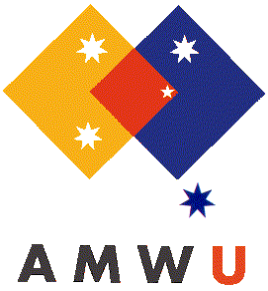

s.156 Review of Modern Awards

AM2014/75

Submissions in reply Revised Exposure Draft

COVER SHEET

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1. The Commission's decision of 23 October, 2015[1] (the October Decision) determined various issues regarding the exposure drafts in Group 1C-1E awards and included directions regarding submissions and submissions in reply. It is the expectation[2] of the Full Bench that the matters will be finalised on the papers..

2. The Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award) is in Group 1C and the following submissions are in reply to submissions made by various parties regarding the republished exposure draft of the Manufacturing Award dated 4 November, 2015.

3. The AMWU has made a significant number of submissions regarding the Manufacturing Award and matters impacting on the Manufacturing Award arising from the review of 1A and 1B awards. A list of the AMWU's submissions is attached and marked 'A". We continue to rely on those submissions. Before addressing specific submissions we wish to address the issue of the AIG attempting to re-agitate matters already settled and which the AIG had abundant opportunity to address. The matters are firstly, the impact on employee entitlements in specified clauses of replacing the Manufacturing Award expression "ordinary time with "ordinary hourly rate and subsequently 'applicable rate of pay', and secondly, all purpose allowances and the casual loading

4. We take the time to address this issue as procedural fairness dictates that parties should be able to rely of the proper procedures and directions of the Commission and parties should also be able to rely on the decisions of the Commission without being required to readdress matters recently settled in the absence of cogent reasons establishing why the decision should not be applied to the Manufacturing Award. Prior to addressing this issue however we raise the matter of payment expressed as "ordinary hourly rate' and the definition of "casual ordinary hourly rate".

[1] [2015] FWCFB 7236
[2] Ibid @ [358]

Ordinary Hourly rate/Casual Ordinary Hourly Rate

5. . Many of the Manufacturing Award (and other) exposure draft entitlements are expressed vis 'ordinary hourly rate', for example:

> **30.2 Payment for overtime—other than continuous shiftworkers**
>
> (a) Employees will be paid the following rates for overtime worked (except as otherwise provided in clauses 30.2(b), 30.7, 30.5, 30.6):
>
> (i) 150% of the ordinary hourly rate for the first three hours; and
>
> (ii) 200% of the ordinary hourly rate thereafter.

6. With the inclusion of a definition at Schedule H for "casual ordinary hourly rate' an ambiguity arises as to whether a casual would receive overtime, or other payments expressed as a multiple of 'ordinary hourly rate or at 'ordinary hourly rate' at their "casual ordinary hourly rate" or the specified "ordinary hourly rate". As we previously argued, the AIG fact sheets state and the October decision confirmed the casual loading is for all purposes and applies to overtime, shift and other payments. It is important to have casual employee's entitlements expressed clearly in the exposure draft. This could be achieved by adding "/casual ordinary hourly rate" to relevant clauses as per the below:

> (a) Employees will be paid the following rates for overtime worked (except as otherwise provided in clauses 30.2(b), 30.7, 30.5, 30.6):
>
> (i) 150% of the ordinary hourly rate/casual ordinary hourly rate for the first three hours; and
>
> (ii) 200% of the ordinary hourly rate/casual ordinary hourly rate

Applicable Hourly Rate

7. The Commission determined that the issues raised regarding replacing the term 'ordinary time rate' with 'ordinary hourly rate' would be best solved through the use of the term 'applicable rate of pay' in specific clauses. We support that approach however propose an amendment clarifying the intent of the definition to not disturb the status quo:

Applicable rate of pay means the ordinary hourly rate plus applicable penalties, relevant allowances and relevant loadings

8. The AMWU supports the expectation of the Commission that the matters relating to the exposure draft will be settled on the papers given the extensive opportunities, both written and oral made available to parties to address the Commission on these matters. This particular submission applies to all the matters but specifically to the AIG submission that procedural fairness requires that AIG be given an additional opportunity to put forward detailed evidence and submissions on the use of the term "applicable hourly rate".[3] The Commission's October decision[4] provided parties the opportunity to address the issue now and the history of the case identifies that the AIG has had previous opportunities to respond to the issues identified by the AMWU and recorded in the October decision.

9. In addition to the numerous submissions, hearing and conferences before the Commission the AMWU discussed the issue of the impact of replacing the expression "ordinary time" with "ordinary hourly rate" on entitlements with the AIG and other employer groups at negotiations organised by the AMWU involving both Union and employer parties working through exposure draft issues. The AIG was well apprised of the issue and didn't see anything amiss with the issue raised by the AMWU regarding employee's entitlements being diminished. Refer Attachment "B" for summaries provided to the AIG and the Commission in conferences chaired by the Commission and conferences hosted by the AMWU. The summaries identify that the issue of diminished entitlements agitated by the AMWU has been before the AI Group, ABI and Business SA for many months prior to the October decision.

10. The issue the Commission has resolved by the inclusion of the term "applicable hourly rate" was identified by the AMWU in 2014 and appears at Item 35 of the AM2014/75 Summary of

[3] Ibid @ [105]
[4] Ibid @ [106]

submissions dated 14 November, 2014 [5] where the AIG 's submission regarding the diminution of entitlements identified by the AMWU was summarised as "*Ai Group has not identified any problems with terminology in exposure draft*";26 November, 2014[6] (where the item was linked to Item 37);16 December, 2014 where the parties agreed "*that this is a significant issue*"[7]; 19 February, 2015 where an additional note following a conference before the Commission was added identifying Item 35 "*Remains a significant issue and will be subject to further submissions. 19Feb15"* and Item 37 *"This issue is part of the all purpose rate issue being heard on 24 and 25 March 2015. 19Feb15,*[8] and 8 May, 2015[9] where Item 37 was updated noting "See *further submissions of AMWU dated 21-Apr-15* ". The AMWU's submission of 21 April, 2015 referred to our submission of 11 March, 2015 and went directly to the issue of the diminution of employee entitlements including the identification of specific clauses where this would occur on the then exposure draft terminology of "ordinary hourly rate" in the clauses specified.

11. The AMWU's submissions identified two issues. The first issue related to the meaning of the Manufacturing Award expression "ordinary time" applying to overaward payments. This issue was resolved by the Full Bench in the July decision.[10]. The second issue related to the issue of a diminution of entitlement within specific clauses. This issue is resolved through the October decision with parties being given opportunity to identify any issues regarding the revised exposure draft.

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[5] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-summary-manfuacturing.pdf

[6] FWC Further revised Summary 26/11/14 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-revised-sub-summary-manufacturing.pdf

[7] Summary 16 December, 2014 , Item 35 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-furtherrevised-sub-summary-manufacturing.pdf

[8] Summary 19 February, 2015 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-revised-sub-summary-manufacturing-amended.pdf

[9] Summary 8 May, 2015 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-revised-sub-summary-manufacturing-further-amended-8May15.pdf

[10] [2015] FWCFB 4658 @[96

12. The AMWU's submission of 21 April, 2015 referred to our submission in the 1A and 1 B awards regarding "ordinary hourly rate" where we identified the issue as it related to specific Manufacturing Award clauses. The AIG did not respond instead relying on its earlier submissions (Item 35) that replacing award terms linked to 'time' with 'ordinary hourly rate' was not a problem.

