent with our *provisional* view to accept a submission by the SA Wine Industry Association. We agree with the AWU and for the reasons which follow we accept the submission put by the SA Wine Industry Association and will not make the amendment proposed by Ai Group.

[521] The SA Wine Industry Association raised a similar issue to that raised by Ai Group and proposed that clause 17.4 be amended as follows:

> 17.4 The following clauses of this award do not apply to an employee on a piecework rate:
>
> (a) clause 13—Ordinary hours of work and rostering;
> (b) clause 19.3(c)—Meal allowance;
> (c) clause 22 – Overtime
> (d) clause 23 – Penalty Rates
> ~~(c) clause 23.3 Shiftworkers;~~
> ~~(d) clause 23.1 Day workers; and~~
> ~~(e) clause 22 Overtime.~~

[522] At [458] of the Tranche 3 BP we agreed with the SA Wine Industry Association. No party expressed a contrary view. We confirm our view and will amend the Exposure Draft and variation determination accordingly.

(ii) Clause 17.6(d) Piecework rate

[523] Ai Group and the SA Wine Industry Association submitted that a similar issue arises in relation to clause 17.6(d) in that the clause omits any reference to public holiday penalty rates and as a consequence deviates substantially from the current clause 23.6. Ai Group proposed that this issue be resolved by deleting clause 17.6(d)(iv) and amending clause 17.6(d)(iii) so that it reads 'Clause 23 – Penalty rates'.

[524] At [447] of the Tranche 3 BP we agreed with Ai Group. No party expressed a contrary view. We confirm our and will amend the Exposure Draft and variation determination accordingly.

[525] The SA Wine Industry Association raised four additional matters set out below.

(i) Clause 15 Minimum rates

[526] The matter raised concerns regarding clause 15.3. To provide some context we set out clauses 15.1 to 15.3:

> 15.1 An employer must pay adult employees, other than those listed in clause 15.3, the following minimum ~~wages~~ rates for ordinary hours worked by the employee:

Employee classification	**Minimum weekly ~~wage~~ rate (full-time employees)**	**Minimum hourly rate**
	$	**$**
Grade 1	751.50	19.78
Grade 2	784.00	20.63
Grade 3	816.60	21.49
Grade 4	862.50	22.70
Grade 5	916.60	24.12

NOTE: See Schedule B – Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and ~~penalties~~penalty rates.

~~See Schedule B – Summary of Hourly Rates of Pay for a summary of hourly rates of pay including overtime and penalties.~~

15.2 For the purpose of clause 15.1, any entitlement to a minimum ~~wage~~ rate expressed to be by the week means any entitlement which an employee would receive for performing 385 ordinary hours of work.

15.3 The following adult employees are not entitlement to the minimum ~~wages~~ rates set out in the table at clause 15.1:

(a) an adult apprentice (see clause 16 – Apprentice rates~~Apprentice rates~~); or
(b) a trainee (see clause 15.9 – National training wage~~Schedule E~~); or
(c) an employee receiving a supported wage (see Schedule E – Supported Wage System).

[527] The Association proposed that for 'the purposes of clarity' an additional paragraph be added to clause 15.3, as follows:

'(d) an employee that has agreed to a piecework rate in accordance with clause 17.'

[528] Clause 17 sets out the circumstances in which an employer and employee may enter into an agreement for the employee to be paid a piecework rate. The clause also deals with the content of such an agreement. For present purposes clauses 17.3 and 17.10 are particularly relevant:

17.3 An agreed piecework rate is paid instead of the minimum rates ~~wages~~ specified in clause 15—Minimum rates~~Minimum rates~~.

…

17.10 Nothing in this award guarantees an employee on a piecework rate will earn at least the minimum weekly or hourly rate in this award for the type of employment and the classification level of the employee, as the employee's earnings are contingent on their productivity.

[529] Given the terms of clauses 17.3 and 17.10 we expressed the *provisional* view (at [452] of the Tranche 3 BP) that clause 15.3 be amended as proposed by the Association.

[530] Ai Group supported our *provisional* view and the UWU did not oppose the *provisional* view.

