



Australian Government

Fair Work

OMBUDSMAN

2 March 2015

The Associate to Hon Justice Iain Ross AO
Fair Work Commission
11 Exhibition Street
Melbourne Victoria 3000

By email: amod@fwc.gov.au

Dear Associate,

Award Stage, Groups 3 and 4 Modern Awards

I refer to paragraphs 20 and 23 of the Fair Work Commission's (**Commission**) Guide to Award Stage which invited interested persons to provide a short outline of issues relevant to each award stage.

Please find **attached** tables referring to specific award provisions within the Groups 3 and 4 Modern Awards. The provisions included in the attached tables have been identified through analysis of the Fair Work Ombudsman's (**FWO**) extensive interactions with workplace participants in its role as a statutory office responsible for ensuring compliance with Australian workplace laws and educating employers and employees about their rights and responsibilities at work.

The FWO regularly interacts with a wide range of workplace participants including small businesses, individual employees as well as employer and employee representatives. For example, in the 2013–2014 financial year the FWO:

- (a) responded to more than 595,000 enquires;
- (b) answered more than 90,000 calls to the FWO's Small Business Helpline;
- (c) received more than 1.57 million visits to the FWO's pay tools; and
- (d) finalised more than 25,650 workplace complaints.

The attached tables include queries commonly raised with the FWO and issues which may be a source of uncertainty for workplace participants to understand and implement award entitlements. When selecting provisions for inclusion in the attached tables the FWO has had regard to factors such as:

- (a) the number of queries received in relation to specific award provisions as well as whether those queries disclose common areas of confusion or ambiguity;
- (b) the consequences or practical impact of any identified uncertainty; and
- (c) the number of award users who may be affected by the uncertainty (e.g. by reference to the frequency with which differing awards are accessed on the FWO's website or the varying levels of award reliance in different industries).

The attached tables contain several common themes which have arisen in relation to Group 3 and 4 modern awards (which are also consistent with recurring themes contained in the tables prepared by the FWO in respect of the Group 1 and 2 awards). For example:

- (a) 14 of the issues raised in the attached tables relate to whether casual employees are able to access particular award entitlements (the majority of these relate to overtime rates), and if so, how the entitlement is calculated;
- (b) 11 of the issues raised in the attached tables relate to ordinary hours of work. The majority of these relate to how to identify an employee's span of ordinary hours (and as a consequence how to identify which hours may be payable at penalty or overtime rates); and
- (c) 10 of the issues raised in the attached tables relate to shiftwork provisions, the majority of these relate to how to determine whether or not an employee is a shiftworker.

The FWO provides this information to assist the Commission and relevant parties to achieve the modern award objectives, in particular, the need to ensure a simple easy to understand modern award system under subsection 134(1)(g) of the *Fair Work Act 2009* (Cth).

Unless otherwise requested to do so, the FWO does not intend to provide further comment or submissions on the attached information. Further, the FWO does not intend to appear at the hearings for the Groups 3 and 4 modern awards.

Yours sincerely,



Janine Webster
Chief Counsel

TABLE OF PROVISIONS RELEVANT TO THE AWARD STAGE, GROUP 3 MODERN AWARDS

No.	Clause Number(s)	Description of issue
Banking, Finance and Insurance Award 2010 (MA000019)		
1.	22.1	The FWO has received enquiries regarding the span of ordinary hours on a Saturday. Clause 22.1 specifies that the span of ordinary hours will be from 7:00 am to 7:00 pm Monday to Friday and 8:00 am to noon on Saturday. However, clause 22.1 further provides that "on not more than one night per week", which must be specified in advance by the employer, the span of ordinary hours may be worked up to 9:00 pm. The FWO has received enquiries as to whether this extension of ordinary hours to 9.00 pm can apply on a Saturday.
2.	22.8	The FWO has received enquires as to whether night shift penalties will apply to a person finishing a shift between midnight Friday and 8:00 am Saturday. Clause 22.8(a)(iv) defines a night shift as any shift finishing between midnight and 8.00 am. Clause 22.8(b) provides that shiftwork loadings will apply to shiftwork on Monday to Friday and on Saturday between 8.00 am and 12.00 pm. Due to the interaction of these two clauses, it may be unclear whether or not the period from midnight on Friday to 8:00 am on Saturday is included within the span described at clause 22.8(b) (i.e. whether or not this period should be considered part of the Friday night shift).
Business Equipment Award 2010 (MA000021)		
3.	22.1(b)(ii)(A), 27.9 and 31.6(b)	The award includes three clauses which apply to "country employees" or in respect of employees performing work in "country territories" or in "country areas", however, as these terms are not defined it may be unclear when the entitlements apply. The relevant provisions are: <ul style="list-style-type: none"> • clause 22.1(b)(ii)(A) which provides a higher vehicle allowance for an employee who uses their own vehicle to carry out assigned duties in a "country territory"; • clause 27.9 which provides for differing ordinary hours of work for "country employees"; and • clause 31.6(b) which provides for additional annual leave for an employee operating in "country areas" where that employee is required to remain away from their usual place of residence on more than two nights in any week.

