



BACKGROUND PAPER

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 Yearly Review of modern awards—Penalty Rates—*General Retail Industry Award 2010*—Late night and Saturday penalty rates (AM2014/305)

SYDNEY, 5 MAY 2017

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

| | | |
|-----|--|----|
| 1. | Introduction | 2 |
| 2. | The <i>General Retail Industry Award 2010</i> | 2 |
| 3. | Pre-reform awards and NAPSAs | 3 |
| 3.1 | Retail sector | 3 |
| 3.2 | State retail awards | 3 |
| | <i>New South Wales</i> | 3 |
| | <i>Victoria, ACT and NT</i> | 4 |
| | <i>Queensland</i> | 5 |
| | <i>South Australia</i> | 6 |
| | <i>Western Australia</i> | 7 |
| 3.3 | Casual loadings | 7 |
| 4. | Part 10A Award Modernisation | 8 |
| 4.1 | Making the modern awards | 8 |
| 4.2 | Retail sector | 9 |
| | <i>Exposure draft</i> | 9 |
| | <i>Modern award as at 19 December 2008</i> | 9 |
| | <i>Variations to modern award prior to operation</i> | 11 |
| | <i>Transitional provisions</i> | 11 |
| 5. | Transitional Review 2012 | 12 |
| 5.1 | Penalty Rates Full Bench Decision | 12 |
| | <i>Modern award as at 20 April 2017</i> | 13 |
| | Appendix A— Summary of Retail industry Awards | 14 |
| | Appendix B—Penalty rates in pre-reform instruments | 17 |

1. Introduction

- [1] The purpose of this paper is to provide background information about the late night and Saturday penalty rate provisions in the *General Retail Industry Award 2010* (the Retail Award). The matter is being considered as part of the 4 yearly review of modern awards (the 4 yearly review).
- [2] The Fair Work Commission has produced this background paper in order to assist interested parties in the preparation of submissions in the matter. The background paper is intended to identify, for the benefit of the parties, decisions which may be relevant or significant in the determination of the application currently before it. It is not intended to be exhaustive in this respect, or to confine the parties in their submissions. The parties are at liberty to address any issues which they consider to be relevant in their respective submissions.
- [3] The background paper discusses the evolution of penalty rates for work performed on Saturdays and evenings and considers the application of the casual loading in such circumstances. The paper discusses the development of the Retail Award based on the historic context of pre-reform awards and NAPSAs, as well as recent decisions including the Transitional Review of modern awards in 2012–14.
- [4] Interested parties are invited to consider the material contained in this background paper and provide any response by 4:00pm on Monday 15 May 2017.

2. The *General Retail Industry Award 2010*

- [5] The Retail Award came into force on 1 January 2010. It was made by the Australian Industrial Relations Commission following the award modernisation process (see chapter 4).
- [6] The Retail Award currently provides a number of overtime and penalty rates. The hours of work attracting penalty rates include evenings, weekends and public holidays.
- [7] Clause 29.4 currently provides the following penalty rates:

29.4 Penalty payments

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

- [8] Employees working outside ordinary hours on Saturdays (before 7.00 am and after 6.00 pm) are entitled to overtime in accordance with clause 29.2(a) :

29.2 Overtime

(a) Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter.

- [9] The issue of whether a casual employee is entitled to both the overtime rate *and* the casual loading is currently the subject of proceedings before the Casual Employment Full Bench in [AM2014/197](#) (see [submission](#) by SDA of 13 May 2016).
- [10] Clause 13 currently provides the following casual loading:
- 13.2** A casual employee will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.
- [11] The *Penalty Rates decision*¹ determined that penalty rates on Sundays and Public Holidays would be reduced in the Retail Award. At [1704]–[1720] of that decision the Full Bench identified an inconsistency between the way the casual loading applies to work on Saturdays compared to work on other days. The Shop, Distributive and Allied Employees Association (SDA) has sought a review of the Saturday penalty rates and the late night penalties in the Retail Award.²

3. Pre-reform awards and NAPSAs

3.1 Retail sector

- [12] Aside from the Territories, and prior to the referral to the Commonwealth of Victoria's industrial relations powers, coverage of the retail sector was predominantly within individual state industrial relations systems.

3.2 State retail awards

New South Wales

- [13] An allowance for working on Saturdays was introduced in the NSW Shop Assistants award in 1955³ then converted to a penalty rate of 125% for work before noon and 150% after midday in 1974. A decision in 1985 following the increase in Saturday afternoon trading in NSW saw the penalty rate for work by full-time and part-time employees on a Saturday afternoon decreased to 125%.⁴ The Full Court of the Industrial Court of New South Wales decided that the 125% loading would not apply to casual employees.⁵ Instead, in addition to the then 15% casual loading, casual employees were paid a flat dollar amount of \$6 for undertaking more than four hours' work on a Saturday. A flat additional amount of \$2 was payable for less than four hours' work.

¹ 23 February 2017, [\[2017\] FWCFB 1001](#)

² See [Correspondence](#) of 28 March 2017

³ [\[1955\] AR \(NSW\) 871](#)

⁴ [\[1985\] NSW IR 62](#)

⁵ *Ibid* at p. 33–34

- [14] In dismissing the applications by employer groups to remove evening penalties, the decision maintained the 25% loading for work after 6pm for full-time and part-time employees. Casual employees working after 6pm were given “no additional allowance or loading”.⁶

Victoria, ACT and NT

- [15] Awards applying to employers and employees in the Retail sector in the Territories (which generally operated on a common rule basis) have been in the federal jurisdictions for many decades, while the first general retail award in Victoria was made in 1994.

