CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2014/196 and 197

Fair Work Act 2009
Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Common issues - Casual employment and Part-time employment
(AM2014/196 and AM2014/197)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) IN REPLY

22nd February 2016

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). On the 17th March 2014 the President, Justice Ross, issued a Statement and Directions[1] in which casual employment and part-time employment provisions were identified as common issues to be dealt with as part of the Review.

2. On 1st October 2014 a further Statement[2] was issued by the President, Justice Ross, which included at Attachment A a timeline for the provision by 11th November 2014 of submissions from parties of an outline of their proposed provisions in relation to the casual employment and part-time employment common issues and the identification of the awards affected.

3. On 1st December 2014 President Justice Ross issued a Statement[3] in which he indicated that all matters pertaining to casual and part-time employment would be dealt with by one full Bench,

> *"**[19]** To ensure that the range of issues relating to casual and part-time employment are dealt with efficiently and to minimise the risk of inconsistent decisions it is appropriate that all matters pertaining to casual and part-time employment be dealt with by one Full Bench, the Casual and Part-time Employment Full Bench. This means that the ACTU and employer claims referred to in the submissions filed and matters which arise during the award stage, will be referred to the Casual and Part-time Employment Full Bench. The referral of these claims to that Full Bench simply relates to the process adopted for the hearing and determination of these claims. In this context it is relevant to note the following observation by the Full Bench in the Preliminary Jurisdictional Issues decision pertaining to the Review:*
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> > *"Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective."*

[1] [2014] FWC 1790
[2] [2014] FWC 6904
[3] [2014] FWC 8583

[20] *The presiding Member of the Casual and Part-time Employment Full Bench (Vice President Hatcher) will list these matters for mention and programming in due course."*

4. On 29th June 2015 the Casual and Part-time Employment Full Bench issued Directions[4] for the hearing of the matter which required any party seeking variations to any modern award, in respect of the issues identified to be dealt with by the Full Bench, to file in the Commission a list of the awards it seeks to vary and any proposed draft determinations by 17th July 2015. The Directions also required any party seeking variations to file comprehensive written submissions and any witness statements or documentary material on which the party seeks to rely by 12th October 2015, and any interested party that sought to adduce evidence and/or make submissions in reply to file such material by 22nd February 2016.This reply submission from the CFMEU Construction and General Division (the CFMEU C&G) is made in accordance with those directions.

5. The main focus of this submission is on the proposed variations to the *Building and Construction General On-site Award 2010*, the *Joinery and Building Trades Award 2010* and the *Mobile Crane Hiring Award 2010*, however as we also have an interest in other awards we will also make brief comments on the proposed variations put forward by employers to those awards.

6. In regard to the variations to awards proposed by the ACTU and other unions we generally support the submissions filed by those organisations.

Draft Determinations Filed by 17th July 2015

7. Draft determinations for the *Building and Construction General On-site Award 2010* were filed by the following employer organisations:

    - HIA which sought to vary the award by the insertion of a new clause 9.3(c) dealing with the calculation of the casual hourly rate;
    - the AIG who sought to vary the casual conversion clause in clause 14.8; and
    - the RCSA who sought to vary the casual conversion clause in clause 14.8;

8. Although the MBA did not file draft determinations in accordance with the Directions issued by the Full Bench, they did file a submission which identified the variations that they were seeking which included changes to clause 3 and clause 14.5, the substance of which related

[4] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196and197-dir-290615.pdf

to the calculation of the casual hourly rate, in the *Building and Construction General On-site Award 2010*.

9. It should be noted that the CFMEU C&G also filed a draft determination seeking a variation to the *Building and Construction General On-site Award 2010* but this was withdrawn in correspondence dated 12th October 2015.

10. In regard to the *Joinery and Building Trades Award 2010* draft determinations were filed by the following employer organisations:

    - HIA which sought to vary the award by reducing the minimum daily engagement in clause 12.3 to 4 hours;
    - the AIG who sought to vary the award by reducing the minimum daily engagement in clause 12.3 to 3 hours and vary the casual conversion clause in clause 14.8; and
    - the RCSA who sought to vary the casual conversion clause in clause 14.8;

11. Again, although the MBA did not file a draft determination for the *Joinery and Building Trades Award 2010* in accordance with the Directions issued by the Full Bench, they did file a submission on 17th July 2015 in which they sought a reduction of the minimum daily engagement for casuals to 4 hours per engagement and a variation to clause 12.5 which would have the effect of only applying the casual loading to the base rate under clause 18.1.

12. In regard to the *Mobile Crane Hiring Award 2010* draft determinations were filed by the following employer organisations:

    - the AIG who sought to vary the casual conversion clause in clause 14.8; and
    - the RCSA who sought to vary the casual conversion clause in clause 14.8.

13. The AIG and RCSA also filed draft determinations to vary the casual conversion clause in the following awards:

    - *Concrete Products Award 2010*
    - *Manufacturing and Associated Industries and Occupations Award 2010*
    - *Waste Management Award 2010*

14. In summary the changes to the main awards for which the CFMEU C&G has an interest deal with the issues of the calculation of the casual rate of pay (*Building and Construction General On-site Award 2010*); the minimum daily engagement of casuals and calculation of the casual rate of pay (*Joinery and Building Trades Award 2010*); and the casual conversion clause (various awards).

The Nature of the Review

15. The Full Bench in their 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues decision (the Preliminary Jurisdictional Issues decision), stated,

> *"[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation*."[5]

16. The same Full Bench also made a number of important observations relevant to the conduct of the Review,

> *"[24] In conducting the review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective ……..In the Review the commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.*
>
> ……
>
> *[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full*

[5] [2014] FWCFB 1788

Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. "[6]

17. The above extracts identify that in prosecuting their claims before the Commission there is a need for the employer organisations to advance a merit based argument in support of the proposed variations, that they must address the legislative provisions, and provide probative evidence to demonstrate the facts supporting the proposed variation. The extracts confirm that the history of awards are important, particularly the award modernisation proceedings resulting in the creation of the modern awards, and that at the time the modern awards were made there was a legislative acceptance that they achieved the modern awards objective. The extracts also confirm that previous Full Bench decisions relevant to a contested issue are relevant and should be followed unless there are cogent reasons for not doing so.

18. As this submission will demonstrate, when the employer organisations claims are considered against the tests outlined in the above paragraph they clearly fail. We therefore submit that their proposed variations should be rejected.

Calculation of the Casual Rate of Pay – *Building and Construction General On-site Award 2010*

19. The HIA and MBA both seek variations to the *Building and Construction General On-site Award 2010* that would impact on the calculation of the casual rate of pay under that award. The HIA seek that the casual loading only be applied to the minimum rates in clause 19.1 (i.e. exclusive of allowances)[7], whereas the MBA seek that the casual loading be applied to weekly hire rates (i.e. inclusive of all relevant allowances except the follow the job loading)[8].