> "21. Entitlements in the exposure draft at Clause:
>
> - 14.5 Working Through Meal Break (38.4 MA10)
> - 15.1(d) Ship Trials (39.4 MA10)
> - 30.10 Rest Break on Overtime (40.10 MA10)
> - 30.13 Standing By (40.6 MA10)
>
> Diminish the current entitlement as they are expressed as paying the "ordinary hourly rate" as defined, excluding weekend, shift and other loadings or penalties. The current entitlement to the matters identified above requires payment at the "ordinary time rate""[11].

13. The AIG in submission and transcript[12] chose to respond to the overaward issue however did not respond to Issue 2, the diminution of entitlement regarding specific clauses other than to say it did not perceive there to be a problem. The transcript of 24 March 2015 records

> PN154 (MS Taylor)
>
> In relation to the issue of whether awards should be clarified to remove the time expression, our submission is that they should not. We point in our submission to the various ways that time is used in the award at the moment and we also point to the way in which simply removing time and replacing it by the term "ordinary hourly rate" can have some unintended consequences and one of those is that there is a diminution of the award entitlement. So we believe that there can be no

[11] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-1160315.pdf

[12] https://www.fwc.gov.au/documents/documents/Transcripts/20150324_AM201464.htm

general replacement of the term "ordinary hourly rate" where previously time rate has occurred. (emphasis added)

14. The matters determined by the Commission in the October decision have been the subject of hearing. The AIG referred to their "extensive written submissions" [13]and argued that the status quo should prevail. The AIG had the opportunity and did, make submissions regarding the expression "ordinary time":

> PN82
>
> JUSTICE ROSS: Okay. In relation to the rate at which penalties and loadings are referrable, this is 2.3 of your submission, your preference is the percentage of the minimum rate specified in the award, or whatever the expression is in each relevant award, rather than expressions such as double time, et cetera, because you say the risk is that would regulate over award payments, which is a matter beyond - at least this is how I understand your framework - your submission. To do that would be to go beyond what the legislation conceives as being the role of modern awards to provide a fair and relevant safety net, is that the essence of it?
>
> PN83
>
> MR FERGUSON: That's the essence of it. I think the first point is we raise those in circumstances where it might be viewed as unclear what the effect of the current provision is, which is - it's just a reference to double time or time and a half, but there's no explanation of what that relates to.
>
> PN84
>
> Now, that firstly throws up an issue about is that to be read in the context of the award, which sets specific rates? And we'd say well, yes it is, and that's what the reference should be to. So it enlivens an issue about the need for the award to be simple and easy to understand and, to be frank, just clearer, as a first issue. Secondly, it does enliven the issue of what is the role of awards now? Obviously we maintain the view that they should be a minimum safety net of terms and conditions. Of course they can only include terms that are necessary to achieve that modern award's objective of reflecting a fair and relevant set of minimum conditions.

[13] Transcript 24 March 2015,@ [29]

PN85

So your Honour's right. We say the legislation stops it going further. We, nonetheless, say that that's the way the awards work anyway and then we point to other complexities around the operation of enterprise bargaining, for example, if we didn't have them operate in that manner.

15. The AIG chose to make additional oral submissions regarding the expression of "ordinary time" and its application to minimum as opposed to over award rates however chose not to make additional submissions regarding the issue of the diminution of entitlements identified by the AMWU regarding matters subsequently identified in the October decision to be covered by the term "applicable award rate". The AMWU made additional oral submissions including matters subsequently covered by the October decision The AI Group's position to the identification of the loss of entitlement remained as identified in the summary *"Ai Group has not identified any problems with terminology in exposure draft"*.

16. The AIGroup submission regarding procedural fairness is not supported by the facts. It would however be procedurally unfair to enable the AIG to re-agitate determined issues simply because it did not avail itself of the opportunity to do so when the matter was being considered instead relying in its earlier submissions. Granting additional opportunities for the AI group to press their claim is unfair to other parties and disturbs the orderly process of the Award review. Granting yet further opportunities to the AIG encourages parties dissatisfied with the Commission' determinations to argue they should be heard post decision as their pre decision submission/s failed to secure the desired outcome.

17. The AFEI [14]and ABI and NSW Business Chamber[15] generally oppose the inclusion of 'applicable rate of pay'. The AFEI submission indicates an error in understanding of the issue raised by the AMWU and determined by the FWC. Applicable rate of pay would not operate to deliver a "penalty on a penalty". Applicable rate of pay relates to the actual rate of pay an employee is entitled to under the award for working their ordinary time, as

[14] Submission dated 23 November, 2015
[15] Submission dated 20 November

opposed to overtime, hours. The Award already provides that shift loadings are not included in the calculation of overtime (refer for example Clause 23, 29.2(h) (ii) Exposure Draft).

18. The ABI oppose the inclusion of 'applicable rate of pay' and consider without providing any argument that the term results in a substantive change. The ABI was also represented in the many conferences with the AMWU, before the Commission in conference for AM2014/75, made submissions and submissions in reply vis the Manufacturing Award and appeared in and made both written and oral submissions in AM2014/64 and ORS. Our submissions above regarding the history of the matter are relevant to the ABI claim that an additional case be run. The ABI had the opportunity to identify "Item 35" as a substantive issue and did not - the ABI have had various opportunities to address the issue and have not taken the opportunity. Natural Justice does not entail a "junket' of justice where parties dissatisfied with the outcomes can continue to agitate matters determined. The AIGroup have made comprehensive submissions on the papers, the ABI also had an opportunity to put their position on the papers.

Issues of general concern raised by the AI Group

1. The characterisation of premiums payable and the manner in which the premium is expressed

19. The issues raised by the AIG are interesting albeit boxing at shadows. The identification of the minimum classification rates within the body of the Award and the wage schedules should avoid the problems AIG suggest could arise.

20. If there are specific issues (notwithstanding the issues raised by the AIG at paragraphs 17-18, 23-29 as they are solved by firstly the wage schedules which specify 100% of the minimum or ordinary rate and the amount payable under the various loadings and secondly reading the award as a whole), those issues can be dealt with where they can be identified, not just as an imaginable possibilities but as tangible ambiguities.

2. The ordinary hours of work and s.147

21. The AMWU find the AIG's submissions here perplexing given the AIG opposed the AMWU's submission that the exposure draft should specify firstly a clause identifying that the provisions of the award applied to casuals except where otherwise specified and secondly a provision identifying when a casual became entitled to overtime.

22. The Commission determined not to include a provision identifying that the terms of the award applied to casuals unless specified[16]. The hours of work provisions[17] are written to cover all employees covered by the award and the identification of the ordinary hours of work for casuals are included within those provisions. Awards may contain specific hours of award provisions for different categories of workers however generally an Award's hours of work provisions satisfy s.147 of the Act.

3. Application of penalties and loadings to the ordinary hourly rate

23. The AIG attempt to re-agitate the issues determined by the July[18] and September[19], 2015 (casual loading) decisions in the guise of an "award by award" review they argue was the outcome of the July and September decision.

24. We do not argue that the July decision left open the opportunity to review the text of specific clauses to see whether they departed from "established practise"[20] however we do not see this as carte blanche to re-open the review on this issue, especially where earlier submissions with regard to specific Awards have argued a 'compounding' as opposed to "cumulative" application of all purpose allowances[21]., see for example the AMWU submission regarding the Manufacturing Award:

> 103. The intent in the manufacturing award is that employees receive their all purpose allowances when on leave provided for in the NES and Award.. This is manifest at Clause 27.1 of the exposure draft.
>
> 104. The AIG/FWO Fact Sheet (refer Attachment C1 @ Allowances) also provides that "An 'all-purpose' allowance is added to the base rate of pay, forming a new higher rate of pay. Any shift penalties, loadings, overtime or leave payments (are calculated

[16] October decision @ 91
[17] See for example Clause 13.2 Ordinary Hours of work- day work of the Manufacturing Award Exposure Draft
[18] [2015] FWCFB 4658decision decision @[47]
[19] [2015] FWCFB 6656
[20] July Decision @[47]
[21] AMWU republished submission 29 October, 2014

on this higher rate)"[22]. (The text in brackets was inadvertently omitted from the quote however appears in the AIG document).