Victoria

- [16] Following an application for a new award, *The Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 1994*⁷ (the *Victorian Shops award*) was made by Commissioner Lewin in Print [L3048](#). The Commissioner adopted the recommendations of an extensive review of conditions of employment in the retail industry that had been conducted by the former Victorian Industrial Relations Commission in 1991 and 1992 and set penalty rates for ordinary hours worked on a Saturday in Victoria at 125%.
- [17] The 1994 award provided a penalty of 130% for full-time and part-time employees working night shift between 6.00 pm and 8.00 am. This penalty was consistent with the rate for late night work inserted in the *General Shops Award (Vic)* on 30 November 1981.⁸
- [18] The interim award made following Commissioner Lewin’s decision only provided for casual employees to be engaged as nightshift employees, replenishing stock outside trading hours. Casual nightshift employees were paid at 145% for night work and 195% of the minimum hourly rate for work on Saturdays.
- [19] A further decision by Commissioner Foggo permitted casual employment more generally and provided a 25% loading for hours worked on Monday to Friday.⁹ Rates for casual employees working on a Saturday were expressed as hourly payments and equated to approximately 150%, which was equivalent to their casual hourly rate plus the Saturday loading payable to full-time and part-time employees working on Saturdays.
- [20] In the years between 1994 and 2007, the real value of the rates slowly eroded as the flat dollar payment for working on a Saturday was not adjusted. Clause 18.2.3 of the *Victorian Shops Award* stated:

18.2.3 Pursuant to decision D92/0256 of the Industrial Relations Commission of Victoria the rates set out in this clause for the payment for work within ordinary hours on a Saturday

⁶ Ibid at p. 32

⁷ [AP796250CRV](#) - *Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000*

⁸ Matter No. 45765/82

⁹ Print [L3443](#)

shall not be adjusted until those rates equate with the rates prescribed under this award for the payment of work within ordinary hours during the evenings Monday to Friday.

- [21] Prior to the introduction of the modern award, the Saturday rates for full-time, part-time and casual employees were all approximately 136% of the ordinary time hourly rate.

Australian Capital Territory

- [22] In the ACT, the *Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000*¹⁰ provided an additional monetary allowance for ordinary hours worked on a Saturday for all employees. Prior to the introduction of the modern award, a casual employee was entitled to their ordinary time hourly rate plus an additional amount of \$5.22 multiplied by the 115% casual loading per hour for Saturday work. A full-time or part-time employee working all day on Saturday was paid \$39.70 (being \$5.22 x 7.6) in addition to their ordinary hourly rate.

- [23] These additional rates were introduced into the ACT award on 1 December 1989¹¹ and subsequently discussed in a decision considering wage rates in 1990¹². In that decision, the Full Bench increased the base rates for all employees to take into account the expanded trading hours in the ACT. When setting a monetary allowance for working on a Saturday rather than a percentage loading the Full Bench expressed the view that as the disutility of working on a Saturday affects all employees equally, the compensation should be the same, that is it should not be proportionate on the underlying rate of pay.

- [24] The 1990 decision also outlined a number of decisions in other State tribunals that assessed the impact of changes in shop trading patterns on ordinary hourly rates and penalty rates in retail awards.

Northern Territory

- [25] Similarly, in the NT, the *Retail, Wholesale and Distributive Employees (NT) Award 2000*,¹³ an additional monetary allowance for work performed by casuals outside the ordinary span of hours. The span of hours for ordinary hours of work and additional remuneration for weekends and evenings were inserted in this award in 1989.¹⁴

Queensland

- [26] Saturday penalty rates were reviewed in a decision issued by the Queensland Industrial Relations Commission (QIRC) on 4 March 1989.¹⁵ The applications before the QIRC sought an increase in the penalty rate applying to ordinary hours worked on a Saturday to 150% and

¹⁰ [AP794740CRA](#) - *Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000*

¹¹ R017CRA Dec 962/89 S Print J0551

¹² see Print [J1694](#)

¹³ [AP794741CRN](#) - *Retail, Wholesale and Distributive Employees (NT) Award 2000*

¹⁴ 20 January 1989, Print H4529, following decision in transcript of 18 July 1988.

¹⁵ Queensland Industrial Relations Gazette, 4 March 1989 No 13 folios 220–4.

that it also apply to casual employees. Both applications were dismissed and the rate remained at 125% for all employees (inclusive of casual loading).

- [27] Queensland rates (in particular Sunday rates) were again reviewed in 1993 following the extension of shop trading hours. The QIRC (by majority) set penalty rates for all employees working on Sundays at 150% (and 200% for non-exempt shops).¹⁶ In setting the rate for casual employees at the same rate as permanent employees, the QIRC considered that the previous rate for casuals of 244% (being double a casual employee's ordinary time rate) was too high, but the applicant's proposed rate of 122% was too low and would encourage casualisation in the workforce.