No.	Clause Number(s)	Description of issue
Business Equipment Award 2010 (MA000021)		
4.	27.2(a)(i)	<p>Clause 27.2(a) states that the spread of ordinary hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or between the employee and the employer. It may be unclear whether this means that the span of ordinary hours can be:</p> <ul style="list-style-type: none"> • increased by up to one hour at one end of the spread only (so that the number of hours within the spread is increased by up to one hour); • increased by up to one hour at both ends of the spread (so that the number of hours within the spread is increased by up to two hours); or • shifted at both ends of the spread by up to one hour (so that the number of hours within the spread remains the same – for example, under this interpretation rather than the spread of ordinary hours being worked from 6:30 am to 6:30 pm it could instead be altered to 5:30 am to 5:30 pm).
5.	27.1 and 28.1(c)	<p>The FWO has received enquiries about the circumstances under which an employee should be considered a shiftworker (as this is not a defined term).</p> <p>In particular it may be unclear whether shiftwork allowances apply in relation to an employee who performs day work (as defined at clause 27.1) as well as hours which could comprise shiftwork hours. For example, an employee who at times finishes work after 6:30 pm on a week day could be considered to be a day worker working outside of the spread of ordinary hours (clause 27.3(a)) or an afternoon shift worker (clause 28.1(c)).</p>
Clerks–Private Sector Award 2010 (MA000002)		
6.	24.5(b)	<p>Clause 24.5(b) requires employers to make superannuation contributions (for up to a maximum of 52 weeks) in relation to an employee who is absent from work due to a work related injury or illness. The FWO has received enquiries about how to apply the maximum 52 week limit, including whether it should be applied on the basis of:</p> <ul style="list-style-type: none"> • 52 weeks per workers compensation claim; • 52 consecutive weeks; or • 52 weeks over the course of the employee’s entire employment.

No.	Clause Number(s)	Description of issue
Clerks–Private Sector Award 2010 (MA000002)		
7.	25.1 and 28.1	<p>The FWO has received enquiries about the circumstances under which an employee should be considered a shiftworker (as this is not a defined term).</p> <p>In particular it may be unclear whether shiftwork allowances apply in relation to an employee who performs day work (as defined at clause 25.1) as well as hours which could comprise shiftwork hours. For example, an employee who at times finishes work after 7:00 pm on a weekday could be considered to be a day worker (working outside of the spread of ordinary hours) or as an afternoon shiftworker (clause 28.1(a)).</p>
8.	25.2	<p>Clause 25.2 states that the spread of ordinary hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or between the employee and the employer. The FWO has received enquiries as to whether this means that the span of ordinary hours can be:</p> <ul style="list-style-type: none"> • increased by up to one hour at one end of the spread only (so that the number of hours within the spread is increased by up to one hour); • increased by up to one hour at both ends of the spread (so that the number of hours within the spread is increased by up to two hours); or • shifted at both ends of the spread by up to one hour (so that the number of hours within the spread remains the same – for example, under this interpretation rather than the spread of ordinary hours being worked from 7:00 am to 7:00 pm it could instead be altered to 6:00 am to 6:00 pm).
9.	26.1 and 28.4(f)	<p>The FWO has received enquiries regarding the interaction between the meal break provisions, and related penalties, at clauses 26.1 and 28.4(f) in relation to shiftworkers.</p> <p>Clause 26.1 (which is expressed to be subject to the provisions of clause 28) provides for an unpaid meal break of at least 30 minutes which must be taken not later than five hours after commencing work. Under this clause if the required meal break is delayed the employee will receive double time until the meal break is allowed. Clause 28.4(f) provides shiftworkers with a paid 20 minute crib break.</p> <p>It may be unclear whether the 20 minute paid crib break for shiftworkers in clause 28.4(f) applies instead of or in addition to the 30 minute unpaid meal break in clause 26.1 and if both apply, whether they should be applied on the basis of:</p> <ul style="list-style-type: none"> • a 20 minute paid crib break and a 30 minute unpaid meal break (a total of 50 minutes break); or • a 20 minute paid crib break and an additional 10 minute unpaid break (a total of 30 minutes break). <p>In addition, the FWO has received enquiries as to whether the penalty of double time in clause 26.1 applies if a shift worker works through their crib break, given that clause 26.1 is “subject to” clause 28.</p>

No.	Clause Number(s)	Description of issue
Clerks–Private Sector Award 2010 (MA000002)		
10.	28.4 and 28.7	<p>The FWO has received enquiries about the meaning of the term “special rates” in clause 28.7. The clause specifies that the “special rates prescribed are in substitution for and not in addition to shift allowances prescribed”. However, in the absence of a definition of the term “special rates” it may be unclear under what circumstances this clause applies.</p> <p>The term “special rates” is also used at clause 28.4 which is titled “Hours, shift allowances, special rates, meal interval”. However, as this clause deals with a number of entitlements (including overtime rates, weekend penalties and public holiday penalties) it may be unclear which of the listed entitlements constitute a “special rate”.</p>
11.	29.3	<p>The FWO has received enquiries about the applicable loading payable to an employee on annual leave. Clause 29.3(b) provides that an employee must be paid the greater of the relevant shift/weekend penalties and a loading of 17.5%. In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:</p> <ul style="list-style-type: none"> • on a daily basis with each day of annual leave being assessed separately; or • as a whole over the entire period of annual leave.
Contract Call Centres Award 2010 (MA000023)		
12.	24.6(b) and (c)	<p>It may be unclear what rate should be paid to an employee for the performance of work prior to the spread of ordinary hours which is continuous with ordinary hours.</p> <p>Clause 24.6(c) provides that such hours are to be regarded “as part of the 38 ordinary hours of work”. It may not be clear whether this means the hours are to be:</p> <ul style="list-style-type: none"> • counted towards the number of ordinary hours and be paid as ordinary time hours; or • counted towards the number of ordinary hours but continue to attract penalties under clause 24.6(b).
13.	24.8(a)(i)	<p>Clause 24.8(a)(i) states that the spread of ordinary hours may be altered by up to one hour at one or both ends of the spread, by agreement between an employer and the majority of employees concerned or between the employee and the employer. The FWO has received enquiries as to whether this means that the span of ordinary hours can be:</p> <ul style="list-style-type: none"> • increased by up to one hour at one end of the spread only (so that the number of hours within the spread is increased by up to one hour); • increased by up to one hour at both ends of the spread (so that the number of hours within the spread is increased by up to two hours); or • shifted at both ends of the spread by up to one hour (so that the number of hours within the spread remains the same – for example, under this interpretation rather than the spread of ordinary hours being worked from 7:00 am to 7:00 pm it could instead be altered to 6:00 am to 6:00 pm).