20. The HIA claim that the calculation of the casual rate of pay remains a source of contention for employers covered by the *Building and Construction General On-site award 2010*[9]. They claim that the current controversy consists of two elements: one is the interpretation of the award as to how the rate is calculated and the second is the complexity associated with attempting to calculate the rate under the current award provisions. They also attempt to link the appropriateness of the application of the casual loading to a number of allowances to the interpretation of the award.[10] The solution put forward by the HIA is to only apply the casual loading to the minimum classification rates in clause 19.1(a).

[6] Ibid
[7] HIA draft determination at attachment B
[8] MBA Submission of 3rd September 2015 at paragraph 3.5
[9] HIA submission at 6.1.1
[10] Ibid at 6.1.2

21. The MBA rely on their submissions filed on 11th November 2014. It would appear from this submission that the MBA are relying on paragraph 188 of the decision of SDP Watson[11] to claim that the debate, as to whether or not the follow the job loading should be included in the amount to which the casual loading should be applied, is not finally settled and should be addressed in the 2014 Modern Award Review.[12]

22. The MBA accept that most of the pre-modern awards provided for the casual loading to be applied to the ordinary time rate (inclusive of the follow the job loading) for tradespersons and labourers, and has advised their members to calculate the casual rate of pay under the modern *Building and Construction General On-site Award 2010* on this basis. The MBA however claim that this is illogical and far from certain.[13] The MBA claim that there is no necessity to protect so-called insecure workers with casual loadings as well as the follow the job loading and their proposed solution is, in essence, to remove the follow the job loading from the calculation of the ordinary time rate to which the casual loading is then applied.

23. The impact of both the HIA and MBA proposed variations would be a reduction in the existing minimum casual rates of pay for the majority of tradespersons and labourers covered by the *Building and Construction General On-site Award 2010.* The reduction would be greater under the HIA proposed variation. The amounts involved under the HIA proposal were set out in Exhibit CFMEU 1 in AM2014/1 and others, where a Full Bench considered the general issues of the absorption clause and the calculation of casual loadings in awards which provided for an all-purpose allowance during subgroups 1A and 1B of the Award stage. A copy of the document is attached at Appendix 1 to this submission. Attached at Appendix 2 is a table showing the reductions in the hourly rates for casuals (and the effective casual loading) if the MBA variation was approved. The reductions in both scenarios are significant for employees on the minimum award rates of pay.

24. In seeking such a substantial change to the award the onus is clearly on the HIA and MBA to provide probative evidence addressing the facts in support of the proposed variations and cogent reasons as to why the previous Full Bench decisions should not be followed. The HIA and MBA have failed on both accounts.

25. Before going to the HIA "evidence" we believe it is necessary to point out that whilst we do not dispute the fact that there are casual employees engaged in the building and construction industry the statistics relied on by the HIA[14] are not directly relevant to the level of casual

[11] [2013] FWC 4576
[12] MBA Submission of 11th November 2014 at 3.4 and 3.5
[13] Ibid at 3.7
[14] HIA Submission at 4.1.2

employment. The hours worked per week figures that they refer to include all persons working in the construction industry and includes employees and owner managers (a proxy for independent contractors). Also the statistics are based on surveys of workers as to the actual number of hours they worked during a particular month during the survey period which may have included time off work for a variety of reasons. According to the ABS website "employed" for the purposes of the Labour Force survey is taken to include:

> "*All persons aged 15 years and over who met one of the following criteria during the reference week:*
>
> - *Worked for one hour or more for pay, profit, commission or payment in kind, in a job or business or on a farm (employees and owner managers of incorporated or unincorporated enterprises).*
> - *Worked for one hour or more without pay in a family business or on a farm (contributing family workers).*
> - *Were employees who had a job but were not at work and were:*
> - *away from work for less than four weeks up to the end of the reference week; or*
> - *away from work for more than four weeks up to the end of the reference week and received pay for some or all of the four week period to the end of the reference week; or*
> - *away from work as a standard work or shift arrangement; or*
> - *on strike or locked out; or*
> - *on workers' compensation and expected to return to their job.*
> - *Were owner managers who had a job, business or farm, but were not at work.*"[15]

26. The number of persons working 29 hours per week or less is therefore not an indicator of casual employment levels.

27. As the ABS themselves point out "*Employees without leave entitlements is the most objective and commonly used measure of casual employment.*"[16] Although the latest release of Labour

[15] 6103.0 - Labour Force Survey Standard Products and Data Item Guide, May 2015

[16] http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6291.0.55.003Main%20Features6Nov%202015?opendocument&tabname=Summary&prodno=6291.0.55.003&issue=Nov%202015&num=&view=

Force statistics now include information on employees without leave entitlements[17] they do not include an industry breakdown. According to the Forms of Employment catalogue[18] released in May 2014 the total number of employees without leave entitlements in the construction industry was 130,100. It should be noted however that this includes all employees not just those that would be covered by the *Building and Construction General On-site Award 2010* and the *Joinery and Building Trades Award 2010*.

28. Turning to the HIA evidence there is really nothing of substance. All that they rely on is a witness statement from an HIA employee which does nothing more that set out how they currently calculate casual rates and how they would be calculated if the HIA proposal was adopted, and a draft guidance note from the FWO which has no legal standing whatsoever. We submit that the witness statement is hardly probative evidence and is nothing more than part of the HIA's submission and should be treated as such.

29. Similarly other than referring to what they understand the FWO's position to be, the MBA have provided no probative evidence.

30. The HIA try and muddy the waters in their submission by making the outrageous claim that what is an all-purpose allowance is far from clear under the *Building and Construction General On-site Award 2010.*[19] The HIA is either being deliberately misleading or suffering from a severe case of amnesia and has forgotten the consent position that was reached on the definitions of ordinary time hourly rates during the Modern Awards Review 2012 process. In his decision on the *Building and Construction General On-site Award 2010* ([2013] FWC 4576) SDP Watson said the following:

> *"3. Reference rate issue*
>
> *[33] The MBA's initial application sought variations directed to providing greater clarity in respect of reference rates throughout the Building On-site Award. It submitted that, whilst most allowances are defined under the Building On-site Award as a proportion of the "standard rate", which is described at clause 3.1 as the minimum wages as expressed for CW/ECW 3 workers under clause 19.1, i.e. 19.1(a) base rates, the reference rates for a range of other entitlements under the Building On-site Award are less clear. It submitted that many loadings, redundancy payments,*

[17] See http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6291.0.55.003Main+Features6Nov%202015?OpenDocument
[18] 6359.0 - Forms of Employment, Australia, November 2013
[19] HIA submission at 6.1.17

distant work entitlements etc., are often described as being payable at "ordinary time rates of pay", "ordinary rates", "time and a half" or "double time" etc., which are not defined under the Building On-site Award. The MBA submitted that this resulted in employers being often uncertain about which rates should be paid upon redundancy, or to which rates loadings should be applied, proposing that reference rates under the Building On-site Award be specifically defined, based both on the penalty reference rate definitions contained in the NBCIA and common law precedent on the meaning of "ordinary time rates of pay".