South Australia

- [28] Following amendments to South Australia's *Shop Trading Hours Act 1977*¹⁷ in 2003—the effect of which was to increase the number of shops permitted to trade on evenings and weekends—an application was made by Australian Retailers Association to vary the *Retail Industry (South Australia) Award*¹⁸ to (amongst other claims) extend the span of ordinary hours.¹⁹
- [29] The award was varied to permit the working of ordinary hours until 9.30 pm on weeknights; however, if hours were worked beyond 6.30 pm on more than one night each week, it would need to be compensated by a loaded rate. Accordingly employees who worked in establishments with longer trading hours including trading after 12.30 pm on Saturdays (Schedule 1 employees)²⁰ were paid a higher hourly rate than those whose employer did not elect to do so (Schedule 2 employees). Schedule 2 employees were not entitled to a separate penalty rates for working ordinary hours on Saturdays. Casual employees under Schedule 1 only received the standard 20% casual loading for working on Saturday mornings however all Schedule 1 employees (including casuals) were entitled to the late night penalties.

- [30] The SAIRC observed that:

‘Weeknight Work

We consider that some modification to the weeknight work arrangements is warranted and in particular that the Award should permit the working of ordinary hours until 9.30 pm on weeknights. The requirements in this regard have changed and extended ordinary weekday hours are a feature of many interstate retail Awards where general weeknight trading is allowed. This feature can also be found in a number of broadly "comparable" Awards in this jurisdiction and some adjustment to the Award is appropriate given our general approach to the application as outlined earlier in this decision. However, other than the single late trading night that is presently contemplated under the Award and within the Schedule 2 rates, weeknight work in ordinary time beyond 6.30 pm should attract a loading that recognises the impact of such work upon employees.

¹⁶ For example, (1993) 144 QGIG 917

¹⁷ [Shop Trading Hours Act 1977 \(SA\)](#)

¹⁸ [AN150130 – Retail Industry \(South Australia\) Award](#)

¹⁹ [\[2004\] SAIRCComm 54](#)

²⁰ [AN150130 – Retail Industry \(South Australia\) Award Schedules 1 and 2](#)

In light of the nature of evidence regarding this element and the fact that the extent of such work following the 2003 amendments to the *Trading Hours Act* is still developing, we consider that we should be guided by the penalty established for late trading nights applicable to the Schedule 1 employers. The penalty will be 25 per cent of the Schedule 2 rate, noting that this rate already includes a loading to compensate for the inclusion of the single late night and Saturday afternoon work as part of ordinary time. In addition, we take into account that any such work in ordinary time will also be relevant for the purposes of Annual Leave, Sick Leave and Superannuation entitlements. Given that such work was formerly overtime paid generally at time and a half of the Schedule 1 rate, and also having regard to the increased roster flexibility to be afforded to the employers, we consider that the overall package evident in these arrangements is appropriate in balancing the competing interests.

These weeknight arrangements will also apply to casual employees with the further addition of the normal casual loading. This is the approach contained in the second of the SDA's alternative propositions.²¹

(emphasis added)

Western Australia

- [31] In Western Australia, the *Retail Trading Hours Act 1987* restricts trading hours for retailers subject to certain exemptions, e.g. small retail shops may apply for a certificate to trade outside the general trading hours. Restrictions on weekend and public holiday trade were considered in some detail in a 1993 decision by the Western Australian Industrial Relations Commission following a review of the *Retail Trading Hours Act*.²²
- [32] Over the years applications for a reduction in penalty rates on Sundays have been rejected and resulted in such work being characterised as overtime and thereby providing employees the right to refuse to work. (See, for example, the decision of the Western Australian Industrial Relations Commission re *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* in November 1993).²³
- [33] It should be noted that as Western Australia has not referred its industrial relations powers to the Commonwealth, many small businesses who operate as non-constitutional corporations continue to be covered by the State award.²⁴

3.3 Casual loadings

- [34] In 2000, a Full Bench of the Australian Industrial Relations Commission handed down a decision about casual employment provisions in the *Metal, Engineering and Associated Industries Award 1998* (the *Metal Industry Award*).²⁵ At the time, the *Metal Industry Award* was varied to increase the casual loading from 20% to 25%. The Full Bench's decision noted that:

²¹ Ibid at [223]–[225]

²² [\(1993\) 73 WAIG 3447](#)

²³ Ibid

²⁴ *The Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* [[SHO001](#)]

²⁵ *Metal, Engineering and Associated Industries Award, 1998* [[AP789529CRV](#)]. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - re application for variation of award, 29 December 2000, [[20001 AIRC 722](#)].

[20] Under the Award, casual employees appear to have more or less equal entitlement to overtime penalty rates for work outside the ordinary hours of the enterprise as worked by full-time employees.²⁶

(emphasis added)

[35] The Full Bench had considered, amongst other things, a claim to increase the casual loading from 20% to 30%. The decision considered a number of arguments about what was intended to be included in the casual loading. The Full Bench concluded:

14. Conclusion and determination of casual loading:

[198] For the reasons we have given in the preceding Sections, we are satisfied that paid leave; long service leave; and a component covering differential entitlement to notice of termination of employment and employment by the hour effects, should constitute the main components to be assessed in determining casual loading for the Award.²⁷

(emphasis added)

4. Part 10A Award Modernisation

4.1 Making the modern awards

[36] The award modernisation process took place under Part 10A of the *Workplace Relations Act 1996* from April 2008 to December 2009 and was conducted in accordance with a written request made by the Minister for Employment and Workplace Relations (the award modernisation request) to the President of the AIRC. All stakeholders and interested parties were invited to make submissions on what should be included in modern awards for a particular industry or occupation. Separate processes, including variously, the provision of submissions, hearings and release of draft awards, were undertaken in respect of the creation of each modern award to ensure parties were able to make submissions and raise matters of concern relevant to particular awards. By the end of 2009 the AIRC had reviewed more than 1500 federal awards and notional agreements preserving State awards (NAPSAs) and created 122 industry and occupation based modern awards.