[531] We confirm our *provisional* view and will amend clause 15.3 as proposed by the Association.

(ii) Clause 20 Accident pay

[532] Clause 20.1 Definitions provides:

20.1 Definitions

For the purposes of ~~this~~ clause 20, the following definitions will apply:

(a) Accident pay means a weekly payment made to an employee by the employer that is the difference between the weekly amount of compensation paid to an employee pursuant to the applicable workers' compensation legislation and the weekly amount that would have been received had the employee been on paid personal leave at the date of the injury (not including over award payments) provided the latter amount is greater than the former amount.

(b) Accident pay means a weekly payment made to an employee by the employer that is the difference between the weekly amount of compensation paid to an employee pursuant to the applicable workers' compensation legislation and the weekly amount that would have been received had the employee been on paid personal leave at the date of the injury (not including over award payments) provided the latter amount is greater than the former amount.

(c) Injury will be given the same meaning and application as applying under the applicable workers' compensation legislation covering the employer.

[533] The Association notes that clause 20.1(b) simply duplicates clause 20.1(a) and proposes that clause 20.1(b) be deleted and clause 20.1(c) be renumbered 20.1(b).

[534] At [461] of the Tranche 3 BP we agreed with the Association. No party expressed a contrary view. We confirm our view and will delete clause 20.1(b) from the Exposure Draft and variation determination.

(iii) Clause 22.1(b) Overtime for part time employees

[535] Clause 22.1(b) provides:

(b) A part-time employee must be paid overtime rates in accordance with clause 22.2—Overtime rates for all time worked:

(i) outside of the spread of ordinary hours <u>in clause 13.6</u>; and/or

(ii) in excess of 38 ordinary hours per week; and/or

(iii) in excess of the ordinary hours provided for in clause 13—Ordinary hours of work and rostering. (Emphasis added)

[536] Clause 13.6 states:

13.6 Ordinary hours of work—day workers

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

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

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

(b) Vineyard employees during the vintage

(i) For the purposes of clause 13.6, vintage means a period not exceeding ~~six~~6 months between November and June inclusive, which starts on the date when the harvest of wine grapes begins at a particular vineyard and ends on the date the last wine grapes are harvested at that vineyard.

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

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

[537] The comparable provision in the current award is clause 12.4(a), which states:

12.4 A part-time employee must be paid overtime rates in accordance with clause 30—Overtime and penalty rates for all time worked:

(a) outside of the spread of ordinary hours; and/or

[538] The Association submitted that:

'The wording in the exposure clause is tighter than in the existing clause, which reads that overtime would apply to any hours worked outside of day work hours. This could be incorrectly interpreted to mean that any hours, including shiftwork ordinary hours, would attract overtime rates. Remove 'in clause 13.6.' This would allow for shift work and associated shift penalty rates to be paid.'[84]

[539] At [466] of the Tranche 3 BP we invited interested parties to comment on the Association's submissions and proposed amendment.

[540] Ai Group did not oppose the changes proposed by the Association. ABI supported the proposed changes noting that they would reflect the terms of the current award.

[541] We agree and will make the changes proposed.

(iv) Clause 22.1(c) Overtime for casual employees

[542] Clause 22.1(c) provides:

(c) A casual employee must be paid overtime rates in accordance with clause 22.2—Overtime rates for all time worked:

(i) outside of the spread of ordinary hours in clause 13.6; and/or

(ii) in excess of 38 ordinary hours per week; and/or

(iii) in excess of the ordinary hours provided for in clause 13—Ordinary hours of work and rostering.

[84] Association submission, 4 March 2020 at paragraph 4

[543] The comparable provision in the current award is clause 13.4(a) which states:

> **13.4 Overtime**
>
> (a) A casual employee must be paid overtime rates in accordance with clause 30—Overtime and penalty rates for all time worked:
>
> (i) outside of the spread of ordinary hours; and/or
>
> (ii) in excess of 38 ordinary hours per week; and/or
>
> (iii) in excess of the ordinary hours provided for in clause 28—Ordinary hours of work and rostering.