[34] As already noted in this decision, organisations appearing sought a further opportunity to progress the simplification of reference rates. They utilised that opportunity productively, resulting in a variation agreed between the CFMEU, the HIA, the MBA, the AWU, the AMWU and the CEPU which was conveyed to the Commission in a submission and correspondence of 6 March 2013, which was posted on the website.

[35] The variations proposed are as follows:

Clause	***Variation proposed***
3	*By inserting the following new definitions in alphabetical order in clause 3:* ***Double time*** *means the ordinary time hourly rate multiplied by 200%* ***Double time and a half*** *means the ordinary time hourly rate multiplied by 250%* ***Ordinary time hourly rate*** *means:* *for daily hire employees the hourly rate calculated in accordance with clause 19.3(a);* *for weekly hire employees the hourly rates calculated in accordance with clause 19.3(b);* *for apprentices the weekly rate (determined in accordance with clause 19.7 or 19.8) divided by 38;* *for trainees the weekly rate (determined in accordance with clause 28.2 or 28.3) divided by 38;* *for employees covered by clause 42 – Lift industry, includes the all-purpose amounts specified in clause 42;*

	for forepersons and supervisors in the metal and engineering construction sector the relevant weekly rate specified in clause 43.2(a) divided by 38; *for leading hands includes the amount calculated in accordance with clause 19.2(a) or (b)* ***Time and a half** means the ordinary time hourly rate multiplied by 150%*
13.2	*By deleting clause 13.2 and inserting the following:* ***13.2** For each ordinary hour worked, a part-time employee will be paid no less than the ordinary time hourly rate for the relevant classification and pro rata entitlements for those hours. An employer must inform a part-time employee of the ordinary hours of work and the starting and finishing times.*
15.3(a)	*By deleting clause 15.3(a) and inserting the following:* ***(a)** When overtime and/or shiftwork are worked the relevant penalties and allowances prescribed by the award will apply, based on the applicable ordinary time hourly rate. No apprentice/trainee will work overtime or shiftwork on their own or without supervision.*
17.3(c)	*By deleting clause 17.3(c) and inserting the following:* ***(c)** **Week's pay** means the ordinary time hourly rate at the time of termination multiplied by 38. **Hours pay** means the ordinary time hourly rate at the time of termination.*
19.1(b)	*By deleting clause 19.1(b) and inserting the following:* ***(b)** The rates in clause 19.1(a) prescribe minimum classification rates only. The payment of additional allowances is required by other clauses of this award in respect of both weekly and hourly payments. The ordinary time hourly rate for an employee's classification is set out in clause 3.*
19.4(a)	*By deleting clause 19.4(a) and inserting the following:* ***(a)** A new employee, if engaged and presenting for work to commence employment and not being required, will be entitled to at least eight hours' work or payment therefore at ordinary time hourly rates, plus the appropriate*

		allowance prescribed by clause 25—Fares and travel patterns allowance.
21.7		*By deleting clause 21.7 and inserting the following:* ***21.7*** ***Carpenter-diver allowance*** *Employees undertaking work normally performed by a carpenter-diver must be paid an additional 4.5% of the hourly standard rate per hour extra which will be regarded as part of the ordinary time hourly rate for all purposes of the award.*
21.8(b)		*By deleting clause 21.8(b) and inserting the following:* ***(b)*** *This allowance must be paid instead of all special rates prescribed in clause 22—Special rates, except clauses 22.2(b) and 22.2(c) and will be regarded as part of the ordinary time hourly rate.*
22.2(m)		*By deleting clause 22.2(m) and inserting the following:* ***(m)*** ***Furnace work*** *An employee engaged in the construction of, or alteration or repairs to, boilers, flues, furnaces, retorts, kilns, ovens, ladels, and similar refractory work must be paid an additional 8.5% of the hourly standard rate per hour. This additional rate will be regarded as part of the ordinary time hourly rate for all purposes.*
22.2(n)		*By deleting clause 22.2(n) and inserting the following:* ***(n)*** ***Acid work*** *An employee required to work on the construction of or repairs to acid furnaces, acid stills, acid towers and all other acid resisting brickwork must be paid an additional 8.5% of the hourly standard rate per hour. This additional rate will be part of the ordinary time hourly rate for all purposes.*

22.3(l)	*By deleting clause 22.3(l) and inserting the following:* ***(l)*** ***Brewery cylinders—painters*** ***(i)*** *A painter in brewery cylinders or stout tuns must be allowed a 15 minute spell in the fresh air at the end of each hour worked. Such 15 minutes will be counted as working time and will be paid for as such.* ***(ii)*** *The rate for working in brewery cylinders or stout tuns will be at the rate of time and a half. When an employee is working overtime and is required to work in brewery cylinders and stout tuns the employee must, in addition to the overtime rates payable, be paid one half of the ordinary time hourly rates.*
23.7	*By deleting clause 23.7 and inserting the following:* ***23.7*** *Where an employee is not able to perform any work at any location because of inclement weather, the employee will receive payment at the ordinary time hourly rate for ordinary hours. Payment for time lost due to inclement weather is subject to a maximum of 32 hours pay in any four week period for each employee. Payment is subject to adherence to the terms of this clause.*
24.7(a)(i)	*By deleting clause 24.7(a)(i) and inserting the following:* ***(i)*** *An employee must:* • *be provided with appropriate transport or be paid the amount of a fare on the most appropriate method of public transport to the job (bus, economy air, second class rail with sleeping berths if necessary), and any excess payment due to transporting tools if such is incurred; and* • *be paid for the time spent in travelling, at ordinary time hourly rates up to a maximum of eight hours per day for each day of travel; and* • *be paid $13.70 per meal for any meals incurred while travelling.*
25.5	*By deleting clause 25.5 and inserting the following:* ***25.5*** ***Travelling outside radial areas*** *Where an employer requires an employee to travel daily from inside one radial area mentioned in clauses 25.2, 25.3*