[37] In making modern awards the AIRC had the task of balancing the interests of employees and employers throughout Australia after examining both federal awards and NAPSAs. In relation to penalty rates for Saturdays and Sundays and other conditions, the AIRC adopted a ‘*swings and roundabouts*’ approach where the most common provisions, or provisions with the broadest application, were seen as the most influential and were often adopted.²⁸ In the decision making the Retail Award the Full Bench stated:

‘We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments.’²⁹

²⁶ [2000] AIRC 722 at [20]

²⁷ Ibid at [198]

²⁸ [2009] AIRCFB 800, 2 September 2009

²⁹ Ibid at [286]

4.2 Retail sector

[38] Awards in the Retail sector were considered in the first or ‘priority’ stage of the award modernisation process. The awards considered in the making of the Retail Award are listed in [Appendix A](#).

Exposure draft

[39] An exposure draft for a Retail sector award was published on 12 September 2008³⁰ and contained the following provisions:

13.2 A casual will be paid both the actual hourly rate paid to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.

29.2 Overtime and penalty rates

...

(b) Evening work Monday to Friday (excluding shiftwork)

A loading of 25% will apply for ordinary hours of work within the span of hours after 6.00pm.

(c) Saturday work (excluding shiftwork)

A loading of 25% will apply for ordinary hours of work within the span of hours on a Saturday.

[40] The Statement issued on 12 September 2008 stated that it was proposed that all modern awards would provide a default casual loading of 25%.³¹ There is no detail provided about the setting of the Saturday and late night penalties however these were consistent with the *Retail Services Employees (State) Award (NSW)*³² and the draft award submitted by the SDA during the consultation process.³³

Modern award as at 19 December 2008

[41] Further consultation took place after the exposure draft was published and a number of employer organisations made submissions opposing the apparent requirement to pay casual employees both the casual loading and penalty rates for working on Saturdays and late nights.³⁴ Employer parties argued that under most pre-reform instrument casual employees were not entitled to such penalties.³⁵ In response to submissions from various parties amendments were made to the casual and penalty payment provisions as shown in red below. The Retail award was made in a decision on 19 December 2008 and commenced operation on 1 January 2010. The amended provisions were:

³⁰ [Exposure draft](#), 12 September 2008; see also Statement [\[2008\] AIRCFB 717](#)

³¹ [\[2008\] AIRCFB 717](#) at [20]

³² [AN120470](#)

³³ [SDA Parties draft](#) (as amended), 11 August 2008

³⁴ See for example [NRA submission](#), 10 October 2008 at paras 20–26; [Ai Group submission](#), 10 October 2008; [Transcript of 5 November 2008](#) at PN3368–3326

³⁵ [Ai Group submission](#), 10 October 2008 at pp. 34–35

13.2 A casual will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee. A casual employee is not entitled to the additional penalty payment for evening work and Saturday work in clause 28.4 but must be paid an additional 10% for work performed on a Saturday between 7 am and 6 pm.

28.4 Penalty payments

(a) Evening work Monday to Friday

A loading-of penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) Saturday work (~~excluding shiftwork~~)

A loading-of penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday. This does not apply to casuals.

[42] In making an award for the Retail sector the Full Bench acknowledged that:

‘Many of the submissions made to us from employers expressed concern at additional costs arising from provisions of the Retail industry exposure draft regarding hours of work, overtime, penalty rates, annual leave and allowances. We have revised these provisions having regard to the terms, incidence and application of relevant instruments for each sector. The result is provisions which more closely approximate to existing instruments for the relevant parts of the industry but which adopt different standards from one part to another. We have addressed submissions concerning the application of allowances and hours provisions and made other changes consistent with the approach to such matters in the main part of this decision.’³⁶

[43] While the Full Bench did not expressly explain the basis for reducing the loading for casual employees working in Saturdays from 50% to 35%, this appears to reflect the loading payable under the Victorian Shops award at that time.³⁷

[44] In relation to casual loadings the Full Bench found that:

‘Types of employment

In our statement of 12 September 2008 we indicated that we intended to adopt a standard loading of 25 per cent for casual employees. We received many representations in relation to that indication. For example, a number of employer representatives submitted that we should not adopt a standard casual loading or that if we did so 25 per cent was too high.

There is great variation in the casual loadings in NAPSAs and federal awards. In some cases the situation is complicated by the fact that casuals receive an annual leave payment, usually through an additional loading of one twelfth, although in most cases casuals do not receive annual leave payments. To take some examples, a casual loading of 25 per cent is common throughout the manufacturing industry, casual loadings in the retail industry vary from 15 per cent to 25 per cent. A loading of 25 per cent is very common, although not universal, throughout the hospitality industry. A number of pre-reform awards currently provide for a 33½ per cent loading and higher when the annual leave payment is taken into account. It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. We appreciate that there are casual employees in some industries in some States receiving loadings less than 25 per cent and we understand that employers of those employees will experience an increase in labour costs if the loading is standardised to 25 per cent. Equally, there will be reductions in labour costs where the loading, including the annual leave loading where it applies, exceeds 25 per cent currently.