25. The AIG argue [23]that their submissions regarding "all purpose" dealt with general views rather than specific provisions found in Awards in sub-groups 1C-1E however the review of the 1 C -1E awards ran in tandem with the consideration of the general "all purpose" and "ordinary /minimum rate" issue. The revised drafts reflect the impact of the July and September decisions.

26. Further the AIG argue[24] that where the current award provision requires the application of a premium to an award rate that does not include any all purpose allowances an exposure draft deviating from this approach creates a substantive change. This is a broad brush statement ignoring the context that Awards such as the Manufacturing Award have some all purpose allowances applying to some employees in some circumstances and the former expression where penalties applied to a "time" rate captured these all purpose payments.

27. The AIG opposed the introduction of a definition of "all purpose" in the Manufacturing Awards arguing:

> 137. The term 'all purpose' has been a feature of the Award for many years, even prior to award modernisation, and it is well understood in the context of being for 'all purposes of the award[25]'.(emphasis added).

28. In transcript of 17 November, 2014 the AIG submitted that the minimum/ordinary hours matters arising in 1A and 1B had relevance to the Manufacturing Award:

> PN55
>
> MS VACCARO: Thank you, your Honour. I guess as a starting point we appeared in the hearings in the 1A and 1B proceeds and a lot of issues that arise in this award and other awards generally we made submissions on before so I don't seek to repeat

[22] Ibid paragraph 103-104
[23] AIG Submission dated 20 November, 2015 @ 41
[24] Ibid 43
[25] AIG submission 11 November, 2014
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201467andors-sub-AiG-121114.pdf

those and our submissions are self-explanatory I hope, but if you have got any questions please feel free to ask. So in terms of those general matters we have identified the issues such as the pay slip matter, it runs back into the NES summary issue which we will touch on tomorrow as well and I will use the opportunity tomorrow to make further submissions about what you just raised, and then there's also the all-purpose issue which I've got nothing further to add, aside from a submission I will make in respect of the manufacturing award and we will deal with that later today, and the minimum versus the ordinary rate issue and I suspect this was put by my colleague at that hearing but just to raise before your Honour because you raised that issue. We would support a position that would replicate what's in the current award. If the current award refers to a minimum hourly rate or the base rate of pay then we think that should be reflected in the exposure draft. Where the current award does reflect the ordinary rate then we are happy for that to appear in the exposure draft. So it's just the presentation of the current – of what currently appears in the award[26]. (emphasis added)

29. The AIG may not agree with the Manufacturing Award Exposure draft and the expression of "ordinary" as opposed to "minimum" rate signifying the inclusion of all purpose payments however it is not correct to say the issue has not been reviewed in the context of the Manufacturing Award both within AM2014/75 and in the context of the 1A and 1B review AM2014/64 and Ors.

30. We will address this issue further in reply to AIG's specific submissions on the Manufacturing Award however note that the AIG have made no submission regarding specific 'all purpose' payments ' and their inclusion or otherwise in an employee's 'ordianry rate.

4. Application of the casual loading

31. The AIGroup seek to re-agitate this issue as well, arguing the same award by award review and that specific awards were not considered when the September decision was made[27]..

[26] AM2014/75
[27] AIG Submission dated 20 November, 2015 2 [51]

32. The AMWU rejects this submission. The September decision identifies that the AMWU made submissions regarding calculation of the casual loading in respect of not only the Manufacturing Award but also the Graphic Arts, Printing and Publishing Award2010 and the Food, Beverage and Tobacco Manufacturing Award 2010 as awards which would be affected[28].

33. The AIG submit that the general rule established by the Full Bench in the September decision should not apply to 4 awards, including the Manufacturing Award[29]. In support of their claim they quote the AMWU out of context arguing that we submitted that the 2008 decision demonstrated that there may be a departure from a general rule regarding the application of the casual loading to the ordinary rate in particular awards. The AMWU's submission did not apply to whether the casual loading applied to the "ordinary rate" but to that part of the 2008 decision which provided that the general rule created a "cumulative" rather than "compounding effect" when applying penalties and the casual loading :

> "….Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate"[30]

34. .This is clear from the AMWU submission recorded in transcript of 27 August, 2015[31]:

> PN765 Ms Taylor
>
> We rely on the submissions of the AWU and CFMEU for question 2. In relation to question 3, we say that the Full Bench decision in 2008, which has been oft quoted here in relation to the general rule applying, is an indication that the Full Bench has determined that, even where a general rule may apply, there is certainly provision for different arrangements to apply in other Awards.
>
> PN766
>
> And in relation to that particular matter, for example, the general rule does not apply in the Manufacturing Award where the application of the casual loading to any other penalty arrangement is a compounded effect and there is not the two

[28] [2015]FWCFB 6656 @ [89]
[29] AIG Submission 20 November,2015 @ [57]
[30] [2008]AIRCFB 1000 @ [50]
[31] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/20150827_AM201464.pdf

separate calculations to be made. But we do say that the decisions is nevertheless authority that you can have a general rule and it be varied or other circumstances arise in other modern awards. That's all I have, your Honour.

35. The transcript above reinforced our written submission of 3 August, 2015 that:

> **30.** The 2008 Full Bench initial stage award modernisation decision confirmed the standard approach to be applied to casual loadings when it determined that the loading was to be applied to the "ordinary rate". The bench stated: [50] 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 (Emphasis added)
>
> **31**. We note that the Full Bench did not require the "general rule" to apply consistently and awards, such as the Manufacturing Award, which have a "compounding" application continued to operate in that manner. The Full Bench statement however is authority for the standard position and the application of casual loading to ordinary, rather than minimum rates. As submitted above, the jurisdictional issues decision established that the review would proceed on the basis that previous full bench authority should be followed.

36. Not only is the AIG submission regarding the "general rule"misleading the above extracts and the Commission's decision establish that the Manufacturing Award, Graphic Arts and Food Awards were before the Commission and further that where the casual loading is expressed to be for "all purposes", the formula is a compounding rather than cumulative equation. The issue of the application of the casual loading in the Manufacturing Award was before the Full Bench and has been determined.

37. We address this issue in more detail in response to the AIG's specific submission regarding the Manufacturing Award.

5. Application of penalties and loadings to over-award payments

38. The July decision determined the issue of the term to be used replacing reference to terms such as "double time" in the context of over award payments. The AIG's submission[32] however is further evidence that the issue of Award terms expressed as "time" was fully before the parties and the Commission and AIG's protest at the determination of "applicable award rate" coming from nowhere is without substance.

6. Schedules summarising hourly rates of pay

39. The AIG have raised concerns regarding the NOTE to be included in the wage schedules The AMWU also raised concerns[33] regarding the NOTE identifying that the NOTE inserted did not reflect the Commission's decision[34]. We rely on our submission that the NOTE determined by the Commission in the July decision is appropriate.

AIG Submission regarding the Manufacturing and Associated Industries and Occupations Award 2010

Applicable rate of pay

40. Our submissions above at paragraphs 3-14 address the AIG claims regarding lack of notice regarding issues the Commission has settled by the introduction of the term 'applicable rate of pay ' to preserve existing entitlements in specific clauses. The submission should be rejected. The AIGroup cannot be granted special consideration when no circumstance exist warranting special attention. The AIG cannot be allowed to continue to put other parties to the considerable and exhaustive time and task in rearguing their position in matters that have been the subject of extensive submission and have been determined.