	and 25.4, to work on a construction site outside that area, the employee will be entitled to: ***(a)*** *the allowance prescribed in clause 25.2 for each day worked; and* ***(b)*** *in respect of travel from the designated boundary to the job and return to that boundary:* ***(i)*** *the time outside ordinary working hours reasonably spent in such travel, which will be paid at the ordinary time hourly rate, and calculated to the next quarter of an hour with a minimum payment of one half an hour per day for each return journey; and* ***(ii)*** *any expenses necessarily and reasonably incurred in such travel, which shall be $0.46 per kilometre where the employee uses their own vehicle.*
34.1(b)	*By deleting clause 34.1(b) and inserting the following:* ***(b)*** *When an employee is employed continuously (inclusive of public holidays) for five shifts Monday to Friday, the following rates will apply:* ***(i)*** *afternoon and night shift—ordinary time hourly rate plus 50%;* ***(ii)*** *morning and early afternoon shifts—ordinary time hourly rate plus 25%.*
34.1(d)	*By deleting clause 34.1(d) and inserting the following:* ***(d)*** *In the case of broken shifts (i.e. less than 38 ordinary hours worked over five consecutive shifts Monday to Friday) the rates prescribed will be time and a half for the first two hours and double time thereafter.*
34.1(i)	*By deleting clause 34.1(i) and inserting the following:* ***(i)*** *All work in excess of shift hours, Monday to Friday, other than holidays must be paid for at double time (excluding shift rates).*
34.2(j)	*By deleting clause 34.2(j) and inserting the following:* ***(j)*** ***Shift allowances*** *A shiftworker whilst on afternoon or night shift other than on a Saturday, Sunday or holiday must be paid their ordinary time hourly rate plus 15%.*

34.2(n)	*By deleting clause 34.2(n) and inserting the following:* ***(n)*** ***Permanent night shift*** *An employee who (except at their own request pursuant to clause 34.2(b)(i)):* ***(i)*** *during a period of engagement on shift, works night shift only; or* ***(ii)*** *remains on a night shift for a longer period than four successive weeks; or* ***(iii)*** *works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift in each cycle;* *must, during such engagement, period or cycle be paid their ordinary hourly rate plus 30% for all time worked during ordinary working hours on such night shift.*
34.2(o)	*By deleting clause 34.2(o) and inserting the following:* ***(o)*** ***Call outs*** *A shiftworker called out to work after the expiration of their customary working time and after they have left work for the shift, or is called out to work on a day on which they are rostered off, must be paid for a minimum of three hours work calculated at double time for each occasion the shiftworker is called out. Provided that if called out on a public holiday, payment must be calculated at the rate prescribed in clause 37.9 of this award.*
36.5	*By deleting clause 36.5 and inserting the following:* ***36.5*** *If an employer requires an employee to work during the time prescribed by clause 35.1 for finishing of work, the employee must be paid at the rate of double time for the period worked between the prescribed time of finishing and the beginning of the time allowed in substitution for the meal break. If the finishing time is shortened at the request of the employee to the minimum of 30 minutes prescribed in clause 35.1 or to any other extent (not being less than 30 minutes) the employer will not be required to pay more than the ordinary time hourly rate of pay for the time*

		worked as a result of such shortening, but such time will form part of the ordinary working time of the day.
37.7		*By deleting clause 37.7 and inserting the following:*
	37.7	*An employee working overtime on a Saturday or working on a Sunday must be allowed a paid crib time of 20 minutes after four hours work, to be paid for at the ordinary time hourly rate of pay but this provision will not prevent any arrangements being made for the taking of a 30 minute meal period, the time in addition to the paid 20 minutes being without pay.*
37.8		*By deleting clause 37.8 and inserting the following:*
	37.8	*In the event of an employee being required to work in excess of a further four hours, the employee must be allowed to take a paid crib time of 30 minutes which will be paid at the ordinary time hourly rate of pay.*

[36] The CFMEU correspondence noted that consequential variations would or might be required in respect of clauses 14.5, 14.6, 14.7 and 19.3 but the consequential variations would depend on the determination of other variations proposed in respect of the substantive provisions in this decision. It also noted that consequential variation of clauses 19.7 and 19.8 would depend on the outcome of the separate Full Bench dealing with apprentices.

[37] Finally, the CFMEU noted that the unions believe no change should be made to clause 38.2(a) as it highlights that the base rate of pay referred to in the Fair Work Act 2009 (the Act) does not apply.

[38] The position reflected in the currently proposed variations, if accepted, disposes of numerous MBA claims: in respect of clauses 3.1, 17.3(c), 19.4(a), 22.3(l)(ii), 23.6, 23.7, 24.7(a)(i), 34.1(b)(i) and (ii), 34.1(d), 34.1(i), 34.2(i)–(k), 34.2(m)–(o), 36.2, 36.5, 36.11, 36.13, 37.1, 37.3, 37.5, 37.7, 37.8 and 37.9.

[39] In a statement of 7 March 2013,[i] all parties with an interest in the Building On-site Award were afforded an opportunity to make submissions on the reference rate variations, as set out in the CFMEU correspondence and recorded above, through a conference/hearing listed on 21 March 2013.

[40] On 15 March 2013, correspondence from the Ai Group was posted on the website for the matter supporting the combined proposal, save for one matter. Specifically, it indicated that the word "time" has been missed in the last sentence in the proposed clause 34.2(n), as highlighted below:

*"**(iii)** works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift in each cycle;*
must, during such engagement, period or cycle be paid their ordinary <u>time</u> hourly rate plus 30% for all time worked during ordinary working hours on such night shift."

[41] No other written submissions were received. In the hearing of 21 March 2013, no objection was taken to the amendment proposed by the Ai Group. In a statement of 22 March 2013,[ii] a further opportunity was provided for submissions in respect of the Ai Group amendment. None were made.

[42] <u>I am satisfied that the additional definitions and the consequential variations contained in the CFMEU correspondence of 6 March 2013, amended in respect of clause 34.2(n) as proposed by the Ai Group, provide clarity and consistency as to the calculation of various entitlements under the Building On-site Award by reference to the definitions proposed. As noted by the MBA, the definitions now proposed more closely correspond with the definitions within s.16 of the Act. I am satisfied that the variations proposed should be made to give effect to the modern awards objective in s.134(g), to address uncertainty arising from the current terms and does not materially alter the relevant terms and conditions. The Building On-site Award will be varied in the agreed terms proposed, subject to the Ai Group amendments to clause 34.2(n), unless otherwise varied in this decision.</u>

[43] Any consequential variations which are in respect of clauses 14.5, 14.6, 14.7 and 19.3, having regard to my determination of other variations proposed in respect of the substantive provisions in this decision, may be sought by further written submissions by no later than 15 August 2013. Any consequential variation of clauses 19.7 and 19.8, if necessary following the decision of the Apprentice, Trainees & Juniors Full Bench may be sought by further written submissions by no later than two weeks after the decision, if not already addressed in any determination made by that Full Bench." (Emphasis added)

31. The above extract demonstrates that the parties were fully aware at the time of reaching the consent position of the consequences of adopting the definitions of ordinary time hourly rates, and that if an allowance was included in the ordinary time hourly rate calculation then it was paid for all purposes.