³⁶ [2008] AIRCFB 1000, 19 December 2008, at [287]

³⁷ The Saturday loading was expressed as a dollar amount rather than a percentage.

In 2000 a Full Bench of this Commission considered the level of the casual loading in the *Metal, Engineering and Associated Industries Award 1998* (the Metal industry award). The Bench increased the casual loading in the award to 25 per cent. The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry. It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard.

In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.³⁸

- [45] From the final sentence in the quote above it appears that the Full Bench intended that the casual loadings and penalties would, unless expressly stated otherwise, be calculated on a cumulative rather than compounding basis.

Variations to modern award prior to operation

- [46] Prior to the commencement of the Retail Award applications were made by various employer associations and unions to vary the new modern award. In a decision of 29 January 2010 the Full Bench stated:

‘The NRA seeks variations to the hours of work provisions for retailers who traditionally trade longer hours by allowing ordinary hours to be worked until 11pm when trading hours extend beyond 9pm Monday to Friday or 6pm on Saturdays and Sundays. It relies on provisions of pre-reform awards and NAPSAs which provide for flexibility in hours limitations depending on the nature of the shops and their trading hours. Unfortunately the pre-reform Awards and NAPSAs are not uniform – or even broadly consistent. The flexibility in hours in the modern award is confined to newsagents and video shops. Other employer groups support the application. The SDA submits that such a reconsideration of matters determined during the award modernisation process should not be permitted.

We accept the logic that business needs reflected in the trading hours of the business should be a factor in establishing the limits on working of ordinary hours. We have accepted the concept in providing flexibility for newsagents and video stores. In a variety of ways it is also reflected in previous instruments. It is appropriate that a late night penalty applies to compensate for the social inconvenience of such hours, but requiring normal trading hours to be worked only on an overtime basis is generally not appropriate. We will insert a new cl.26.2(b)(iii) in line with the NRA application.³⁹

(emphasis added)

- [47] The order arising from this decision amended the definition of ordinary hours for late night retailers and clarified that the Sunday penalty rate in (then) clause 28.4(c) applies to casual employees in substitution for the casual loading in clause 13.2. No variations were made to clauses 13.2 (casual loading) or 28.4(a) or (b) (penalty rates for evenings and Saturdays) following this decision.

Transitional provisions

- [48] The Award Modernisation Full Bench introduced transitional arrangements in all modern awards that were to be used to phase in any increase or decrease in rates or loadings

³⁸ [2008] AIRCFB 1000, 19 December 2008, at [47]–[50]

³⁹ [2010] FWAFB 305, 29 January 2010, at [13]–[14]

(including casual loadings) over a five year period to minimise the impact of the introduction of modern awards on employers and employees.⁴⁰

- [49] An analysis of late night and Saturday penalty rates in a selection of pre-reform instruments is contained in [Appendix B](#). Some of the NAPSAs and pre-reform awards divided hours of work by function because of the broad award coverage and industry restrictions with regards to trading hours. While clause 27 of the Retail Award currently provides different ordinary hours for newsagencies, video shops and shops with extended trading hours, the Saturday and late night penalties apply to all sectors.
- [50] Any variations to the casual loading resulting from the introduction of the modern award were phased in by the transitional provisions with casual employees entitled to a loading of 25% from 1 July 2014 under clause 13 of the Retail Award.

5. Transitional Review 2012

- [51] The Transitional Review⁴¹ was quite separate from, and narrower in scope than, the current 4 yearly review being conducted under s.156 of the *Fair Work Act 2009* (Cth) (the Act). The scope of the Transitional Review was dealt with in a decision of the Commission in June 2012.⁴²

5.1 Penalty Rates Full Bench Decision

- [52] In March 2012, several parties lodged applications to vary penalty rate provisions contained in a number of awards ([AM2014/218 and others](#)). The Full Bench had before it, applications from employer organisations, individual employers and the SDA.
- [53] The substantive variations sought by the National Retail Association included seeking the removal of the 25% penalty payment for evening work under clause 29.4(a) of the Retail award.⁴³ Concurrently, Business SA sought clarification of the penalty paid to a casual employee on Saturdays.
- [54] At the time, the casual employment and Saturday penalty rates clauses in the Retail award were worded as follows:

13.2 A casual will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee. A casual employee is not entitled to the additional penalty payment for evening work and Saturday work in clause [28.4](#) but must be paid an additional 10% for work performed on a Saturday between 7 am and 6 pm.⁴⁴

⁴⁰ [\[2009\] AIRCFB 800](#)

⁴¹ Transitional review was conducted under Part 2 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

⁴² [\[2012\] FWAFB 5600](#)

⁴³ Application to vary Retail Award, National Retail Association, [9 February 2012](#) at p. 6

⁴⁴ Clause 13.2 of the *General Retail Industry Award 2010* as at 1 January 2010

(b) Saturday work

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday. This does not apply to casuals.⁴⁵

[55] Along with other claims to reduce Sunday penalty rates, the claim in relation to the evening penalty rates was dismissed.⁴⁶

[56] In its decision,⁴⁷ the Full Bench noted that the variation sought by Business SA⁴⁸ was unopposed:

‘This proposal by Business SA seeks clarification of the penalty paid to a casual employee on Saturdays. This is essentially a drafting issue and was not opposed by any party.