[544] The Association submits:

> 'The wording in the exposure clause is tighter than in the existing clause, which reads that overtime would apply to any hours worked outside of day work hours. This could be incorrectly interpreted to mean that any hours, including shiftwork ordinary hours, would attract overtime rates. Remove 'in clause 13.6'. This would allow for shift work and associated shift penalty rates to be paid.'[85]

[545] At [470] of the Tranche 3 BP we invited interested parties to comment on the Association's submissions and proposed amendment.

[546] Ai Group did not oppose the changes proposed by the Association. ABI supported the proposed amendment noting that it reflected the terms of the current award.

[547] The UWU submits:

> 'In relation to the proposed clause 22.1(c) of the text of the exposure draft does reflect the equivalent provision in the current award at clause 13.4(a). The concern of the Association appears to relate to what is in the current text of the award an ambiguity as to whether overtime is paid when a casual employee is working shift work. The reference to clause 13.6 should not be deleted in the exposure draft as clause13.6 indicate what are ordinary hours for employees covered by this Award. The inclusion of this reference does not 'tighten' the clause but makes it easier to use. The reader is referred to a relevant definition of ordinary hours.
>
> The concerns raised by the Association are not issues that we have come across in South Australia where we have many members covered by this award. The Award is complex, in part due to the seasonal nature of the work and that there are seasonal periods of unpredictable ad hoc work during vintage. It is our view that the current drafting reflects the current award and is in fact clearer and it is not appropriate to attempt to resolve a theoretical ambiguity that is not, to our knowledge, a real industrial concern, at this stage of the review.'[86]

[548] This matter will be discussed at a conference to be convened shortly.

[549] The AWU raised two issues.

(i) Clause 24.4

---

[85] Ibid, at paragraph 5

[86] UWU Reply submission 7 April 2020 at paras. 26-27

[550] Clause 24.4 provides:

> **24.4 Annual leave loading**
>
> During a period of annual leave an employee must be paid a shift penalty, in addition to their base rate of pay as referred to in section 90(1) of the Act, as follows:
>
> **(a) Day work**
>
> An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of their base rate of pay as referred to in section 90(1) of the Act or the relevant weekend penalty rates, whichever is the greater but not both.
>
> **(b) Shiftwork**
>
> An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of their base rate of pay as referred to in section 90(1) of the Act or the shift penalty including relevant weekend penalty rates, whichever is the greater but not both.
>
> **(c) Piecework**
>
> An employee on a piecework rate must be paid a loading equal to 20% of their base rate of pay.

[551] Clause 31.4 of the current award provides:

> **31.4 Annual leave loading**
>
> During a period of annual leave an employee must be paid a loading, in addition to their base rate of pay as referred to in s.90(1) of the Act, as follows:
>
> (a) Day work
>
> An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of their base rate of pay as referred to in s.90(1) of the Act or the relevant weekend penalty rates, whichever is the greater but not both.
>
> (b) Shiftwork
>
> An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of their base rate of pay as referred to in s.90(1) of the Act or the shift loading including relevant weekend penalty rates, whichever is the greater but not both.
>
> (c) Piecework
> An employee on a piecework rate must be paid a loading equal to 20% of their base rate of pay.

[552] The AWU submitted that it is unclear why the leave loading has been referred to as a 'shift penalty' in clause 24.4 of the Exposure Draft when it is referred to as a 'loading' in clause 31.4 of the current award.

[553] At [475] of the Tranche 3 BP we dealt with this issue, as follows:

> 'The reference to the 'shift loading' in clause 24.4 has been amended to 'shift penalty' to reflect changes in terminology throughout the exposure draft. All references to 'shift loadings' in the exposure draft have been changed to 'shift penalties' and clause 24.4 has been amended so that the terminology is used consistently. We do not propose to make any amendment to clause 24.4.'

[554] No party has expressed a contrary view. We confirm that we do not propose to amend clause 24.4.