No.	Clause Number(s)	Description of issue
Contract Call Centres Award 2010 (MA000023)		
14.	27.4(a) and (b)	<p>The FWO has received enquiries about the applicable loading payable to an employee on annual leave. Clause 27.4(b) provides that an employee must be paid an additional loading of 17.5% of the employee's minimum rate or the shift loadings and penalties that they would have ordinarily received if they were not on leave, whichever is greater.</p> <p>In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:</p> <ul style="list-style-type: none"> • on a daily basis with each day of annual leave being assessed separately; or • as a whole over the entire period of annual leave.
Dredging Industry Award 2010 (MA000085)		
15.	14.3	<p>It may be unclear what is meant by the term "weekly aggregated wage" in clause 14.3.</p> <p>Clause 14.3 contains a list of "aggregated" rates payable to employees engaged on a dredge other than a non-propelled dredge that is fully operational. The use of the term "aggregated" in clause 14.3 differs from clauses 14.1 and 14.2 which both provide "minimum weekly rates" in respect of different categories of employees.</p> <p>In the absence of a definition of "weekly aggregated wage" it may be unclear which entitlements have been "aggregated" (and as a result it may be unclear which, if any, entitlements remain separately payable).</p>
Educational Services (Post-Secondary Education) Award 2010 (MA000075)		
16.	3.1 and Schedule C	<p>The FWO has received enquiries about the appropriate classification for an employee who:</p> <ul style="list-style-type: none"> • does not hold a teaching qualification; and • is teaching a course or units of a course which are accredited. <p>Such an employee does not appear to fall into either the definitions of "teacher" or "tutor / instructor" in clause 3.1.</p>
Fitness Industry Award 2010 (MA000094)		
17.	13.3 and 26.3(c)	<p>The FWO has received enquiries about what rate applies to casual employees working on a public holiday.</p> <p>Clause 26.3(c) provides for payment at the rate of double time and a half for all hours worked on a public holiday. This clause is expressed as being "subject to clause 13.3". Clause 13.3 provides that a casual employee is paid a loading of 30% for working ordinary hours on a public holiday.</p> <p>Due to the interaction of clauses 13.3 and 26.3(c), it may not be clear to an award user:</p> <ul style="list-style-type: none"> • how to calculate the rate payable to a casual employee during ordinary time on a public holiday; and • whether any casual loading is payable for overtime hours worked on a public holiday.

No.	Clause Number(s)	Description of issue
Horticulture Award 2010 (MA000028)		
18.	10.4(c), 22.1(d) and 22.2(h)	<p>The FWO has received enquiries about whether casual employees are entitled to overtime rates of pay.</p> <p>Clauses 22.1(d) and 22.2(h) define overtime as work in excess of ordinary hours. Clause 22.1 and 22.2 set out ordinary hours for full-time and part-time employees and shiftworkers but not for casuals.</p> <p>Clause 10.4(a) states that a casual employee's ordinary hours will be the "lesser of an average of 38 hours per week or the hours required to be worked by the employer". Clause 10.4(c) states that the casual loading provided for in clause 10.4(b) is paid "instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment".</p> <p>The interaction of these provisions may cause uncertainty amongst award users regarding whether the overtime rates in clause 22.1 and 22.2 apply to casual employees.</p>
19.	10.4(c), 22.1 and 22.2	<p>The FWO has received enquiries about whether the shiftwork provisions in clause 22.2 can apply to casual employees.</p> <p>It may be unclear whether the shiftwork provisions in clause 22.2 (which does not mention which types of employees it may cover) should be read in conjunction with clause 22.1 (which deals with ordinary hours of work and rostering for full-time and part-time employees).</p>
20.	15.5, 22, 25 and 26	<p>The FWO has received enquiries about how to determine what amount a pieceworker should be paid when they take annual leave or personal/carer's leave under clauses 25.1 and 26 respectively.</p> <p>Given that pieceworkers are paid by output rather than by time worked, it may be unclear how to determine the amount of leave payable and at what rate it should be paid.</p>
21.	15	<p>The FWO has received enquiries about how to calculate the piecework rate for a casual employee. Clause 15.2 provides that pieceworkers will be paid at least 15% more than the minimum hourly rate. Under clause 15.3 the calculation of piecework rates for casual employees "will include the casual loading prescribed in clause 10.4(b)". The casual loading under clause 10.4(b) is 25% of the minimum hourly rate.</p> <p>It may be unclear whether under clause 15.3 the piecework rate should be calculated:</p> <ul style="list-style-type: none"> • on a compound basis: that is, minimum hourly rate x casual loading x piecework rate; or • on a cumulative basis: that is, (minimum hourly rate x casual loading) + (minimum hourly rate x piecework rate).
Labour Market Assistance Industry Award 2010 (MA000099)		
22.	10.3(d)	<p>Clause 10.3(d) provides that by agreement, a part-time employee may be paid a loading of 25% and not have an entitlement to annual leave, personal/carers' leave or payment for public holidays, and that such agreement will not alter the employee's status as a part-time employee. This appears to be inconsistent with entitlements to leave under the National Employment Standards.</p>