41. In numerous meetings with the AMWU , in conference and hearing before the Commission the AIG had the opportunity to address the issues but did not as they

[32] AIG Submission 20 November, 2015 @[72"
[33] AMWU submission 20 November, 2015 @ 20-24
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-AMWU-201115.pdf

[34] [2015]FWCFB4658 @ [63]

submitted there was no problem with the term 'ordinary hourly rate' replacing 'ordinary time rate' in the Manufacturing Award.

42. We do however propose an amendment to the definition inserted by the Commission in the October decision. The underlined amendment proposed below will clarify that employees entitled to the 'ordinary hourly rate' [35] do not receive non-applicable penalties or loadings. Applicable rate of pay captures ordinary time as opposed to overtime payments:

> **Applicable rate of pay** means the ordinary hourly rate plus <u>applicable</u> penalties and relevant loadings

43. The Manufacturing Award provides for 'Ordinary *hours of work- day workers'* (Clause 36.2, 13.2 of Exposure draft); '*<u>Ordinary</u> hours of work- continuous shiftworkers'* (Clause 36.3, 13.3 of Exposure Draft) and *'<u>Ordinary</u>* Hours of work-Non-continuous shiftworkers' (Clause 36.4, 13.4 of Exposure Draft). '*Methods of arranging <u>ordinary</u> working hours'* for both day and shift workers is provided at Clause 36.5 (13.5 of the Exposure Draft). The span of ordinary hours for shiftworkers are specified at Clause 37.1. (29.2(a) of the Exposure Draft) and the afternoon and night shift allowances for working during the span of ordinary hours are defined at 37.3 (29.2(c),(d) and (e).The award is structured recognising the ordinary hours or 'times' within which shift occurs and the allowances payable at such time.

44. The *Industrial Arbitration Service considers* the meaning of "ordinary pay". With regard to the meaning of the term as it appears in awards the Service states:

> "The expression "ordinary pay" or "<u>ordinary time rates</u>" in awards generally refers to the amount of wages payable for <u>time usually worked during the normal span of working time prescribed by the award</u> as distinct from the penalty rate payments for overtime, holiday or other special work"[36] (emphasis added)

[35] [2015] FWCFB 7236 @ 103
[36] Cullen, CL (ed); Peterson, RJ; Shaw, JW; Wright, FL and Thomson, A: Industrial Arbitration Service, The law Book Company, 1976; @ p.477.

45. The ordinary hours for shiftworkers occurring with the span specified in the Manufacturing Award is their ordinary time. Ordinary time rate is the specified rate applying to that ordinary time. The expression currently appearing in the Manufacturing Award to "time" or "ordinary time" must be read in context. As we argued in our submission of 11 March, 2015

> **19.** The exposure draft definition of "ordinary hourly rate" removes the link between the rate to be paid and the time at which work is performed and refers the "ordinary hourly rate" to the minimum wages table, currently used to identify rates of pay for classification, not pay purposes.
>
> **20**. The "decoupling" however is not consistent. The exposure draft formula may work where the "ordinary hourly rate" entitlement is expressed as a multiple reflecting weekend, shift or other penalties. The "ordinary hourly rate" exposure draft expression fails however where it is left to do all the heavy lifting unsupported by a multiplication factor.
>
> 21. Entitlements in the exposure draft at Clause:
>
> - 14.5 Working Through Meal Break (38.4 MA10)
> - 15.1(d) Ship Trials (39.4 MA10)
> - 30.10 Rest Break on Overtime (40.10 MA10)
> - 30.13 Standing By (40.6 MA10)
>
> Diminish the current entitlement as they are expressed as paying the "ordinary hourly rate" as defined, excluding weekend, shift and other loadings or penalties. The current entitlement to the matters identified above require payment at the "ordinary time rate".[37]

46. The AIG did not take the opportunity to address the issues raised by the AMWU in the above and earlier submissions apart from their response that no problem existed in respect to employee entitlements.

[37] AMWU Submission AM2014.64 and Ors , 11 March 2015

47. The Commission's decision of July 2015[38] made a distinction between 'minimum rates' for classification and 'ordinary rates' to be paid including all purpose allowances. As argued above, the replacement in the Manufacturing Award of "ordinary time rate" with "ordinary hourly rate" may preserve the current entitlement where the loading is applied to the ordinary hourly rate. Each specific clause identified by the Commission's October decision[39] however must be looked at in context to ensure the employee's entitlement to receive the rate applicable during the times they work is not diminished.

Clause 14 Meal Breaks (Clause 38 Manufacturing Award)

48. Clause 38.1 (Clause 14.1)provides that employees do not have to work longer than 5 hours without a meal break with clause 38.1(a) and (b) providing exceptions to the general entitlement.

49. The AIG submit[40] that the term "applicable rate of pay" has replaced "ordinary time rate" at existing paragraph 38.1(a) and 38.1(b) (exposure draft equivalent 14.1(a) and (b)). There is no reference to "ordinary time rate" in Clause 38.1(a). Clause 38.1(b) is a facilitative provision enabling employee/s and an employer to agree to work up to 6 hours at "the ordinary time rate" without the penalty of "time and a half rates" provided for at Clause 38.5 (14.5).

50. The AIG submission is that the use of the term "ordinary time rate in Clause 38.1(b) is to ensure "that the 150% penalty in Clause 38.5 does not apply[41]. This is not correct. It is the facilitative arrangement which prevents the time and a half rate from applying and enables agreement to be reached to work up to 6 hours without a break. The AMWU's submission is that "ordinary time rate" in this context means the rate paid to an employee for the time being worked.

[38] [2015] FWCFB 4658 @ 54
[39] [2015] FWCFB 7236 @ 105
[40] AIG submission 20 November, 2015 @ [153]
[41] Ibid at [152]

51. For example the ordinary time rate for a day worker working ordinary hours on a Saturday would be time and a half. The AMWU's position is that the clause enables the ordinary time rate to continue to be paid where agreement is reached to work between 5-6 hours without a break. Previous exposure drafts[42] provided that the "ordinary hourly rate" would apply. This resulted in the untenable situation whereby the said day worker would be paid time and a half from the commencement of work up to the 5th hour and then the minimum rate plus any all purpose allowances between the 5th and 6th hour. This was the result that the AIG submitted it did not find problematic[43]. This is the result the AIG continue to press.

52. At paragraph 153 the AIG submit :

- The flexibilities in clauses 14.1(b) and 14.4(a) would become meaningless because the 'applicable rate of pay' would potentially include the penalty in clause 14.4(b); and

- The 150% rate in clause 14.5(b) would be applied to a rate that included penalties, resulting in double penalties.

.

53. The AIG's argument at dot point 1 is absurdist; reply feels like being trapped in *Waiting for Godot.* The flexibility at 14.1(b) is a facilitative provision allowing, where agreed, the 150% penalty to <u>not apply</u>. The terms "applicable rate of pay" creates no issue at 14.1(b) or 14.4(b) .The flexibilities at 14.4 do not mention a rate of pay at all as the flexibility to alter the timing of the meal break may or may not attract a penalty depending on how the timing of the break is altered.

54. The AIG submission at dot point 2 has some weight as we agree there are limitations in the award regarding penalties on a penalty however we reject the solution advanced at paragraph 156 to replace "ordinary hourly rate" at 14.5(a) with "without deduction of pay".

[42] See clause 14.1(b) of the 16 December 2014 exposure draft
[43] AIG Submission 12 November, 2014, p.33 see Working Through Meal Breaks

55. AIG concede that their proposal preserves a shift, weekend or other loading or allowance. If that is the meaning it is a concession that the current term "ordinary time rate", in context, includes weekend, shift or other allowances and penalties and cannot simply be replaced by the term 'ordinary hourly rate'.