In our view the variation sought will remove a technical problem arising from the award modernisation process and on that basis we propose to vary the award in the terms sought.’⁴⁹

[57] A determination was issued by Justice Boulton, Senior Deputy President on 23 August 2013⁵⁰ which varied the Retail Award to correct what was identified as a technical problem with clauses 13.2 and 29.4(b) as follows:

Modern award as at 20 April 2017

(Incorporating [PR540640](#) ppc 23Aug13)

13.2 A casual employee will be paid both the hourly rate payable to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee. ~~A casual employee is not entitled to the additional penalty payment for evening work and Saturday work in clause 29.4 but must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.~~

29.4 Penalty payments

(a) Evening work Monday to Friday

A penalty payment of an additional 25% will apply for ordinary hours worked after 6.00 pm. This does not apply to casuals.

(b) Saturday work

“A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday.”

A penalty payment of an additional 25% will apply for ordinary hours worked on a Saturday for full-time and part-time employees. This does not apply to casuals. A casual employee must be paid an additional 10% for work performed on a Saturday between 7.00 am and 6.00 pm.

⁴⁵ Clause 28.4(b) of the *General Retail Industry Award 2010* as at 1 January 2010.

⁴⁶ [\[2013\] FWCFB 1635](#), 18 March 2013, at [235]

⁴⁷ [\[2013\] FWCFB 1635](#), 18 March 2013, at [243]

⁴⁸ Business SA Submission, [14 August 2012](#) at para 3.5

⁴⁹ Ibid, at [243]–[244]

⁵⁰ [PR540640](#)

Appendix A— Summary of Retail industry Awards

Pre-reform awards and NAPSAs considered during the making of the Retail Award

Note: The following list of awards has been extracted from Attachment B of the Award Modernisation decision issued by a Full Bench of the Commission on 20 June 2008.⁵¹

| Publication Title | Pub ID | Common Rule | State |
|---|----------|-------------|-------|
| Agricultural Produce, Fruit and Grain Stores' Award - Southern Division (Eastern District) 2002 | AN140007 | | QLD |
| Airport Retail Concessions Award 2003 | AP830231 | CRV | Fed |
| Avon Products Pty Limited (Brookvale) Consent Award 2004 | AN120038 | | NSW |
| Avon Products Pty Ltd (Brookvale) Clerical Employees Consent Award 1997 | AN120666 | | NSW |
| Avon Products Pty Ltd (Brookvale) Clerical Employees Consent Award 1997 | AN120666 | | NSW |
| Baking and Pastrycooking (Retail Stores) Award - Northern Division 2003 | AN140022 | | QLD |
| Baking and Pastrycooking (Retail Stores) Award - Southern and Mackay Divisions 2002 | AN140023 | | QLD |
| BBC Hardware Limited Retail Award 2001 | AP811337 | | Fed |
| Bi-Lo Pty. Ltd. Retail Award 2002 | AP817663 | | Fed |
| Bootmakers and Heel Bar Operatives, &c. (State) Award | AN120060 | | NSW |
| Brisbane Markets Award - 2003 | AN140042 | | QLD |
| Butchers, Retail (State) Award | AN120096 | | NSW |
| Chanel (Australia) Pty Limited (State) Award | AN120115 | | NSW |
| Chemists (Australian Capital Territory) Award 2000 | AP772207 | CRA | Fed |
| Clerical Employees in Retail (State) Award | AN120132 | | NSW |
| Clerical Employees in Retail (State) Award | AN120132 | | NSW |
| Clerks (Retail Industry) Award | AN150038 | | SA |
| Clerks (Retail Industry) Award | AN150038 | | SA |
| Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947 | AN160080 | | WA |
| Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947 | AN160080 | | WA |
| Coles Myer Logistics Pty Ltd Goulburn and Somersby D.C. Consolidated Award 2004 | AN120147 | | NSW |
| Coles Myer Occupational Superannuation Award 1992 | AP772301 | | Fed |
| Coles Supermarkets Australia Pty. Ltd. Retail Award 2002 | AP817683 | | Fed |
| Commercial Sales (Victoria) Award 1999 | AP772623 | CRV | Fed |
| Commercial Travellers (A.C.T.) Award 2000 | AP805733 | | Fed |
| Commercial Travellers and Sales Representatives' Award 1978 | AN160084 | | WA |
| Commercial Travellers Award | AN150042 | | SA |
| Commercial Travellers' Award - State 2003 | AN140076 | | QLD |
| Commercial Travellers, &c., (State) Award | AN120149 | | NSW |
| Community Pharmacy (State) Award 2001 | AN120152 | | NSW |
| Community Pharmacy Award 1998 | AP773671 | CRV | Fed |
| Fast Food Industry Award - South Eastern Division 2003 | AN140113 | | QLD |
| Fast Food Industry Award - State (Excluding South-East Queensland) 2003 | AN140114 | | QLD |
| Fast Food Outlets Award 1990 | AN160127 | | WA |
| Federal Meat Industry (Retail and Wholesale) Award 2000 | AP805114 | CRV | Fed |
| Fishery Employees' Award - State 2003 | AN140116 | | QLD |
| Foodland Associated Limited (Western Australia) Warehouse Award 1982 | AN160132 | | WA |
| Fruit and Produce Market Employees Award No. 50 of 1955 | AN160135 | | WA |
| Harris Scarfe Limited Employees Award, 2003 | AP823645 | | Fed |