No.	Clause Number(s)	Description of issue
Labour Market Assistance Industry Award 2010 (MA000099)		
23.	16.5 and 23.1	Clause 16.5 provides entitlements where an employee is required to supervise clients in excursion activities involving overnight stays away from home. The FWO has received enquiries regarding whether in these circumstances, employees are also entitled to overtime entitlements as per clause 23.1.
24.	23.2(c) and 28.2	<p>The interaction between clauses 23.2(c) and 28.2 may be unclear as both provide for penalty payments on public holidays. Clause 23.2(c) provides that an employee who works on a public holiday will be paid, in addition to, the payment for the public holiday, at the rate of:</p> <ul style="list-style-type: none"> • time and a half for work performed during ordinary hours of work; and/or • double time and a half for work performed outside ordinary hours of work. <p>Clause 28.2 provides that an employee who works on a public holiday will be paid at a rate of double time and a half of their ordinary rate of pay for all time worked.</p> <p>Award users may have difficulty determining, if both entitlements apply, on what basis the total rate should be calculated.</p>
Local Government Industry Award 2010 (MA000112)		
25.	10.5(b), 10.5(c), 23 and 24.2	<p>The FWO has received enquiries in respect of whether the casual loading is payable during overtime hours due to the interaction between clauses 10.5(b) and 10.5(c).</p> <p>Clause 10.5(b) provides that a casual employee must be paid “in addition to the hourly ordinary time rate and rates payable for shift and weekend work” a casual loading of 25%.</p> <p>Clause 10.5(c) provides that public holiday penalties and overtime rates for casual employees will be calculated on the hourly ordinary time rate (exclusive of the casual loading).</p> <p>It may be unclear whether public holiday penalties and overtime rates are payable in replacement of or in addition to the casual loading.</p>
Market and Social Research Award 2010 (MA000030)		
26.	21.2	The application of clause 21.2 may be unclear as it specifies the ordinary hours of work of “regular employees” but does not define that term.
Miscellaneous Award 2010 (MA000104)		
27.	Schedule B	Schedule B ‘Classification Structure and Definitions’ provides that a Level 4 employee includes a “sub-professional employee”. The FWO has received enquiries about the meaning of this term as it is not defined in the award.

No.	Clause Number(s)	Description of issue
Nursery Award 2010 (MA000033)		
28.	24.2	<p>The FWO has received enquiries as to whether casual employees are entitled to overtime rates of pay.</p> <p>Clause 24.2(f) provides that all time worked outside ordinary hours is overtime. It may not be clear whether, or under what circumstances, overtime rates can apply to casual employees, as:</p> <ul style="list-style-type: none"> • clause 24.2(a) sets out weekly ordinary hours for full-time employees; and • clause 24.2(c) provides daily ordinary hours which are not limited to full-time employees.
Pastoral Award 2010 (MA000035)		
29.	35.3 and 35.9	<p>It may be unclear under which circumstances an employee should be considered a shiftworker (as this is not a defined term).</p> <p>Clause 35.3 defines types of shifts, but does not define a shiftworker. Clause 35.9 provides penalty rates which are expressed as applying to "shiftworkers". In the absence of a definition of shift worker, it may not be clear if an employee is a shiftworker (as opposed to a day worker working outside the spread of ordinary hours).</p>
Ports, Harbours and Enclosed Water Vessels Award 2010 (MA000052)		
30.	10.3(b), 20.3, 20.4 and 21.2	<p>The FWO has received enquiries regarding whether the casual loading is payable during overtime and shiftwork hours.</p> <p>Clauses 20.1, 20.3, 20.4 and 21.2 each provide for overtime or penalty payments which are calculated "at the employee's ordinary hourly base rate of pay" or "ordinary time rate". It may be unclear how these terms should be applied for casual employees.</p> <p>Clause 10.3(b) sets out that a casual loading of 25% applies for ordinary hours of work. The 25% casual loading is expressed to incorporate several entitlements but does not include payment for overtime and shift allowances. It may be unclear whether this means that the overtime rates and shift allowances should be applied instead of or in addition to the casual loading.</p>
31.	18.2, 20.1(b) and 20.3	<p>Clause 18.2 states that ordinary hours can be worked Monday to Friday. However, clauses 20.1(b) and 20.3 refer to ordinary hours worked on a Saturday and Sunday. It may be unclear under what circumstances an employee can work ordinary hours on a Saturday or Sunday.</p>
Real Estate Industry Award 2010 (MA000106)		
32.	16.2 and 16.3	<p>The FWO has received enquiries about the meaning of the term "real estate sales" in clause 16.3.</p> <p>Under clause 16.2(f) an employee can only work on a commission-only basis if the employee can demonstrate that they have achieved the minimum income threshold in clause 16.3. Clause 16.3(a) provides a formula which is based on the employee's "real estate sales".</p> <p>The FWO has received enquiries as to whether "real estate sales" should be calculated based on the gross sale amount of properties sold by the employee, the commission received by the employer, the commission received by the employee, or some other amount.</p>

No.	Clause Number(s)	Description of issue
Real Estate Industry Award 2010 (MA000106)		
33.	17.5(a)	<p>It may be unclear whether clause 17.5(a) is consistent with the National Employment Standards. Clause 17.5(a) provides that commission-only employees may be paid their entitlements to annual leave, personal leave or any other entitlements under the National Employment Standards in advance.</p> <p>In the recent Full Bench decision of <i>Canavan Building Pty Ltd</i> [2014] FWCFB 3202 (29 May 2014) the pre-payment of annual leave was considered to be a form of cashing out in a manner inconsistent with the National Employment Standards.</p>
Seagoing Industry Award 2010 (MA000122)		
34.	18.2 and 27	The FWO has received enquiries regarding the interaction of clauses 18.2 and 27 of this award (which both provide for certain categories of employees to work greater than 38 ordinary hours of work per week) and the maximum ordinary hours provisions of the National Employment Standards.
35.	30	<p>Clause 30 provides for leave for employees on a vessel granted a temporary license. The provision states that notwithstanding the National Employment Standards, each employee will be entitled to payment of leave of eight days for each completed month of service and pro rata for any shorter period.</p> <p>It may be unclear whether this amount is to be paid in addition to the entitlements to annual leave and personal leave under the National Employment Standards, or in substitution for them.</p>
Sugar Industry Award 2010 (MA000087)		
36.	29.2(c) and 31.2(b)	Award users may have difficulty determining the correct Sunday rate for field sector employees. Clause 29.2(c) provides that field sector employees receive time and a half for all ordinary time on Sundays. Clause 31.2(b) (which applies to employees other than shiftworkers) provides that all work done commencing on a Sunday must be paid for at the rate of double time.
37.	11.3(a) and 20.2(a)	<p>The FWO has received enquiries about how to calculate the piecework rate.</p> <p>Clause 20.2(a) provides that an employer and employee may enter into an agreement for the employee to be paid a piecework rate. The rate must be sufficient to equal the payment for the actual hours worked based on both ordinary time and overtime as the case may be, plus a loading of 20%.</p> <p>The FWO has received enquiries as to whether the calculation of the minimum piece rate:</p> <ul style="list-style-type: none"> • for casual employees should include the casual loading and, if so, how the casual loading and the additional 20% piecework loading interact; and • for employees performing work during penalty hours should take into account penalty rates in the award, and if so, how these and the additional 20% piecework loading interact.