56. The AIG submission that the term "without deduction of pay" is well understood or accepted during this review in highly questionable. The "AIG" reference the overtime clause in the Manufacturing Award and the use of the term 'without deduction of pay'[44] however the use of the term in the specific context of the overtime Clause 40.10(a) (current award, exposure draft clause 30.10(a) refers to the overtime rate applying in the 4 hours immediately prior to the break and not the 'ordinary time rate' advanced by AI Group. This usage can be compared to the use of the term in the 'Rest period After Overtime' clause where 'without loss of pay' is linked to 'the ordinary hours' of pay during the employee's absence

> **30.10 Rest Break (exposure draft)**
>
> (a) An employee working overtime must be allowed a rest break of 20 minutes without **deduction** of pay after each four hours of overtime worked if the employee is to continue work after the rest break.
>
> **30.11 Rest period after overtime (exposure draft)**
>
> (b) An employee, other than a casual employee, who works so much overtime between the termination of their ordinary hours on one day and the commencement of their ordinary hours on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to the other provisions of clause 30.11, be released after completion of the overtime until the employee has had 10 consecutive hours off duty without **loss** of pay for ordinary hours occurring during the absence.
>
> (c) If on the instructions of the employer an employee resumes or continues work without having had 10 consecutive hours off duty the employee must be paid at 200% of the ordinary hourly rate until the employee is released from duty. The employee is then entitled to be absent until the employee has had 10 consecutive hours off duty without **loss** of pay for ordinary hours occurring during the absence.

[44] AIG Submission dated 20 November, 2015 @ [156]

57. The terms 'Without deduction of pay' and "Without loss of pay" have no one size fits all meaning. They are tied to the context in which they are used. In the 'Rest Break' provision above the context is the overtime rate being paid prior to the break; no deduction will occur to the overtime rate of pay while the break is taken. In the 'Rest Period after Overtime' clause the language changes to "loss" and the context is specified as 'without loss of pay for ordinary hours occurring during such absence' which would include shift, weekend and other applicable allowances and loadings where the employee's ordinary hours included those entitlements.

58. The use of 'applicable rate of pay' is used appropriately in Clause 14.5(a).

59. In Clause 14.5(b) the term "ordinary hourly rate" preserves the entitlement in the context of '150% of the ordinary hourly rate', preserves the status quo in this part of clause 14.5 and should replace 'applicable rate of pay' in the exposure draft.

Ship Trials

60. The AIG concede the rate "applicable rate of pay" is appropriate in the context of ship trials. The AIG however attempt to make much out of nothing in submitting that the text within the current and pre-modern award is informative ", "contrasting starkly" with the wording used in other clauses identified in paragraph [105] of the October decision.

61. Differences in text leading to the same application occur throughout the current and pre-modern awards. See for example our review of the various terms used in the exposure draft at paragraphs 11 onwards in our submission of 11 March, 2105 and our submission regarding 'without loss of pay' and 'without deduction of pay' above. The AIG did not avail themselves of the opportunity to respond to the differences in award expression in their submissions in reply to our submission that:

> 11. The Table at Attachment A and our submission below summarise some of the issues and anomalies in the exposure drafts concerning the use of various

terms such as “ordinary rate”, “ordinary time”; “ordinary hourly rate”, “hourly rate” and “casual ordinary hourly rate”[45].

Extra Rates not cumulative

62. This is not a clause identified by the AMWU in earlier submissions. We do not oppose the use of the term “ordinary hourly rate”. We do however oppose the AIG’s submission that “arguably the entitlements would be more generous because the Commission has included all purpose allowances in the definition of ‘ordinary time rate’.”[46]

Travelling Time Payments

63. The AIG submit[47] that ‘travelling time’ is paid at a “standard rate”. This appears to be a new term to add to the mix as it does not appear in the award outside of a definition of ‘standard rate’ pertaining to the C10 rate for the purposes of determining certain allowance amounts .The AIG devalue an employee’s time in arguing that a standard rate is appropriate as the employee is travelling not working. The employee is travelling in the service and to meet their employer’s requirements.

64. The term ‘applicable rate of pay’ is required and appropriate to define the rate for travelling time Monday to Saturday at Exposure Draft Clause 27.4(e) (i). Using the term ‘ordinary hourly rate’ to replace the current “ordinary time” could result in the bizarre situation where an employee usually rostered on for example afternoon shift is required by their employer to travel at times prescribed by the award as ‘night shift” (130%) or “afternoon or night shift – non-successive shifts” (150% first three, 200% thereafter) but be paid the minimum award rate plus any all purpose allowance.

65. For example if half of the travel time took place during the afternoon shift employee’s ordinary working hours the employee would receive their afternoon shift allowance. The other half of travelling time would then occur at times ordinarily attracting overtime, night

[45] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-1160315.pdf @ paragraph 11
[46] AIG Submission 20 November, 2015 @[170]
[47] AIG submission dated 20 November, 2015 @ [171]

shift or other penalty but on the AIG view would be paid at minimum rate plus any all purpose allowance.

66. The term 'applicable rate of pay" captures the existing entitlement which we say is already a "favour ", a 'ragged trousered philanthropist's[48] gift to their employer who requires them to be in their service outside of usual rostered hours.

67. The AIG have argued that many employers rely on the Award books distributed by employer associations to identify their responsibilities:

> PN292 Mr Ferguson…….The reality is there are still many, many employers that operate on paper-based awards, be it ones they've printed out or, of course, very commonly ones that are distributed via employer associations[49]

68. The AIG's Award Book, refer Attachment C for extract, provides examples to assist employers understand how the travelling time payment provisions operate. The example provided to illustrate the application of travelling time includes the statement :

> "As travel time is to be paid at ordinary time, John is entitled to be paid **his** ordinary rate of pay for the three hours of travel time to the temporary work location."[50] (emphasis added)

69. If John was a shift worker then John's ordinary rate includes all purpose allowances, shift loadings and other payments to which he is ordinarily entitled. This is manifest at Attachment C , the AIG Award Book where John is said to be entitled to his 'ordinary rate of pay' whilst both travelling and working, the same expression is used to identify the entitlement This concept is captured by "applicable rate of pay" but is not captured by "ordinary hourly rate of pay as identified in the October decision and the AIG's claim that "ordinary rate of pay" in the travelling time clause has a different meaning to 'ordinary rate of pay' whilst working is not sustainable on their own advice and examples provided to members. The AIG's argument does them no credit.

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[48] Tressel, R see https://en.wikipedia.org/wiki/The_Ragged-Trousered_Philanthropists
[49] AM2014/64 and Ors Transcript 25 October 2014 ; https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/231014AM201464ors-amended.pdf
[50] AIG Award Book Issue 2 00-09/2011, Page 8 of Guidance Notes

70. Further on their submission AIG invoke *Kucks v CSR*[51]. The AMWU referred to *Kucks* in transcript in regard to the "framers" of the Award and the context of specific terms in the Award. Our submission went to the meaning of all purpose allowances and the issue of the term "ordinary time". We said.

> PN147 MS TAYLOR: The only matter that I would seek to add is that the submission of the AIG considers a decision which has often been quoted, the Kuck decision in relation to how the parties should interpret awards.
>
> PN148 JUSTICE ROSS: Yes.
>
> PN149 MS TAYLOR: And that Kuck's decision goes to understanding what the ordinary meaning is and that the task of the Commission is – or the court – to decide what the framers of the instrument meant and that the framers were often more likely to be considering the application of those terms in an industry context rather than with reference to industrial or legal jargon
>
> PN150 I would just point out that the AI Group and the Metal Trades Federation of Unions were the drafters of the Modern Manufacturing Award and the other modern awards[52].