32. It should also be noted that the above decision was not the only one made by SDP Watson for this award, regarding casuals, during the 2012 Award Review. In the Supplementary Decision of 30th August 2013 ([2013] FWC 6347), in dealing with the HIA's application to only apply the casual loading to the weekly hire hourly rate[20], SDP Watson decided:

> *"[2] The variation sought by the HIA was to the opposite effect of the Construction, Forestry, Mining and Energy Union (CFMEU) claim to vary the Award which was dealt with, and refused, in paragraphs [186]-[188] of my decision. My reasoning in respect to the CFMEU claim applies equally to the HIA claim:*
>
> > *• The issue concerns the rate to which the casual loading applies.*
> >
> > *• The 25% casual loading applies to the rate otherwise applicable in compensation for the absence of annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.*
> >
> > *• No basis has been established to vary clauses 14.5-14.7 in respect of the rate to which the casual loading applies within the clause specifying the casual loading.*
> >
> > *• No practical problem or any other basis referable to the considerations in Item 6, Part 2 of Schedule 5 of the Transitional Provisions Act to warrant variation of the Award within the 2012 Review process.*
>
> *[3] I am not satisfied that the HIA established cogent reasons to vary clauses 14.5-14.7 of the Award. This element of the HIA application is refused.*
>
> *[4] As noted in my earlier decision, a broader debate as to any overlap of the factors contemplated by the follow-the-job loading and the casual loading was reflected in the submissions of the Master Builders Australia (MBA), the HIA and the CFMEU. That question was not fully ventilated in the current proceedings and no basis was established for considering that issue for the purposes of the 2012 Review."*

[20] https://www.fwc.gov.au/documents/documents/awardmod/review/AM201248&ors_corr_HIA_300813.pdf

33. In a further supplementary decision handed down on 2nd October 2013[21], SDP Watson further determined that,

> *"[4] In my decision of 15 July 2013, I invited further written submissions concerning reference rate variations to clauses 14.5, 14.6, 14.7 and 19.3, having regard to my determination of substantive variations in respect of these clauses and, if necessary, reference rate variations to clauses being considered for substantive variation by the Apprentice, Trainees & Juniors Full Bench.*
>
> *[5] On 15 August 2013, the Construction, Forestry, Mining and Energy Union (CFMEU) corresponded with the Fair Work Commission (the Commission) indicating that clauses 14.6 and 14.7 should be varied to read:*
>
> > *"14.6 A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 36—Overtime, and 37— Penalty rates, provided that:*
> >
> > *(a) where the relevant penalty rate is time and a half, the employee must be paid 175% of the ordinary time hourly rate prescribed for the employee's classification; and*
> >
> > *(b) where the relevant penalty rate is double time, the employee must be paid 225% of the ordinary time hourly rate prescribed for the employee's classification.*
> >
> > *14.7 A casual employee required to work on a public holiday prescribed by the NES must be paid 275% of the ordinary time hourly rate prescribed for the employee's classification."*
>
> *[6] The CFMEU correspondence advised that the MBA and the HIA consent to the variation.*
>
> *[7] On 22 August 2013, the Apprentice, Trainees & Juniors Full Bench published a substantive decision deciding "common matters" relating to multiple modern awards, including the On-site Award.*

[21] [2013] FWC 7478

[8] In my 30 August 2013 supplementary decision, I invited further written submissions by 13 September 2013 as to whether any other reference rate variations of the same character be varied:

1. The reference rate variations to clauses 14.6 and 14.7 (casual clauses) proposed by the CFMEU; and

2. Any reference rate variations to clauses 19.7 and 19.8, which are necessary following the decision of the Apprentice, Trainees & Juniors Full Bench.

[9] Only the MBA and CFMEU have made further written submissions in relation to either issue.

[10] In submissions dated 12 September 2013 the MBA advised that it had settled on the draft variation to clauses 14.6 and 14.7 as proposed by the CFMEU in correspondence of 15 August 2013 and that it agrees with the proposed variation.

[11] Clauses 14.6 and 14.7 will be varied to reflect the terms proposed by the CFMEU and set out above. The determination giving effect to this decision will operate from 2 October 2013."

34. The above extract shows that during the 2012 Award Review a consent position was reached on an appropriate variation to make it clear in the *Building and Construction General On-site Award 2010* that the ordinary time hourly rates (inclusive of specified allowances) were the appropriate reference rates to be used for the calculation of penalty rates, including penalty rates for casuals.

35. The decisions referred to above also reaffirm that all parties accepted that the casual loading should be applied to the ordinary time hourly rate, and that the only possible area of remaining contention was whether or not the daily hire ordinary time hourly rates (inclusive of the follow the job loading) should be used.

36. The Full Bench in the recent absorption and casual loading decision ([2015] FWCFB 6656) (Absorption and Casual Loading decision), after hearing from all parties, adopted the general approach that casual loadings were to be applied to the ordinary time rate,

*"**[102]** We accept the submission that the provisional decision is inconsistent with the general approach adopted in the 2008 decision, namely that the casual loading*

should be applied to the ordinary time rate. Although what constituted the ordinary time rate was not the subject of express consideration in the 2008 decision, we consider it to be well understood that an allowance which is described as all purpose in nature is one that necessarily forms part of the ordinary time rate. That being the case, any departure from that approach proposed by the provisional decision must be justified by cogent reasons.

……..

Conclusions

[107] *We have come to the conclusion that the approach in the provisional decision should not be adopted. We are not satisfied on balance that there are sufficiently cogent reasons to justify a departure from the general approach adopted in the 2008 decision. Leaving aside the dispute concerning the interpretation of the relevant provisions of the On-Site Award for the time being, we do not consider that there is anything before us which suggests that there has been any practical difficulty in the operation of current modern awards provisions which are consistent with the 2008 decision. In that circumstance, the adoption of a change which may cause not insignificant reductions in pay to some award-dependent employees is not justified.*

[108] *Additionally, and on reflection, the application of the provisional decision may add unnecessary complexity to modern awards. Its effect would be that allowances which are currently described as all purpose in nature would no longer operate on a truly all purpose basis, but would apply for certain purposes only. For the sake of clarity, that would then require those purposes to be clearly identified. As was pointed out in the submissions of the AWU, a requirement in the case of casual employees that the casual loading be calculated on the minimum hourly rate, but that other loadings and penalties be calculated on the ordinary hourly rate would add difficulty to the process of calculating the correct hourly rate. This difficulty will not be able to be overcome by the addition of detailed rate schedules specifying the casual hourly rates payable for each ordinary time, overtime, weekend work and shift work scenario because, particularly in those awards where there are different all purpose allowances applying to different categories of employees, it will become impracticable to produce comprehensive rate schedules coverings every possible scenario for every category of employee.*

[109] *The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all purpose allowances to*

be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.