No.	Clause Number(s)	Description of issue
Telecommunications Services Award 2010 (MA000041)		
38.	11.3(b) and 21.1(a)	<p>The FWO has received enquiries regarding whether the casual loading is payable during overtime hours.</p> <p>Clause 11.3(b) provides a casual loading of 25% for hours worked during ordinary time. Clause 21.1(a) provides for overtime rates of pay for all work done in excess of ordinary hours. The FWO has received enquiries as to whether the calculation of the overtime rate for casual employees should include or exclude the casual loading.</p>
Wine Industry Award 2010 [MA000090]		
39.	13.2 and 23.2	<p>The FWO has received enquiries about how to calculate the piecework rate for a casual employee.</p> <p>Clause 23.2 provides that an employer and employee may enter into an agreement for the employee to be paid a piecework rate and provides a formula for the calculation of a piecework rate which is payable instead of the minimum wages in clause 16. However, the formula does not refer to the casual loading.</p> <p>The FWO has received enquiries as to whether a casual worker who is being paid the piecework rate:</p> <ul style="list-style-type: none"> • continues to be entitled to the 25% casual loading in clause 13.2; and, if so; • how the casual loading and piecework loading interact.

TABLE OF PROVISIONS RELEVANT TO THE AWARD STAGE, GROUP 4 MODERN AWARDS

No.	Clause Number(s)	Description of issue
Airport Employees Award 2010 (MA000049)		
1.	27.2(b), 30.1	The FWO has received enquiries regarding whether day workers can work ordinary time hours on a Saturday. Under clause 27.2(b) the ordinary hours of work of a day worker may be worked from Monday to Friday only. However, clause 30.1 sets out overtime rates for all work undertaken by a day worker outside of ordinary hours during the period from Monday to Saturday.
Amusement, Events and Recreation Award 2010 (MA000080)		
2.	23.1, 23.3(a)	The FWO has received enquiries about the rate payable to an employee working overtime on a Sunday. Under clause 23.3(a) all time worked on a Sunday will be paid at 150%. However, under clause 23.1 all overtime worked will be payable at 150% for the first three hours and 200% thereafter.
Broadcasting and Recorded Entertainment Award 2010 (MA000091)		
3.	27.3, 27.6, 39.6, 52.2, item K.1 of Schedule K	<p>The FWO has received enquiries about the difference, if any, between an "accrued day off" and a "rostered day off". Under clause 27.3 an employer may implement a 28 day roster. Employees working under a 28 day roster will be entitled to an "accrued day off" being an additional non-working day within the 28 day roster period.</p> <p>Clauses 27.6, 39.6, 52.2 and Item K.1 of Schedule K each include reference to a "rostered day off". As this term is not defined it may be unclear whether for the purpose of this award a "rostered day off" has the same or different meaning to an "accrued day off".</p>
Building and Construction General On-site Award 2010 (MA000020)		
4.	14.5, 19.1, 19.3	<p>The FWO has received enquiries about how to calculate the rate of pay for casual employees. Clause 14.5 provides that a casual employee must be paid a casual loading of 25% for ordinary hours provided for in this award.</p> <p>It may be unclear whether the casual hourly rate should be calculated by adding 25% to:</p> <ul style="list-style-type: none"> • the hourly rate specified at clause 19.1 (minimum wages); • the hourly rate calculated in accordance with either 19.3(a) or 19.3(b). Clause 19.3 sets out how to calculate the hourly rates of daily hire and weekly hire employees. The hourly rates for these employees include payment for a range of allowances; or • on any other basis.

No.	Clause Number(s)	Description of issue
Building and Construction General On-site Award 2010 (MA000020)		
5.	14.2, 23	<p>The FWO has received enquiries as to whether casual employees are entitled to inclement weather provisions under this award and, if so, how to apply those provisions.</p> <p>Clause 14.2 provides that casual employees are entitled to all applicable rates and conditions of employment in the award, except specified exclusions. The inclement weather provisions at clause 23 are not so excluded. However, it may be unclear how to apply these provisions to casual employees as the inclement weather entitlement is based on a four week accrual period (under clauses 23.7 and 23.9).</p>
6.	28.1-28.3, item C.5.1 and C.5.2 of Schedule C	<p>The FWO has received enquiries as to whether part-time and school-based trainees should be paid in accordance with clauses 28.2 and 28.3 or be paid under clause C.5.2 of Schedule C.</p> <p>Clause 28.1 provides that the rates set out at clauses 28.2 (for civil construction trainees) and 28.3 (for trainees other than civil construction trainees) replace the rates otherwise set out at item C.5.1 of Schedule C. Clause C.5.1 applies only to full-time employees.</p> <p>It may be unclear whether clause 28.1 has any application to part-time and school-based trainees as their rates of pay are set out in C.5.2 (rather than in C.5.1).</p> <p>Additionally, it may also be unclear how to apply the progression structures in clauses 28.2 and 28.3 as the award does not define the terms 'stage' or 'skill level'.</p>
7.	14.6, 33.1, 36	<p>The FWO has received enquiries about how to determine the ordinary hours of work for a casual employee under this award (as this is relevant to determining when overtime rates are payable).</p> <p>Under clause 14.6, a casual employee required to work overtime will be entitled to the overtime rates at clause 36 plus an additional 25%. Under clause 36.2, overtime rates of pay apply for "all time worked beyond an employee's ordinary time of work".</p> <p>As ordinary hours are defined at clause 33.1, in accordance with a procedure which includes rostered days off and a 20 day work cycle, it may be unclear:</p> <ul style="list-style-type: none"> • whether, or how, this procedure should be applied to a casual employee; and • if this procedure should not be applied to a casual employee, how to otherwise determine a casual employee's ordinary hours of work in order to establish when overtime rates apply.