(ii) Schedule B.2.3

[555] The AWU submits that there is 'no dispute'[87] that the 25% casual loading is only paid when overtime is worked on a Sunday or public holiday, as per clause 22.1(d) and on that basis the rates table that had been deleted can be re-inserted. The Association agrees that the rates can be reinserted and that 'the 25% casual loading is only paid when overtime is worked on a Sunday or public holiday'. We agree and will reinsert the rates table.

[556] We propose to republish the Exposure Draft and draft variation determination to incorporate the amendments we have decided to make. We will provide interested parties an opportunity to comment on the revised documents. A conference will be convened to discuss any outstanding issues.

4. Next Steps

[557] We turn first to the timing of any final variation determinations.

[558] As noted in the Tranche 3 BP, Ai Group submitted that a period of not less than three months should be allowed to lapse between the issue of a final determination by the Commission varying each Tranche 3 award to reflect the final iteration of the Exposure Draft and the date upon which those variations commence operation.

[559] During the finalisation of Tranche 2 awards, we issued our decision on 24 December 2019. Final variation determinations were then issued on 14 February 2020, 7 weeks after the decision. Tranche 2 awards that were not contested will have an operative date of 13 April 2020, which is 8 weeks after the final variation determinations were issued. Awards that were contested will have an operative date of 4 May 2020 which is 11 weeks after the final variation determinations were issued.

[560] At [13] of the Tranche 3 BP we invited all interested parties to comment on the 'timing issue' in their reply submissions.

[561] In its reply submission, ABI recognised that there are benefits in allowing time for parties to prepare for the introduction of the updated awards, particularly given the ongoing COVID-19 pandemic and the disruption this has caused to workplaces across Australia.

[562] ABI also pointed to the fact that the end of financial year can be a busy time for employers and consider it preferable that the awards are not varied during this period. The timing of the Annual Wage Review decision was also a factor. ABI concluded that:

[87] See [1.2] of this ABI correspondence: https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201751-corr-abinswbc-101019.pdf and [6] of this FWC Statement: https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc8318.htm at [6].

> 'There may be merit in waiting until after any annual wage review decision has taken effect before issuing the final determinations.'[88]

[563] We agree with ABI and have taken these considerations into account.

[564] We note that since the publication of the Tranche 3 Exposure Drafts and draft variation determinations, Full Bench decisions have been published in respect of the following Tranche 3 awards:

- *Amusement, Events and Recreation Award 2010*[89]
- *Broadcasting, Recorded Entertainment and Cinemas Award 2010*[90]
- *Health Professionals and Support Services Award 2010*[91]
- *Horse and Greyhound Training Award 2010*[92]
- *Journalists Published Media Award 2010*[93]
- *Marine Towage Award 2010*[94]
- *Miscellaneous Award 2010*[95]
- *Ports, Harbours and Enclosed Water Vessels Award 2010*[96]
- *Professional Employees Award 2010*[97]
- *Seagoing Industry Award 2010*[98]
- *Sugar Industry Award 2010*[99]
- *Supported Employment Services Award 2010*[100]
- *Timber Industry Award 2010*[101]

[565] On 8 April 2020, the Commission issued a Decision varying 99 modern awards to include a new Schedule X-Additional measures during the COVID-19 pandemic.[102] Schedule X operates until 30 June 2020 unless extended. The relevant exposure drafts in category 1 below will be updated to include the new Schedule X.

---

[88] ABI Reply submission 7 April 2020 at para. 10

[89] [2020] FWCFB 1518

[90] [2020] FWCFB 1511

[91] [2020] FWCFB 1901

[92] [2020] FWCFB 1901

[93] [2020] FWCFB 1695

[94] [2020] FWCFB 1450

[95] [2020] FWCFB 1589

[96] [2020] FWCFB 1450

[97] [2020] FWCFB 2057

[98] [2020] FWCFB 1450 and [2020] FWCFB 1514

[99] [2020] FWCFB 450

[100] [2020] FWCFB1704

[101] [2020] FWCFB1515

[102] [2020] FWCFB 1837

[566] The Exposure Drafts and draft variation determinations will be updated to reflect the outcome of these Full Bench decisions where final determinations have been issued and any other decisions varying a Tranche 3 award.