[110] *The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances."*

37. Given the above decisions there can be no uncertainty as to the application of casual loadings to the ordinary time hourly rate.

38. In section 6.3 of their submission the HIA attempts to attack the inclusion of a number of allowances in the calculation of the ordinary time rate before the application of the 25% loading, suggesting that casuals should not be paid an additional 25% of a number of allowances.

39. The HIA however ignore the preferred approach of the FWC identified in paragraph [109] of [2015] FWCFB 6656. The HIA do not say that the allowances should not be treated as all purpose allowances under the award, and should not form part of the ordinary time hourly rate, only that they the allowances should not be increased by 25% when paid to casuals. This approach is inconsistent with the decision of the Full Bench.

40. The HIA analysis of the allowances included in the ordinary time hourly rates and the basis on which they are paid is not supported by any probative evidence, ignores the historical determinations regarding the way in which casuals have been paid in the industry, and in some places is clearly wrong (e.g. the HIA say that a daily hire employee may be engaged on a part-time basis[22] whereas the award only provides for part-time weekly hire employees[23]).We would add that the MBA are also wrong in their assertion that the in charge of plant allowance is not subject to the casual loading[24]. The in charge of plant allowance has always been included, when applicable, in the calculation of the ordinary time hourly rate for

[22] HIA submission at 6.3.12
[23] See clause 10.1 of the *Building and Construction General On-site Award 2010*
[24] MBA 11th November 2014 Submission at 3.6

operators in both the *National Building and Construction Industry Award 2000* (see clause 18.3.2) and the *Building and Construction General On-site Award 2010* (see clause 19.3(b)).

41. The HIA conveniently ignore the well understood principles that the intent of the casual loading is to ensure that casuals are not a cheaper form of labour than daily hire or weekly hire employees, and that the compensation received by the casual loading is based on what a daily hire or weekly hire employee would normally receive (inclusive of allowances) for paid leave, etc.

42. In 1913 , in making the first Archer Award for builders' labourers, Justice Higgins noted that,

> "*In the course of the evidence before me, not one employer has objected to the casual rate per hour being fixed higher than the permanent rate; and all who were asked on the subject expressed the opinion that the casual rate should be higher. This opinion is in accordance with the usual practice, so far as it has come under my notice, whether the wages are unregulated or regulated, by agreement, determination, or award. Nor is it without justification on grounds of theory. It is for the advantage of employers, and through the employers, of the public, to have a number of men holding themselves attached to the building trade, ready to take a job in that trade when it is offered, and waiting for the offer. As is said in a recent valuable work on this subject,* "The tendency of each trade is to keep attached to itself in employment, under-employment, or unemployment, a sufficient number of hands to meet all possible demands for the trade*" (Seasonal Trades, edited by Sidney Webb.)*"[25]

43. In the Metal industry Casuals Case decision[26] in 2000 the Full Bench in discussing the casual loading noted that,

> "*In relation to that emerging phenomenon in Australian patterns of employment, Creighton and Stewart have observed:*
>
> ……
>
> *[7.29] The phenomenon of casual employment has important implications for regulatory policy, especially in light of the ease with which workers can come to be classified as casuals. In theory, the loading is meant to discourage employers from hiring casuals. However, even if the loading does constitute adequate compensation for the full value of the non-wage benefits foregone, most employers seem happy to*

[25] 7 CAR 210 @ 218
[26] Print T4991

pay the additional amount in return for what they perceive as the flexibility of being able to hire and fire at will. For some workers too, the loading may seem an attractive substitute for benefits they are unlikely to access, or whose true value they do not appreciate. For many though, the question of choice is simply irrelevant when the only alternative to accepting casual work is unemployment"[27]

44. In the same case the Full Bench noted that the issue of casual loadings should be considered on a case by case basis,

> *"**[148]** In relation to the first of those considerations, the case by case character of loading rate adjustments, we have been influenced by the relative consistency of approach disclosed in several decisions by State industrial tribunals about casual rate loadings. The diversity of constituent components and levels in federal awards historically corroborates that analysis. Those cases, and our own examination of the trail of decision making in the federal tribunals, support the conclusion that:*
>
> - *rationales for loadings have not always been expressed in decisions. Where reasons are exposed, a case by case, sector by sector, approach is well established;*
> - *among rationales that have been expressed the most enduring is that the loading is a means of "cashing out" certain award benefits; or, compensating for other entitlements or conditions foregone;*
> - *support can be found for general propositions that loadings compensate for the nature of casual employment; or should deter too ready a substitution of casual employment for weekly employment.*
>
> ……..
>
> ***[155]** Our consideration of the components and values to be given to particular components in a review of the casual rate loading has been most influenced by the safety net function of the loading. That rationale for the loading more or less dictates what components should be taken into account in calculating it. Primarily those components are the standard award benefits applicable to full-time employees but not applicable to casuals. Any other components, including off-sets, will need to be derived from the operation of the Award on casual employment including its incidents, in comparison with other types of employment and their incidents.*
>
> ……
>
> ***[157]** Perhaps more important in the context of the relevance of employer cost is the potential impact of the loading on it. The Commonwealth submitted that the*

[27] Ibid at [107]

loading should be so calculated as to make the choice between casual and "permanent" employees broadly cost neutral. In our view some of the Commonwealth's later submissions contradicted the consistent application of the principle proposed. However, we consider that the proposition does crystallise what should be an important objective in calculating and fixing the loading. A logical and proper consequence of providing for casual employment with the incidents currently attached to it is that, so far as the award provides, it should not be a cheaper form of labour, nor should it be made more expensive than the main counterpart types of employment."

45. As we have already pointed out the parties involved in the *Building and Construction General On-site Award 2010* have already agreed on which allowances should be treated as all purpose and included in the ordinary time hourly rate and that the matter was resolved during the Modern Awards Review 2012. The parties also recognised that the casual loading was applied to the ordinary time hourly rate.

46. In regard to the inclusion of the follow the job loading in the calculation of the ordinary time hourly rate for daily hire employees, we submit that this is a recognised component of daily hire employment under the *Building and Construction General On-site Award 2010*. It is paid for the loss of wages for periods of unemployment between jobs. The calculation of multiplying by 52/50.4 is to take into account an average of 8 days (1.6 weeks) unemployment per year.