No.	Clause Number(s)	Description of issue
Car Parking Award 2010 (MA000095)		
8.	21.1(b), 23.2, 23.4(a)	<p>It may be unclear under what circumstances an employee should be considered a shiftworker (as this is not a defined term). In particular it may be unclear whether:</p> <ul style="list-style-type: none"> • any employee who performs work during the period from 7:00 pm to 7:00 am must be classified and paid as a shiftworker; or • an employee who performs work during the period from 7:00 pm to 7:00 am may be considered to be a day worker working outside of the spread of ordinary hours specified at clause 21.1(b). <p>For example, an employee who at times finishes work after 7:00 pm could be considered to be a day worker (working overtime hours under clause 23.2) or as an afternoon shiftworker (under clause 23.4).</p>
9.	25.6(b)	<p>The FWO has received enquiries about the applicable loading payable to an employee on annual leave. Clause 25.6(b) provides an employee must be paid an additional loading of 17.5% of the employee's minimum rate plus first aid allowance where appropriate or if they were a shiftworker prior to entering leave, their shift penalty, whichever is greater.</p> <p>In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:</p> <ul style="list-style-type: none"> • on a daily basis with each day of annual leave being assessed separately; or • as a whole over the entire period of annual leave.
Educational Services (Teachers) Award 2010 (MA000077)		
10.	10.4(b), 13.4, 14	<p>The FWO has received enquiries about the application of clause 13.4 to part-time employees.</p> <p>Clause 13.4 provides that an employee will progress through the salary scale at clause 14 based on their number of years of service. The term "years of service" is not defined.</p> <p>Clause 10.4(b) provides that "a part-time employee is entitled to the benefits under this award on a pro-rata basis" and provides a method of calculating the pro-rated entitlement.</p> <p>It may be unclear whether progression to the next level of the salary scale in clause 14 (in accordance with clause 13.4) should be considered a "benefit" under the award, and therefore be pro-rated, or whether progression should occur based on the number of calendar years of service.</p>

No.	Clause Number(s)	Description of issue
Fast Food Industry Award 2010 (MA000003)		
11.	25.5(a)(ii)	The FWO has received enquires about whether early morning hours worked on a Monday to Friday (e.g. a shift commencing at 5.00 am on a weekday) should be considered to be hours worked "after midnight" for the purpose of clause 25.5(a)(ii) and, if so, at what point the loading in clause 25.5(a)(ii) will cease to apply to the employee.
12.	25.5(c), 26	The FWO has received enquiries about the rate payable on a Sunday. Clause 25.5(c) provides for a loading "for all hours of work on a Sunday" at the rate of 50% for full-time and part-time employees and 75% for casual employees. Clause 26, specifies that overtime worked on a Sunday is to be paid at 200%. It may be unclear how clauses 25.5(c) and 26 interact.
Food, Beverage and Tobacco Manufacturing Award 2010 (MA000073)		
13.	30.2(c)	<p>Clause 30.2(c) states that the spread of ordinary hours may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or between the employee and the employer.</p> <p>It may be unclear whether this means that the span of ordinary hours can be:</p> <ul style="list-style-type: none"> increased by up to one hour at one end of the spread only (so that the number of hours within the spread is increased by up to one hour); increased by up to one hour at both ends of the spread (so that the number of hours within the spread is increased by up to two hours); or shifted at both ends of the spread by up to one hour (so that the number of hours within the spread remains the same – for example, under this interpretation rather than the spread of ordinary hours being worked from 6:30 am to 6:30 pm it could instead be altered to 5:30 am to 5:30 pm).
14.	30.2(d)	<p>Clause 30.2(d) provides that "any work performed outside the spread of hours must be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work".</p> <p>The FWO has received enquiries as to whether the exception provided in clause 30.2(d) (which excludes the payment of overtime in certain circumstances) applies:</p> <ul style="list-style-type: none"> only to employees who are "getting the plant in a state of readiness"; or in other circumstances where employees perform work prior to, but continuous with, the spread of ordinary hours (for example, employees being called into work early) and, if so, under which circumstances.

No.	Clause Number(s)	Description of issue
Food, Beverage and Tobacco Manufacturing Award 2010 (MA000073)		
15.	30.2, 31.1(c)	<p>The FWO has received enquiries about the circumstances under which an employee should be considered a shiftworker (as this is not a defined term).</p> <p>In particular it may be unclear whether shiftwork allowances apply in relation to an employee who performs day work (as defined at clause 30.2) as well as hours which could comprise shiftwork hours. For example, an employee who at times finishes work after 6:00 pm on a week day could be considered to be a day worker (working outside of the spread of ordinary hours) or as an afternoon shiftworker (clause 31.1(c)).</p>
16.	34.5	<p>The FWO has received enquiries about the applicable loading payable to an employee on annual leave. Clause 34.5 provides that an employee must be paid the greater of the relevant shift/weekend penalties and a loading of 17.5%.</p> <p>In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:</p> <ul style="list-style-type: none"> • on a daily basis with each day of annual leave being assessed separately; or • as a whole over the entire period of annual leave.
General Retail Industry Award 2010 (MA000004)		
17.	29.1, 29.2	<p>The FWO has received enquiries as to whether casual employees are able to work overtime hours and, if so, how those hours are to be paid.</p> <p>Clause 29.1(a) provides that “an employer may require an employee other than a casual to work reasonable overtime at overtime rates in accordance with the provisions of this clause”. The clause then specifies the circumstances where an employee may refuse to work overtime.</p> <p>Clause 29.2 sets out the rates of pay which apply during overtime. This clause does not specifically refer to full-time, part-time or casual employees.</p> <p>It may be unclear if the exclusion for casual employees in clause 29.1 affects:</p> <ul style="list-style-type: none"> • whether casual employees can work overtime hours; and • if overtime hours may be worked, whether the overtime rates at clause 29.2 apply (or if these hours should otherwise be paid at ordinary time rates of pay).