⁵¹ [2008 AIRCFB 550](#)

| Publication Title | Pub ID | Common Rule | State |
|--|---------------|--------------------|--------------|
| J. Blackwood and Son Limited Storemen and Packers (State) Award 1994 | AN120268 | | NSW |
| KFC National Enterprise Award 2001 | AP807485 | | Fed |
| Kmart Australia Ltd Award 2002 | AP817693 | | Fed |
| Licensed Establishments (Retail and Wholesale) Award 1979 | AN160192 | | WA |
| Liquor and Accommodation Industry - Wine and Spirit Stores - Award 1999 | AP787002 | | Fed |
| Master Grocers' Association and the Shop, Distributive and Allied Employees Association Award 2005 | AP839407 | | Fed |
| Meat Industry (Western Australian Lamb Marketing Board) Award, 1981 | AN160203 | | WA |
| Meat Retailing Award | AN170059 | | TAS |
| Milk and Cream Distributors and Vendors' Award - Northern and Mackay Divisions 2003 | AN140173 | | QLD |
| Motor Vehicle Salesperson (State) Award | AN120352 | | NSW |
| Motor Vehicle Salespersons Award - State 2003 | AN140183 | | QLD |
| Myer/Grace Bros Stores Award 2002 | AP818144 | | Fed |
| National Fast Food Retail Award 2000 | AP806313 | CRV | Fed |
| Officeworks Superstores Pty. Ltd. Award 2002 | AP817698 | | Fed |
| Parents and Citizens and Other Associations Retail Award - State 2004 | AN140200 | | QLD |
| PFD Food Services (Qld) Pty Ltd Sales and Distribution Employees Enterprise Award | AN120415 | | NSW |
| Pharmacy Assistants (State) Award | AN120416 | | NSW |
| Pharmacy Assistants' Award - State 2003 | AN140207 | | QLD |
| Pizza Hut - SDA National Employee Relations Award 2000 | AP792506 | | Fed |
| Post Fulfilment OnLine Consent Award 2004 | AP838502 | | Fed |
| Produce Award | AN170083 | | TAS |
| Queensland Coles/Woolworths Supermarket Meat Employees' Award 2002, The | AP819360 | | Fed |
| Quick Service Food Outlets (QSFO'S) Award - State 2004 | AN140250 | | QLD |
| Restaurants Industry - McDonalds's - Australian Capital Territory - Award 2000 | AP811475 | | Fed |
| Restaurants Industry - McDonalds's - South Australia/Northern Territory - Award 2000 | AP795822 | | Fed |
| Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000 | AP794740 | CRA | Fed |
| Retail Industry (SA) Award | AN150130 | | SA |
| Retail Industry (State) Superannuation Award | AN120716 | | NSW |
| Retail Industry (State) Training Wage Award | AN120469 | | NSW |
| Retail Industry Award - State 2004 | AN140257 | | QLD |
| Retail In-Store Bakehouse Award | AN150129 | | SA |
| Retail Pharmacists' Award, 2004 | AN160277 | | WA |
| Retail Pharmacy Award | AN170087 | | TAS |
| Retail Services Employees (State) Award | AN120470 | | NSW |
| Retail Take-Away Food Award - South-Eastern Division 2003 | AN140258 | | QLD |
| Retail Trade Industry Sector - Minimum Wage Order - Victoria 1997 | AP795238 | | Fed |
| Retail Trades Award | AN170088 | | TAS |
| Retail, Wholesale and Distributive Employees (NT) Award 2000 | AP794741 | CRN | Fed |
| S.D.A Western Australian Community Pharmacy - Pharmacy Assistants Award 2000 | AP806529 | | Fed |
| SDA - Campbells Cash & Carry Pty Ltd - Victoria - Award 2003 | AP827938 | | Fed |
| SDA Hungry Jack's Victoria Award 2002 | AP818850 | | Fed |
| SDA/Pizza Hut (South Australia) Award 2002 | AP814341 | | Fed |
| SDAEA - Toys R Us (South Australia) Award 2002 | AP817958 | | Fed |