[567] We propose to divide the Tranche 3 awards into five categories.

Category 1

[568] The awards in this category are uncontentious or have given rise to a limited number of issues which have now been resolved. The awards in this category are:

- *Aircraft Cabin Crew Award 2010*
- *Amusement, Events and Recreation Award 2010*
- *Business Equipment Award 2010*
- *Dredging Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Journalists Published Media Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Marine Towage Award 2010*
- *Miscellaneous Award 2010*
- *Pest Control Industry Award 2010*
- *Ports, Harbours and Enclosed Vessels Award 2010*
- *Professionals Employees Award 2010*
- *Seagoing Industry Award 2010*
- *Security Services Industry Award 2010*
- *Sugar Industry Award 2010*
- *Supported Employment Services Award 2010*

[569] As mentioned earlier, in the *January 2020 Decision* we expressed the *provisional* view that the variation of the Tranche 3 modern awards in accordance with the draft variation determinations set out at Attachment C of that decision was, in respect of each of these awards, necessary to achieve the modern awards objective. In reaching that conclusion, we adopted the reasons set out in the decisions at Attachment B to the *January 2020 Decision*, in so far as they were relevant to each of the Tranche 3 modern awards and, in particular, to the considerations in ss 134(1)(a) to (h), which are addressed in each of those decisions.

[570] No submissions contested our *provisional* views in respect of each of the Category 1 awards set out above. We confirm our *provisional* views and will issue variation determinations in respect of each of these awards in the terms published on 29 January 2020 subject to the amendments necessary:

- to give effect of this decision;
- to incorporate the variations flowing from the Full Bench decisions referred to at [564];
- the correction of minor typographical errors and omissions (see [11] above); and
- any variations necessary to give effect to any subsequent Full Bench decisions.

[571] These variation determinations will be published by 30 April 2020 and will commence operation on 18 June 2020.

Category 2

[572] The Exposure Drafts and draft variation determinations in respect of these awards require significant amendment to reflect the outcome of this decision. The awards in this category are:

- *Fitness Industry Award 2010*
- *Funeral Industry Award 2010*
- *General Retail Industry Award 2010*
- *Live Performance Award 2010*
- *Racing Clubs Events Award 2010*
- *Registered and Licensed Clubs Award 2010*

[573] We propose to publish revised Exposure Drafts and draft variation determinations in respect of the category 2 awards by 30 April 2020 and will provide 14 days for interested parties to comment. We will then issue a decision finalising the variation determinations in respect of these awards.

Category 3

[574] Some outstanding issues remain in respect of the category 3 awards. The awards in this category are as follows:

- *Broadcasting, Recorded Entertainment and Cinemas Award 2010*
- *Electrical, Electronic and Communications Contracting Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Graphic Arts, Printing and Publishing Award*
- *Horticulture Award*
- *Telecommunications Services Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Wine Industry Award 2010*

[575] Conferences will be convened in respect of the disputed issues in the coming weeks.

Category 4

[576] The awards in this category (collectively, the Constructions Awards) are as follows:

- *Building and Construction (General) On-Site Award 2010*
- *Joinery and Building Trades Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*

[577] A Statement and directions will be issued shortly in relation to the finalisation of the Exposure Drafts and draft variation determinations in respect of the Construction Awards.

Category 5

[578] The issues in respect of the Black Coal Mining Industry Award will be determined in accordance with the directions set out in a Statement published on 12 March 2020.[103]

[579] A separate Statement will be issued in relation to the finalisation of the Exposure Draft and draft variation determination in respect of the Educational Services (Teachers) Award 2010.

[580] In relation to the Nurses Award, Ai Group and the ANMF are to file a joint note by **4pm** on **Friday 23 May 2020** indicating the terms of the Exposure Draft and draft variation determination which are related to AM2020/1. In July 2020, a revised Exposure Draft and draft variation determination will be published. A mention will then be held to set the timetable for parties to provide comments in relation to those aspects of the revised Exposure Draft and draft variation determination which are unrelated to AM2020/1.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR718511>

[103] [2020] FWCFB 1297