No.	Clause Number(s)	Description of issue
General Retail Industry Award 2010 (MA000004)		
18.	29.4(d)(ii)	<p>The FWO has received enquiries as to how to determine the amount of time off an employee is entitled to under clause 29.4(d)(ii) for the performance of work on a public holiday. Clause 29.4(d)(ii) provides that employee may be compensated for a particular public holiday by either an equivalent day or equivalent time off instead without loss of pay or an additional day or equivalent time as annual leave. The FWO has received enquiries as to what is considered 'equivalent day' or 'equivalent time off', particularly whether:</p> <ul style="list-style-type: none"> • the calculation should be performed based on a 1:1 ratio; or • the calculation should be performed taking into account applicable penalties (e.g. one hour which would be payable at 150% equates to 1.5 hours of time off work).
19.	30	<p>Clause 30.1 provides that the shiftwork clause will apply only to persons "specifically employed as shiftworkers under this award". Clause 30.2(a) defines 'shiftwork' to mean "a shift starting at or after 6.00 pm on one day and before 5.00 am on the following day".</p> <p>The FWO has received enquiries as to the meaning of the term "specifically employed as shiftworkers". In particular, it may be unclear whether it is sufficient that an employee is rostered to work shiftwork hours (such as, a newspaper delivery driver working from 3:00 am to 5:00 am) or whether the employee must be expressly told that they have been employed as a shiftworker.</p> <p>Additionally, it may be unclear whether under clause 30.2 'shiftwork' is defined to mean:</p> <ul style="list-style-type: none"> • a shift starting at or after 6:00 pm on one day and (finishing) before 5:00 am on the following day (that is, the entire shift must fall within the two times stated in the award); or • any shift commencing either after 6:00 pm or before 5:00 am.
20.	31.2(b)	<p>Clause 31.2(b) provides that where an employee recommences work without having had 12 hours off work then the employee will be "paid at double the rate they would be entitled to until such time as they are released from duty for a period of 12 consecutive hours" off work without loss of pay for ordinary time hours occurring during the period of such absence.</p> <p>The FWO has received enquiries as to the appropriate calculation method of this penalty in instances where the employee would be entitled to additional payments, such as shift loadings or a casual loading. It may be unclear whether:</p> <ul style="list-style-type: none"> • the penalty of double time applies instead of or in addition to other loadings which would ordinarily apply; and • if both are payable, whether the double time calculation should be applied to the loaded or unloaded rate.

No.	Clause Number(s)	Description of issue
General Retail Industry Award 2010 (MA000004)		
21.	32.3(b)	<p>Clause 32.3(b) provides that day work and shiftwork employees are entitled to an annual leave loading of 17.5% or the relevant weekend penalties or shift loadings, whichever is greater but not both.</p> <p>In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:</p> <ul style="list-style-type: none"> • on a daily basis with each day of annual leave being assessed separately; or • as a whole over the entire period of annual leave.
Hair and Beauty Industry Award 2010 (MA000005)		
22.	19.6, 19.7, Schedule D	<p>The FWO has received enquiries as to the scope of the terms “trainee” and “graduate” at clauses 19.6 and 19.7 of this award. Clause 19.6 provides minimum rates of pay for full-time hairdressing trainees and graduates. Clause 19.7 provides minimum rates of pay for full-time beauty therapy graduates.</p> <p>In the absence of definitions of the two terms “trainee” and “graduate” it may be unclear:</p> <ul style="list-style-type: none"> • in respect of trainees: how clause 19.6 interacts with the trainee provisions separately set out under Schedule D of the award; and • in respect of graduates: how to identify which employees should be regarded as a “graduate” under both clauses 19.6 and 19.7.
Hospitality Industry (General) Award 2010 (MA000009)		
23.	32.3	<p>The FWO has received enquiries about how to apply the evening and night penalties in clause 32.3 in circumstances where an employee performs work for part of an hour. The penalties in clause 32.3 are expressed to apply (during the period from 7:00 pm to 7:00 am) as a percentage of the standard hourly rate “per hour or any part of an hour for such time worked within the said hours”.</p> <p>The FWO has received enquiries regarding whether the penalties in clause 32.3 are payable in units of whole hours only or whether the penalties are payable on a pro-rata basis for part hours worked. For example, if an employee worked from 7:00 pm to 9:30 pm (2.5 penalty hours) it may be unclear whether the employee should be paid:</p> <ul style="list-style-type: none"> • 2.5 hours (that is, pro-rata payment for “such time worked” within the said hours) x 10% of the standard rate; or • 3 hours (that is, one unit of payment for the commencement of each “hour or part of an hour” worked) x 10% of the standard hourly rate.