47. The HIA claim that including the follow the job loading in the calculation of the casual rate is double dipping with casual employees being compensated for the same disability twice. The same point is made by the MBA.[28]

48. We submit that the HIA and MBA are wrong. Whilst the itinerancy of casual employment was considered in the Metals Case it was done so on the basis of comparing casual employment to weekly hire employment under that award. That Full Bench found,

[187] *Our consideration of the issues generated about the inclusion of a component for those considerations <u>is guided by the emphasis we have given to the relationship between the casual rate loading and the award based incidents of types of employment.</u> The retention or inclusion of a factor to deter use of casual employment would be inconsistent with the rationale we have pronounced. <u>The linkage between the award incidents of a type of employment and the itinerance of casual work, or such notions as</u>*

[28] MBA Submission of 11th November 2014 at 3.8 and 3.9

the "incidence of casualness", an expression used in some of the Queensland decisions, is elusive. However, the itinerance is associated with the notions of intermittent work, or lost time. Both may be portrayed as consequential to hourly hire, and to the employment by the hour incident of casual employment.

[188] *Viewed through that connection with the Award, the inclusion in the loading of a component for lost time or intermittency is a variant on much the same sorts of considerations that underlay our acceptance that it is appropriate to take into account a component for the differential entitlements to notice of termination. However, we accept that there are dimensions and matters of degree that need to be weighed in the assessment of any such broad based component. The impact of employment by the hour and the lack of entitlement to notice is likely to have more disruptive financial effect upon a casual employee than the corresponding incidents of employment have on a fixed term employee. Among several considerations relevant to that impact are the incidence and frequency of "short-time" engagements and the associated uncertainty about income. Such short-term volatility may have some direct and indirect effects on use of and access to credit facilities but that impact is a more remote consequence of the periods of engagement permitted by the Award. Although we are not attracted to making provision for itinerance or lost time as direct components, we accept that evidence about them is relevant to assessing the appropriate weight to be given to a notice of termination, and effect of employment by the hour component of the loading."*

49. In applying the casual loading to the types of employment under the *Building and Construction General On-site Award 2010* recognition must be given to daily hire employment and the differences between daily hire and casual hire that impact on the level of itinerancy. In general daily hire employees are engaged for a project and suffer periods of unemployment between projects.[29] Casual employees are engaged on an intermittent and usually irregular basis with greater periods of unemployment. Daily hire employees are engaged by the day with one day's notice of termination. Casual employees are engaged by the hour with a minimum payment of 4 hours work per engagement. The amount of lost time or lost wages that a casual can potentially suffer is therefore significantly greater than a daily hire employee. Accordingly the follow the job loading should be included in the calculation.

50. The HIA accepts that daily hire employment has traditionally been the main form of employment in the building and construction industry[30]. The MBA noted in their 11th

[29] The AIG agrees to this assertion, see http://www.airc.gov.au/awardmod/databases/building/Submissions/AIG_build_con_ed.pdf
[30] HIA submission at 6.3.10

November 2014 submission[31] that casual loadings have historically been applied to either weekly hire or daily hire rates. They also note that,

> "*Master Builders advises conservatively that, if employers have formerly applied the casual loading to an hourly rate inclusive of the daily hire follow-the-job loading, then they should maintain that practice*".[32]

51. Prior to the making of the modern award the question as to which rate to apply the casual loading to was easily resolved as the occupations under awards were specified as either weekly hire or daily hire. For example under the *National Building and Construction Industry Award 2000*[33] (NBCIA 2000) operator classifications were weekly hire employees (clause 13.1) whereas tradespersons and labourers were daily hire employees (clause 13.2). The hourly rates (inclusive of allowances) for each classification were set out in clause 18.1.2, and under clause 13.4.6 a casual employee for working ordinary time was to be paid "*125 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification*".

52. The casual's clause in the NBCIA 2000 was inserted by consent in 2002 by Commissioner Harrison[34]. The clause inserted was as follows:

> "*13.4 Casual employment*
>
> *13.4.1 A casual employee is one engaged and paid in accordance with the provisions of this clause. A casual employee shall be entitled to all of the applicable rates and conditions of employment prescribed by this Award except annual leave, personal leave, parental leave, jury service, public holidays and redundancy.*
>
> *13.4.2 An employer when engaging a person for casual employment must inform the employee in writing that the employee is to be employed as a casual, stating by whom the employee is employed, the job to be performed, the classification level, the actual or likely number of hours to be worked, and the relevant rate of pay.*
>
> *13.4.3 A casual employee may be employed by a particular employer on a regular and systematic basis for any period not exceeding six weeks. If the employment is to continue on a regular and systematic basis beyond six weeks the employee must then be employed pursuant to clause 13.1 or 13.2 of this Award.*

[31] MBA 11th November 2014 submission at 3.2
[32] Ibid at 3.5
[33] https://www.fwc.gov.au/documents/consolidated_awards/AP/AP790741/asframe.html
[34] PR919660

13.4.4 The provisions of 13.4.3 shall not apply to a casual employee who has been engaged by a particular employer to perform work on an occasional basis and whose work pattern is not regular and systematic.

13.4.5 On each occasion a casual employee is required to attend work the employee shall be entitled to payment for a minimum of four hours' work, plus the relevant fares and travel allowance prescribed by clause 38.

13.4.6 A casual employee for working ordinary time shall be paid 125 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.

13.4.7 A casual employee required to work overtime or weekend work shall be entitled to the relevant penalty rates prescribed by clauses 29 and 31, provided that :

13.4.7(a) where the relevant penalty rate is time and a half, the employee shall be paid 175 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification; and

13.4.7(b) where the relevant penalty rate is double time, the employee shall be paid 225 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.

13.4.8 A casual employee required to work on a public holiday prescribed by clause 36 shall be paid 275 per cent of the hourly rate prescribed by clause 18.1.2 for the employee's classification.

13.4.9 Termination of all casual engagements shall require one hour's notice on either side or the payment or forfeiture of one hour's pay, as the case may be."

53. The variation to that award continued the longstanding history of award provisions for building tradespersons and labourers in the building and construction industry whereby the casual loading was added to the hourly rate (inclusive of allowances) as demonstrated in the table attached in Appendix 3.

54. The casual provision of the NBCIA 2000 clearly spelt out in clause 13.4.1 that casuals were entitled to all of the applicable rates and conditions of employment prescribed by the award <u>except for annual leave, personal leave, parental leave, jury service, public holidays and redundancy</u>. These excepted matters were what the 25% loading was compensation for.