| Publication Title | Pub ID | Common Rule | State |
|---|---------------|--------------------|--------------|
| Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977, The | AN160292 | | WA |
| Shop Distributive and Allied Employees Association - Liquorland (Australia) Pty Ltd Consent Award 2002 | AP817697 | | Fed |
| Shop Distributive and Allied Employees' Association - Red Rooster Award 2002 | AP819039 | | Fed |
| Shop Distributive and Allied Employees' Association Toys "R" Us Western Australia Award 2002, The | AP817961 | | Fed |
| Shop Distributive and Allied Employees' Association/Paris Miki Pty Ltd Optical Shop Associates Award 2001 | AP811334 | | Fed |
| Shop Employees (Catholic Personal/Carers Leave) (State) Award | AN120498 | | NSW |
| Shop Employees (State) Award | AN120499 | | NSW |
| Shop, Distributive and Allied Employees' Association - Hardware Retail Industry Award 1999 | AP798407 | CRV | Fed |
| Shop, Distributive and Allied Employees Association - Victorian Pharmacy Assistants Award 2000 | AP796289 | CRV | Fed |
| Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 | AP796250 | CRV | Fed |
| Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 | AP796250 | CRV | Fed |
| Shop, Distributive and Allied Employees' Association Public Holidays Interim Award 1999 | AP798478 | | Fed |
| Shop, Distributive and Allied Employees Association/Toys "R" Us (Victoria) Award 2002 | AP817956 | | Fed |
| Shop, Distributive and Allied Employees Association/Toys R Us (NSW) Award 2002 | AP817959 | | Fed |
| Stewworkers Campbells Cash and Carry Pty. Limited (NSW), NUW NSW Branch Award 2001 | AN120515 | | NSW |
| Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982 | AN160303 | | WA |
| Sydney Markets Award 2003 | AN120527 | | NSW |
| Target Australia Pty Ltd Award 2002 | AP817699 | | Fed |
| The EnergyAustralia Appliance Sales Consent Award 2003 | AN120557 | | NSW |
| Transport Industry Retail (State) Award 1999 | AN120618 | | NSW |
| Transport Workers (Mobile Food Vendors) Award 1987 | AN160321 | | WA |
| Van Sales Employees' (State) Award | AN120629 | | NSW |
| Van Sales Persons Award - Northern and Mackay Divisions 2002 | AN140311 | | QLD |
| Van Salespersons' Award - Southern Division 2003 | AN140312 | | QLD |
| Video Industry (South Australia) Award 2000 | AP822182 | | Fed |
| Video Shops (A.C.T.) Industrial Agreement 1992, The | AP801855 | | Fed |
| Voluntary Work - Extended Trading Hours - Non-Exempt Shops - Award - State | AN140314 | | QLD |
| Wholesale and Retail Trade - The Disney Store Award 2002 | AP815963 | | Fed |
| Wholesale Fruit and Vegetable Employees' (State) Award | AN120644 | | NSW |
| Wholesale Fruit and Vegetable Market Employees (Newcastle, &c.) Award | AN120645 | | NSW |
| Wine and Spirit Stores Award - South-Eastern District 2002 | AN140316 | | QLD |
| Woolworths (South Australia and Northern Territory) Award, 2003 | AP825337 | | Fed |
| Woolworths Distribution Centre Award 2004 | AP837192 | | Fed |
| Woolworths Limited (WA Supermarkets) Award 2004 | AP835548 | | Fed |
| Woolworths Limited and Woolstar Pty Limited Yennora, Moorebank, Helles Ave D.C. Award 2003 | AN120654 | | NSW |
| Woolworth's Supermarkets and Warehouse Administration (State) Award | AN120653 | | NSW |

Appendix B—Penalty rates in pre-reform instruments

NOTE: This comparison contains late night/evening and Saturday penalty rates only.

The analysis is for a simple comparison only – readers should refer to the instruments for details of monetary allowances and exceptions.

See also comparison provided by National Retail Association & another during Award Modernisation proceedings – [10 October 2008](#) at para 23

| | | Evening rate (other than shiftworkers) (Monday-Friday) | | | | Saturday rate (other than shiftworkers) | |
|----------------|---|---|---------------|-----------|--|---|---|
| | | Ordinary casual loading | Span of hours | F/T & P/T | Casual (incl. casual loading) | F/T & P/T | Casual (incl. casual loading) |
| Modern | <i>General Retail Industry Award 2010</i> [MA000004] | 25% | After 6.00pm | 125% | 125% | 125% | 135% (7.00am–6.00pm) ¹ |
| Federal | Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000 AP796250 (clauses 10.4 & 18.1) | 25% | After 6.00pm | 125% | 125% (some exceptions in clause 10.4) | Monetary allowance of approx. 36% | Various additional rates in clause 10.4; equivalent to loading of approx. 36% |
| | Retail, Wholesale and Distributive Employees (NT) Award 2000 AP794741 (clause 28.7) | 20% | After 6.30pm | 125% | 145% | Monetary allowance | 125% + Monetary allowance |
| | Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000 AP794740 (clauses 28 & 13.4) | 15% | After 6.00pm | 125% | 165% | Monetary allowance | Loaded hourly rate x 115% |
| NSW | Retail Services Employees (State) Award AN120470 (Appx A, cl. 14) | 15% ² | After 6.30pm | 125% | 115% (per 'General shops') | 125% | 115% + \$5.90 per day (per 'General shops') |
| Qld | Retail Industry Award - State 2004 AN140257 (clause 6.1) | 23% | After 6.00pm | 125% | 123% | 125% | 123% |

| | | Evening rate (other than shiftworkers) (Monday-Friday) | | | Saturday rate (other than shiftworkers) | | |
|------------|---|---|---------------|-----------------|--|--------------------|---|
| | | Ordinary casual loading | Span of hours | F/T & P/T | Casual (incl. casual loading) | F/T & P/T | Casual (incl. casual loading) |
| SA | Retail Industry (SA) Award AN150130 (clauses 6.3, 4.4, Sched 1 & 2) | 20% | After 6.00pm | 125% | 120% 125% if employer does not usually trade evenings | 125% | 125% ³ |
| Tas | Retail Trades Award AN170088 (clauses 12 & 21) | 20% | After 6.30pm | Loaded rate | 120% + loaded rate | Loaded rate | 120% + loaded rate |
| WA | Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977, The AN160292 (clauses 7, 9, 13 & 48) | 20% | After 6.00pm | \$3.39 per hour | 120% + \$3.39 per hour | Overtime may apply | 120% applying to the average of weekday and Saturdays (see clause 7(5)) |

¹ Hours worked outside the ordinary span will be classified as Overtime and attract a loading of 150% for the first three hours and 200% thereafter.

² 1/12th annual leave loading may also apply.

³ This calculation is unclear in the award and is further complicated by the fact that the different schedules provide different base rates.