71. The AIG's Award Book is evidence of the "framers" intent in the "industry context" and that is that travelling time is not a "standard rate" but is linked to the specific rate of pay of the employee who is travelling.

72. We accept that the existing entitlement to travelling time on Sundays and Public Holidays in 27.4(e) (i) does not require compounded penalties and that the second reference to "applicable rate of pay" could revert to the existing expression of "time and a half" or be replaced by "150% of the ordinary hourly rate". The entitlement to a 150% loading for Sunday and Public Holidays supports however our submission that the entitlement to travel Mon-Sat includes relevant shift and weekend loadings, allowances etc. attached to the employee's ordinary time rate rather than 'the ordinary hourly rate'..

[51] AIG Submission dated 20 November, 2015 @ [196]
[52] Transcript 24 March 2015 AM2014/64

Rest Breaks

73. Clause 40.10(a) provides that where 4 hours of overtime is worked and further overtime is required employees receive a 20 minute break without deduction of pay. In the context of overtime continuing after the 4 hours being paid at overtime rate, the 20 minute break, 'without deduction of pay' means that the overtime rate continues to apply. (Refer to submissions above regarding 'Meal Break').

74. Clause 40.10(b) covers the circumstances of day workers required to work more than 4 hours overtime on Saturday, Sunday or Public Holiday. This clause currently enables the "ordinary time rate" rather than the overtime rate to apply for the first paid break. Specifically the award entitlement to be paid during the first break is not to be paid the 'ordinary time rate' but 'must be paid at the employee's ordinary time rate'[53]. (Manufacturing Award Clause 40.10(b)).

> **(b)** Where a day worker is required to work overtime on a Saturday, Sunday or public holiday or on a rostered day off, the first rest break must be paid at the employee's ordinary time rate. (emphasis added)

75. The term "applicable rate of pay" works in this clause. If "ordinary hourly rate" was used day workers rostered to work ordinary hours on Saturday or Sunday and then asked to perform overtime would not receive their "ordinary time rate" of 150% or 200% specified respectively in Clause 29.1(a) or 250% for their ordinary hours on a public holiday specified in 29.1(b). This diminishes their existing entitlement which is not the intent of the review absent a substantive application. The term 'applicable rate of pay' works in the context of exposure draft clause 30.10(b) preserving the entitlements of employees whose 'ordinary time rate is in excess of the 'ordinary hourly rate' whilst, with the clarification to the definition proposed above, not establishing new entitlements for employees entitled to the 'ordinary hourly rate'.

76. The AIG argue that "applicable rate of pay" should not be used as this would make the whole clause 'unworkable'[54]. Their submission does not establish the point. The AIG also submit that an employee is only entitled to the 'ordinary hourly rate' at Clause 30.10(b) as the employee is not working. The employee is in fact at work and the clause already establishes that the employee will receive pay "for not working" during the first rest break in circumstances where the employee has given their "free time" to the employer at times and most likely days (Saturday, Sunday and Public Holidays) when ordinarily they would not be working.

77. The AIG argue a similar position with regard to the rest break provision at Clause 40.10(c) however again the entitlement in the clause is expressed as 'the employee's ordinary time rate'

> **(c)** Where overtime is to be worked immediately after the completion of ordinary hours on a day or shift and the period of overtime is to be more than one and a half hours, an employee, before starting the overtime, is entitled to a rest break of 20 minutes to be paid at the employee's ordinary time rate

78. The AIG refer to the 1943 decision of O'Mara J however that decision does not disturb the appropriate use of the term 'applicable rate of pay'. The decision arose out of a dispute regarding employers restructuring overtime to avoid payment for the crib break.[55]... The decision confirmed that in circumstances where the employee chose to immediately commence overtime work, the break payable at the end of the 1.5 hours overtime was only payable firstly if the final ceasing time was at least 1 hour 50 minutes[56] after the normal finishing time and secondly, was payable at the 'employee's ordinary time rate of pay' rather than the overtime rate.

79. The decision confirmed that the first break was not to be paid at overtime rates. We concur; however the rate to be paid is 'the employee's ordinary time rate' which, if they were a shift worker for example, includes 'the ordinary hourly rate plus applicable

[54] AIG submission @ 177
[55] (1943) 49 CAR 153 @ p.154
[56] Industrial Information Digest, Ibid @ p.487

penalties and relevant loadings'. The next break would be paid at the overtime rate not, as AIG erroneously submit "without loss of pay"[57] (including shift loading, etc.) but due to the requirement at 40.10(a) that after 4 hours work at the overtime rate there is a paid 20 minute break "without deduction of pay". We refer again to the Industrial Information Digest:

> "Thus in a number of Awards it is provided that an employee working overtime shall be allowed a crib time of 20 minutes without deduction of pay after each 4 hours of overtime worked if the employee continues work after such crib time. This means that that the employee receives payment for the crib time at the penalty rate. See Re Tramways (Melbourne) Award (1959) 92 CAR 387."[58]

80. 'Applicable rate of pay' works at both Clause 30.10 (b) and (c) of the exposure draft with no loss of "flexibility" (ability to pay less than the overtime rate at 30.10(a). We object to the use of the term 'flexibility' in this context.

Standing By

81. The AIG argue that Standing By should be paid for at the 'ordinary hourly rate' rather than the employee's 'applicable rate of pay' as employees may be watching television etc. Again we object strongly to the AIG's insouciant disregard for an employee's time. Standing By payments are made under the current award at "the employee's ordinary rate". This includes any applicable penalties and relevant loadings

82. The reasons for paying employee's their applicable rate of pay on standby include that an employee on Stand By is logically prohibited from obtaining work elsewhere at times which may attract a penalty payment and that the payment compensates for the loss of freedom in being compulsorily available for work.[59].

83. The term 'applicable rate of pay' works in the context of 'Standing By '.

Rostered Day Off falling on a public holiday.

[57] Aig Submission @ [179]
[58] Industrial Information Digest @ p.211
[59] Ibid @ 1322.

84. AIG's arguments are not based in fact. The AMWU was fully engaged and lead the negotiations for the MTFU referred to by the AIG. [60]. There are 3 alternative payment methods for the employee to choose, at the discretion of the employer, when their rostered day off falls on a public holiday.

85. The options were not intended to diminish the entitlement that an employee would normally have been entitled to be off on their rostered day off receiving payment at their ordinary time rate of pay. The options were agreed to provide employees and their employers "flexible' (appropriate use of the term) methods of recouping the value of the employee's rostered day off when it fell on a public holiday. The options are not intended to reduce the "value' of the employee's rostered day off or the public holiday. The alternatives are:

> **(a)** Except as provided for in clauses 44.3(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee's ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either:
>
> **(i)** 7.6 hours of pay at the ordinary time rate; or
>
> **(ii)** 7.6 hours of extra annual leave; or
>
> **(iii)** a substitute day off on an alternative week day.

86. If an employee chose option (ii), the annual leave option their pay on annual leave includes their actual rate of pay, including overawards, and the greater of 17.5% or their relevant shift loading.

87. If an employee chose option (iii) they would be paid at their ordinary time rate for the substitute day off. For example a shift worker taking a substitute shift off on an alternative week day would not be paid less for the week than their ordinary weekly pay, including shift weekend and other relevant loadings and allowances.

88. It is simply not arguable that option (i) firstly, reduces so significantly the pay the employee would have been entitled to but for the public holiday and secondly the rate of pay available under the other 2 options.

[60] AIG Submission dated 20 November, 2015 @ [187]

89. Applicable rate of pay works in this context of Clause 34.5(i) of the exposure draft.

Transfer to Lower Paid Duties

90. The AIG refer[61] to the TCR decision. If an employee, transferred to a lower paid position, worked out their period of notice for the transfer they would receive their 'ordinary time rate' for such period, including applicable penalties and relevant loadings.