No.	Clause Number(s)	Description of issue
Pest Control Industry Award 2010 (MA000097)		
24.	23	It may be unclear under what circumstances an employee should be considered a shiftworker (as this is not a defined term). For example, it may be unclear what entitlements apply to an employee working from 9:00 am to 7:00 pm (that is, whether the employee should receive one hour of overtime as a dayworker or afternoon shift rates as a shiftworker).
Professional Employees Award 2010 (MA000065)		
25.	15	Clause 15 provides minimum wages in the form of annual salaries. The FWO has received enquiries about what minimum hourly rate of pay applies for part-time and casual employees.
Racing Clubs Events Award 2010 (MA000013)		
26.	13.2, 13.5, 14.2, 14.3, 19, 29	<p>The FWO has received enquiries regarding the rates payable to casual employees for overtime periods of work. Clause 29 defines when overtime is payable and sets out the overtime loadings which are payable on top of the “relevant minimum wage”.</p> <p>Casual employees are not excluded from coverage by clause 29, except in circumstances where the casual employee is engaged on night cleaning duties between the hours of 11:00 pm to 7:00 am (clause 13.5).</p> <p>For those casual employees covered by clause 29, it may be unclear how to identify the “relevant minimum wage” as this term may refer to:</p> <ul style="list-style-type: none"> • the minimum wages specified at clause 19; • for 'casual employees - other than liquor employees' – the minimum wages under clause 19 plus a 25% casual loading (in accordance with clause 13.2); or • for 'casual employees - liquor employees' – the loaded hourly rates set out at clause 14.3 (in accordance with clause 14.2).
Registered and Licensed Clubs Award 2010 (MA000058)		
27.	12.1	<p>The FWO has received enquiries as to the scope of clause 12.1. Clause 12.1 provides that “junior employees employed in the bar or other places where liquor is sold must be paid at the adult rate of pay in clause 17.2 for the classification of work being performed.”</p> <p>It may be unclear whether clause 12.1 applies to:</p> <ul style="list-style-type: none"> • a junior waiter who may be required to deliver liquor to tables and/or take payment for liquor; or • a junior employee employed within the same premises as where liquor is sold but who does not themselves sell or serve liquor (e.g. a junior kitchen hand).

No.	Clause Number(s)	Description of issue
Registered and Licensed Clubs Award 2010 (MA000058)		
28.	10.5, 29.1, 29.2	<p>The FWO has received enquiries as to:</p> <ul style="list-style-type: none"> • whether a maintenance and horticultural employee may be engaged on a casual basis; and • whether the rates of pay listed in clause 29.2 apply and, if so, how. <p>Clause 10.5(a) states that “a casual employee is an employee who is engaged and paid as such”. Clause 10.5(b) provides for casual employees to be paid “the percentage at the ordinary hourly rate for the classification in which they are employed as prescribed in clause 29.1, which includes a 25% casual loading.”</p> <p>Clause 29.1 sets out the rates payable to “an employee other than a maintenance and horticultural employee”. Clause 29.1 specifically includes rates of pay for full-time, part-time and casual employees. The rates payable to maintenance and horticultural employees are separately set out at clause 29.2 (this clause does not expressly provide casual rates of pay).</p> <p>Due to the interaction of clauses 10.5(b) and 29.1 it may be unclear whether it is possible to engage a maintenance and horticultural employee on a casual basis.</p> <p>Additionally, if it is possible to engage a maintenance and horticultural employee on a casual basis, then it may be unclear whether any casual loading applies as a maintenance and horticultural employee is excluded from the application of clause 29.1 and clause 29.2 does not provide specific rates for a casual employee.</p>
29.	29.4	<p>The FWO has received enquiries about how to apply the evening and night penalties in clause 29.4 in circumstances where an employee performs work for part of an hour.</p> <p>The penalties in clause 29.4 are expressed to apply (during the period from 7:00 pm to 7:00 am) as a percentage of the standard hourly rate “per hour or any part of an hour for such time worked within the said hours”.</p> <p>The FWO has received enquiries regarding whether the penalties in clause 29.4 are payable in units of whole hours only or whether the penalties are payable on a pro-rata basis for part hours worked. For example, if an employee worked from 7:00 pm to 9:30 pm (2.5 penalty hours) it may be unclear whether the employee should be paid:</p> <ul style="list-style-type: none"> • 2.5 hours (that is, pro-rata payment for “such time worked” within the said hours) x 10% of the standard rate; or • 3 hours (that is, one unit of payment for the commencement of each “hour or part of an hour” worked) x 10% of the standard hourly rate.

No.	Clause Number(s)	Description of issue
Restaurant Industry Award 2010 (MA000119)		
30.	15.1, 20.1	<p>The FWO has received enquiries as to the meaning of the term “liquor service employee” in clause 15.1. Clause 15.1 provides that “junior employees working as liquor service employees must be paid at the adult rate of pay in clause 20.1.”</p> <p>In the absence of a definition of the term “liquor service employee” it may be unclear whether or not this term includes junior waitstaff who may be required to deliver liquor to tables and/or take payment for liquor.</p>
31.	27.3, 33.2(d), 38.2, item F.1(d) of Schedule F	<p>The FWO has received enquiries about the meaning of the term “rostered day off” in clause 38.2 as this is not a defined term.</p> <p>Clause 38.2 sets out arrangements for full-time employees whose rostered day off falls on a public holiday. It may be unclear whether the term “rostered day off” refers to:</p> <ul style="list-style-type: none"> • a scheduled paid day off based on accrued hours of work; or • any day on which an employee is not scheduled to work. <p>Additionally, the undefined term “rostered day off” is also used at clauses 27.3 (payment of wages), 33.2(d) (overtime rates) and item F.1(d) of Schedule F (part-day public holidays).</p>
Social, Community, Home Care and Disability Services Industry Award 2010 (MA000100)		
32.	25.6, 25.7, 29.2	<p>The FWO has received enquiries about how to account for time spent performing a ‘sleepover’ (in accordance with clause 25.7) for the purposes of applying clauses 29.2 (shiftwork) and 25.6 (broken shifts).</p> <p>By way of example, if an employee performs work for two hours from 8:00 pm to 10:00 pm (e.g. readying a client for bed), performs a sleepover from 10:00 pm to 6:00 am and then performs work for two hours from 6:00 am to 8:00 am (e.g. readying a client for the day), then it may be unclear:</p> <ul style="list-style-type: none"> • whether the time spent working from 8:00 pm to 10:00 pm should be considered an afternoon shift (in accordance with clause 29.2) or whether the shift is instead considered to end at 8:00 am; and • whether the two periods worked (that is, 8:00 pm to 10:00 pm and 6:00 am to 8:00 am) can constitute a broken shift under clause 25.6.