91. An employer choosing not to enable the full adjustment period available to an employee is currently required under Clause 23.3 to :

> "….make payment instead of an amount equal to the difference between the former ordinary time rate of pay and the new ordinary time rate of pay for the number of weeks of notice still owing".[62]

92. The employer is effectively 'buying out' the notice period and is required to pay no less than the employee would have been received if he or she worked out their available period of notice. The 'same period as the notice of change in employment as he(sic) would have been entitled to if his/her employment had been terminated'[63]

93. Applicable rate of pay is appropriate in the context of Clause 39.3 Transfer to Lower Paid Duties.

94. The AIG submit[64] that the term 'ordinary pay' has a generally understood meaning. They refer to the decision reviewing the term 'ordinary pay' under an agreement [65]- *(Fonterra v AMWU*). Fonterra reviewed the meaning of "ordinary pay" under an agreement in relation to redundancy pay. It is not authority for the meaning of 'ordinary time rate' in the clauses now referencing 'applicable rate of pay'.

> **[6]** Two main issues arise for consideration in the appeal. These relate to:

[61] AIG submission dated 20 November, 2015, @ [191]
[62] Clause 23.3
[63] TCR 1984 quoted in AIG submission @ [191]
[64] AIG Submission dated 20 November, 2015 @ [195-198]
[65] AIG Submission dated 20 November, 2015 @[196]

(i) the jurisdiction of the Commissioner to deal with the dispute; and

(ii) the proper interpretation of the term 'ordinary pay' as it is used in clause 22.8.1 of the Agreement[66].

95. Clause 22.8.1 of the Agreement related to redundancy and stated:

"Each redundant employee shall receive a redundancy payment of four (4) weeks ordinary pay, and service payment of four (4) weeks for each completed twelve (12) months service or pro rata part thereof

96. The decision is however authority for the propositions that words and phrases should be given their ordinary meaning and that where ambiguity exists the interpretation of words and phrases is informed by "context" reviewed across the agreement or award.

[19] The term 'ordinary pay' is not defined in the Agreement. In these circumstances, and unless there are strong contextual or other reasons for adopting a different approach, we consider that 'ordinary pay' as it is used in the Agreement should be given its generally understood and accepted meaning in industrial usage. This is also the meaning which can be construed from a consideration of the Agreement as a whole and which is generally in line with the purpose of providing redundancy entitlements.(emphasis added)

97. The Fonterra decision cited *Kucks v CSR*[67] which was in turn informed by the decision in *Scott v Sun Alliance*[68] .*Kucks v CSR* involved LSL payments on termination, *Scott v Sun Alliance* related to payments under the Workers Compensation Act 1988 (Tasmania). The purpose of the 'redundancy' as considered in Fonterra , the purpose of LSL considered in Kucks and the purpose of 'compensation under the Tasmanian Workers Compensation Act Scott v Sun cannot be said to align with purpose of , or how the term 'ordinary time rate' is used, in the Manufacturing Award. The specific context of each term must be reviewed.

[66] [2015] FWCFB 3423
[67] (1996) 66 IR 182.
[68] (1993) 178 CLR 1

98. The question under appeal in *Scott v Sun* s was related to hours and quantum of hours within the meaning of the term "*as expressed by reference to a week"*[69]. The High Court reviewed the meaning of "ordinary time rate' in the context of the Tasmanian Compensation Act finding it '*referred to a rate fixed by an industrial award or agreement and did not cover a rate fixed by an individual employment contract*"[70] The High Court decision has effectively been applied during the review[71] regarding over award payments.

99. In coming to their conclusion regarding the meaning of 'ordinary time rate' the High Court said:

> "The expression "ordinary time rate of pay" is well known in the industrial relations field in Australia and New Zealand. It and similar terms have long been used in legislation"[72]

100. The legislation referred to by the High Court was referenced in footnote 11 of the decision and included firstly the Annual Holidays Act (NSW) 1944, s.2 (1). The definition of ordinary rate of pay in the Holiday Act includes applicable shift and weekend allowances attached to working ordinary hours:

> (2) For the purposes of the definition of the term
> "ordinary pay" in subsection (1):
> (a) the term
> "ordinary time rate of pay" in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of the worker's employment means the time rate of pay so fixed for the worker's work under the terms of the worker's employment, including shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holidays, but does not include any other amount payable to the worker in respect of shift work, overtime or penalty

[69] Ibid @ 3
[70] Ibid @ 2
[71]
[72] Ibid @ 5

rates, and where two or more time rates of pay are so fixed means the higher or highest of those rates,

101. The High Court also referenced the Workers Compensation Act 1956 (NZ), s.15 (1) as evidence of the "well known" term "ordinary time rate of pay"[73]. The NZ legislations states :

> **15.** Weekly earnings as basis for calculating compensation
> - (1) For the purposes of the assessment of compensation, the weekly earnings of any worker shall, except as otherwise provided in this Act, be deemed to be a full working week's earnings (exclusive of any payment for overtime) at the ordinary rate of pay for the work in which the worker was employed at the time of the accident, notwithstanding that he may not have actually worked or the employment may not have actually continued for the full week.

102. In ascribing meaning to 'ordinary time rate of pay' the High Court has referenced definitions which include payments for working ordinary time including shift and weekend allowances but excluding 'overtime'. The term 'ordinary time rate' applies to the rate applicable to an employee's ordinary as opposed to overtime hours[74]. The High Court decision referred to in Kucks supports the AMWU's position regarding the inclusion of shift and weekend allowances for employees working 'ordinary hours- day work', 'ordinary hours – continuous' or ordinary hours- non continuous shift work as expressed in the term 'ordinary time' under the Award.

103. The AMWU has reviewed the use of the term 'applicable rate of pay', in context. The AMWU's submissions must be preferred as the AIG's submission leads to a diminution of entitlements and is not supported by High Court Authority.

[73] Ibid @ 5
[74] Ibid @ p.5

Other matters arising from the exposure draft raised by AIG

104. AIG address[75] a range of other matters arising from the exposure draft. We do not comment on matters also raised by the AMWU and others where we agree with the AIG.

Clause 5.4(a) Aig @ [201]

105. We address this issue at paragraph 6 of our submission[76]. The reference should be as identified in our submission: ’13.4(c) and not ’13.4(b) as submitted by the AIG.

Clause 14.1(a) AIG 209

106. The exposure draft reflects the existing entitlement and should remain. The text identifies a ‘meal” as opposed to other breaks for example , tea or a refreshment (refer clause 14.3)

Clause 16.1(a) AIG Commencing [211]

107. These matters have been settled. The AIG’s proposal is to link the minimum wages for classification purposes back to “ordinary hours worked’. Such a link, whilst supporting AIG arguments as to the meaning of ‘ordinary time rate’ being a minimum rate, is not included in the current award (refer 24.1(a)) and has been rejected by the Commission who determined that the minimum rates should reflect classification rates..

108. The issue raised regarding the reference to ‘rate per week’ (at 222) has some merit. We propose the following

> (a) An adult employee, other than one specified in clause 16.1(c), within a level specified in the following table will be paid not less than the rate ~~per week~~ assigned to the appropriate classification, as defined in Schedule A—Classification Structure and Definitions, in which the employee is working

Clause 30.2(b) AIG [238]

109. We do not disagree that the current clause relates to an employee required to continue work. There is a typo within the clause as well. The clause should read

[75] Commencing at 6.2 of AIG Submission dated 20 November, 2015
[76] AMWU submission 4 November 2015

(b) Unrelieved shiftwork on rostered day off

(i) If an employee is ~~be~~ required to continue work on their rostered day off because of the absence of a relieving employee, the unrelieved shiftworker must be paid 200% of the ordinary hourly rate for all hours worked on their rostered day off

END

ATTACHMENT "A"

AMWU SUBMISSIONS

1.0 AM2014/75

A1.3 AM2014/75 20 November 2015 – Exposure Draft of 4 November 2015 Submission

A1.1 AM2014/193 16 November 2015 - Vehicle manufacturing, Repair Services and Retail Award 2010 (AM2014/93, the Vehicle Award); The Manufacturing and Associated Industries and Occupations Award 2010 (AM2014/75, The manufacturing Award)

A1.2 AM2014/75 16 November 2015 – Outstanding Matters Submission

1.1 21 April, 2015 Additional Submissions of the Exposure Draft
https://www.fwc.ov.au/documents/sites/awardsmodernfouryr/am201475-sub-AMWU-210415.pdf

1.2 21 November regarding Transitional Absorption Clause 1.4
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-corr-AMWU-211114.pdf

1.3 13 November 2014 Additional Submission in reply ; Transitional provision Clause 1.4 Absorption Clause
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-additionalsubinreply-AMWU-131114.pdf

1.4 12 November Submission In reply-to AIG (all purpose, ordinary hourly rate inert alia)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-AMWU-121114.pdf

1.5 29 October, 2014 Amended Submission on Exposure Draft
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-amended-AMWU-291014.pdf

1.6 24 October, 2014 Submission on the Exposure Draft
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-AMWU-241014.pdf

1.7 17 October, 2014 Proposed Variations re Laboratory Qualifications
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-corr-AMWU-171014.pdf

1.8 19 August, 2014 AMWU proposed variations

https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-corr-AMWU-190814.pdf

1.9 22 July, 2014 Correspondence on behalf of parties updating progress
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-corr-AMWU-220714.pdf

1.10 9 May, 2014 Short Outline of Issues including hours issues and examples
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475andors-sub-AMWU-090514.pdf

2.0 1A and 1B Awards (AM2014/64 and Ors)

2.1 26 March, 2015 Additional submission "all purpose", payment on leave
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201465-sub-AMWU-260315.pdf

2.2 11 March, 215 Submission in reply ("all purpose, payment on leave, ordinary hourly wage)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-1160315.pdf

2.3 31 October, 2014 (Supercession Clause)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-311014.pdf

2.4 17 October, 2014 response to 1A and 1B awards (Casual provisions)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-171014.pdf

2.A1 3 August, 2015 Additional Submission Absorption and Method of Calculating Casual Loading in Awards with All Purpose Allowances AMWU
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-030815.pdf

2.A2 17 August 2015 Additional Submission Absorption and Method of Calculating Casual Loading in Awards with All Purpose Allowances AMWU
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-170815.pdf

2.A3 28 August 2015 Additional Submission in Reply Absorption and Method of Calculating Casual Loading in Awards with All Purpose Allowances AMWU
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201464andors-sub-AMWU-280815.pdf

3.0 Award Stage: 3 Submissions and Correspondence

3.1 10 December 2014 (New Award for helicopters)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/proposedMA-corr-AMWU-101214.pdf

3.2 15 October, 2014: (NES: Accrual of Annual leave for shiftworkers working part of the year as a shiftworker)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AMWU-151014.pdf

3.3 29 September, 2014 Amended and republished submission of 24 September, 2014 (NES)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultipleMA-sub-NES-AMWU-260914.pdf

4.0 AM2014/1 and Ors Alleged NES Inconsistency Issues

4.1 5th March 2015 (Accrual of Annual leave for shiftworkers)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AMWU-050315.pdf

4.2 20 February, 2015 (Submission in reply Category 5 NES Matters)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AMWU-200215.pdf

4.3 13 February 2015 (Category 3 and 4 re draft determinations)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AMWU-200215.pdf

4.4 23 January, 2015 (Category 5 Matters)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMa-sub-NES-AMWU-230115.pdf

4.5 21 November, 2014 (NES Inconsistencies Annual leave for Shift Workers)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MultiMA-sub-NES-AMWU-211114.pdf

See also 3.2 and 3.3 above

4.6 15 October 2014 (AM2014/1 & Ors – FWC Correspondence re inconsistencies between the National Employment Standards (NES) and Modern Awards)

4.7 12 November 2015 (Category 3 and 4 Awards AMWU) AM2014/1 and Ors

5.0 Feedback on Draft Guide and Draft Exemplar Award

2 May 2014, Form of Award, examples, facilitative provisions inter alia
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Award-stage-sub-AMWU.pdf

6.0 AM2014/1 Initial Stage proceedings

6.1 17 March 2014 (Coverage Issue in Graphic Arts)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141_corr_AMWU_170314.pdf

6.2 16 December, 2013 (Award Stage groupings)
https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM20141_sub_AMWU_161213.pdf

ATTACHMENT B

OHR/All Purpose	Discussion	Arbitration
18 definition of All Purpose in Clause 6.4(b)	17 -Casual Clause 6.4(a) terms of Award and NES apply to casuals	3 Absorption Clause 1.4
35- Clause 14.5 replacement of term ordinary time rate*	31- 20 Minute meal Break Clause 14.1	13- casual part time case
36- heading of Table 16.1(a) AMWU refer to casual column only*	41-resolved AMWU does not press	93- payment on termination
37- See 35 above	48- business SA . resolved?	95- rest period after overtime casual exclusion
38-casual rates rules, rounding.*	62- Ordinary Daily Hours Clause 40 Overtime	
49-AIG All Purpose Clause 27.1	65- Specific reference to casuals and overtime. Linked to Item 87 CFMEU Clarity re casual pay and overtime Clause 30.1(d)	
70 Summary of Hourly rates*		
71- AIG definition of All Purpose Clause 27.1, Schedule B.2.1*	72- AIG Colum heading B.1.5 re Minimum Hourly wage	
81 AMWU No definition of all purpose in schedule H	73- Column heading Actioned	
83, 84 - AMWU definition of ordinary hourly rate in Schedule H	76- Business SA Schedule C Allowances Missing	
	77- Schedules D and E to be reviewed by parties	
	80 Schedule H review definitions	
	82, 84- Schedule H remove definition of irregular casual	
	85 – Cork coverage	
	87 see 65 above	
	89 see 65 above	
	90 Ordinary daily Hours Linked to 62 above	
	91- Business SA penalty rate	93
	96 Payment on Annual	

	leave Clause 31.39c0	

The following special rates are not cumulative under this Award:	The following special rates are cumulative under this Award:
• Glass furnace regenerators • Float glass furnace repair • Jack bolt tensioner • Loading and unloading away from employer's premises	

Allowances for transfers, travelling and working away from usual place of work

Travelling time payment

The rate of pay for travelling time is set out in clause 32.4(e) of the Award. The rate of pay for travelling time is ordinary time when the travel occurs Monday through Saturday. For travel on Sundays and public holidays, the rate of pay for travelling time is time and a half. There is a maximum cap of 12 hours on travelling time payable under the Award per each 24 hour period.

It is important to note that travelling time is not considered as time worked, therefore time spent travelling does not count for the purpose of calculating overtime.

Example:

On Monday John is required by his employer to work at a different work location for the day. It takes 3 hours to travel from John's usual workplace to the temporary work location. John arrives at the temporary work location, works for 7.6 hours, then returns back to his usual workplace.

As travel time is to be paid at ordinary time, John is entitled to be paid his ordinary rate of pay for the 3 hours of travel time to the temporary work location, and for the 3 hours return travel time to his usual workplace.

As travel time is not counted as time worked, and, is therefore not taken into account when calculating overtime, John is entitled to be paid his ordinary rate of pay for the 7.6 hours actually spent carrying out his work duties at the temporary location.