55. When the Award Modernisation Full Bench made the *Building and Construction General On-site Award 2010* they kept the majority of clause 13.4 from the NBCIA 2000 but replaced clause 13.4.3 with the standard casual conversion provision inserted into the majority of awards.

56. Under the current award the casual rate of pay can be calculated on either the daily hire rate or the weekly hire rate. This was confirmed by SDP Watson during the Modern Awards Review 2012 in AM2012/48 and others. In a decision[35] rejecting the CFMEU C&G's application to vary the award (in which the union sought to limit daily hire to tradespersons and labourers and to rectify the technical problem that we said had arisen in regard to determining how casual rates of pay were to be calculated and to clarify that casuals could be employed as daily hire casuals and weekly hire casuals) SDP Watson decided that ,

> *"[173] The CFMEU seeks to justify its application on the basis that the restricted use of daily hire it proposes is consistent with the predominance of pre-modern instruments which operated in the industry. This ignores the fact that the concept of daily hire attracted very specific consideration of the Award Modernisation Full Bench and that the Full Bench opted for a single modern award for the on-site building and construction industry, with only limited specific differences in terms and conditions between sectors. The CFMEU has not established cogent reasons for departing from the provisions determined by the Award Modernisation Full Bench in respect of employment types included in the Building On-site Award, after specific consideration of the issue of daily hire and specific consideration of what differential conditions should be included in the modern award to reflect the various sectors of the industry brought within it. Nor has the CFMEU established that the failure by the Award Modernisation Full Bench to replicate the sectoral provisions in respect of daily hire in the single Building On-site Award is an anomaly. The issue raised by the CFMEU is not one of an anomaly in the general meaning of an "Irregularity, deviation from the common or natural order, exceptional condition or circumstance". The award modernisation process both generally and within the on-site building and construction industry brought together differently regulated industry sectors within broader industry awards. The proposition that the failure to maintain a previous sectoral difference within a broader industry award is an anomaly is not sustainable, given that it would not be an exceptional outcome, either in respect of the Building On-site Award or in other modern awards—as one example, the Manufacturing Award. The CFMEU application is refused.*

[35] [2013] FWC 4576

……

[187] The CFMEU has not established a need for the variation within the context of the 2012 Review process. The 25% applies to the rate otherwise applicable in compensation for the absence of annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits. It is neither appropriate, nor necessary to deal with the rate to which the casual loading applies within the clause specifying the casual loading. Further, the CFMEU has not identified any practical problem or any other basis referrable to the considerations in Item 6, Part 2 of Schedule 5 of the Transitional Provisions Act to warrant variation of the Building On-site Award within the 2012 Review process. The issue raised by the CFMEU is about the rate to which the casual loading applies. The CFMEU submitted that the hourly rate calculation for daily hire employees includes the follow-the-job loading. There is no evidence that the terms of clause 14.3 and/or clause 14.5 have disturbed the practice, reflected in most of the pre-modern awards, of applying this loading to casuals. The MBA submitted that it advises employers that casual loadings should be applied to follow-the-job rates, i.e. as calculated under clause 19.3(a). The CFMEU has not provided any evidence to suggest that the terms of clause 14.3 and/or clause 14.5 have caused any practical problems or otherwise operates contrary to the modern awards objective. It has not established cogent reasons to vary clauses 14.3 or 14.5 of the Building On-site Award. This element of the CFMEU application is refused."

57. Neither the MBA nor HIA have provided any evidence of any substantial change that has occurred, since the Modern Awards Review 2012 or the award modernisation process, nor any other probative evidence to justify their proposed variations to the award. They have not provided any cogent reasons as to why the casual rates of pay payable under the *Building and Construction General On-site Award 2010* should be significantly reduced. We therefore submit that on the authority of the Modern Awards Review 2012 decision of SDP Watson, the Absorption and Casual Loading decision and the Preliminary Jurisdictional Issues decision, the MBA and HIA applications should be rejected and that the casual loading should continue to be applied to the daily hire ordinary time hourly rate for CW building and construction labourers and tradespersons.

58. The final point we would make is that in regard to the modern awards objective the Preliminary Jurisdictional Issues decision reaffirmed the position that "*In the Review the commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made.*"

59. The issues raised by the HIA in section 6.4 of their submission are insufficient justification to warrant a variation to the award. The main issue that they complain of, i.e. the alleged complexity of determining wage rates, will be addressed by the inclusion of schedules of rates of pay in all modern awards arising from the 4 Yearly Review as foreshadowed in the correspondence from the President, justice Ross, to Ms Webster of the Fair Work Ombudsman date 30th March 2015[36].

Calculation of the Casual Rate of Pay – *Joinery and Building Trades Award 2010*

60. As noted in paragraph 11 above, the MBA filed a submission on 17th July 2015 in which they sought a variation to clause 12.5 of the *Joinery and Building Trades Award 2010* which would have the effect of only applying the casual loading to the base rate under clause 18.1.[37] The only submission made in support of the variation is the following,

> "*The minor change proposed would clarify that the casual loading is applied to the base rate under the Joinery Award as the reference to the broad terms of clause 18 currently creates confusion as the method of calculation.*"[38]

61. No other submission is made, nor is any evidence provided to support the proposed variation. On this basis alone the proposed variation should be rejected.

62. We would add that the *Joinery and Building Trades Award 2010* contains a number of all purpose allowances specified in clause 24.1 of that award, therefore what is proposed by the MBA is inconsistent with the Absorption and Casual Loading decision, where the Full Bench decided,

> *"[110] The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.*"

Minimum Daily Engagement of Casuals – *Joinery and Building Trades Award 2010*

63. The HIA, MBA and AIG have all proposed variations which would reduce the minimum daily engagement of a casual, from 7.6 hours to 4 hours, under the *Joinery and Building Trades Award 2010*.

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[36] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Award-stage-corr-FWC-300315.pdf
[37] MBA 17 July 2015 Submission at 3.6
[38] Ibid at 4

64. The employer organisations have put forward a number of arguments to support their proposal which can be summarised as follows;

- there is no rationale for a minimum engagement of 7.6 hours per day[39];
- that the provision is anomalous when considered against other modern awards[40];
- that the provision presents an inflexibility that is both unwarranted and outdated[41];
- that the provision is inconsistent with the modern awards objective[42]; and
- that the provision has not been subject to a full merits review for 22 years.[43]

65. Remarkably none of the employer organisations have put forward any probative evidence, by way of witness statements, to support the variation that they seek. **Not one employer member from the many thousands that the HIA, MBA and AIG say they represent, has come forward to say anything about any problems they have with the existing provision or that it is acting as a disincentive to the use of casual labour.** This is despite the numerous decisions and statements of the FWC and its predecessors alerting the parties to this requirement.

66. As noted in the Preliminary Jurisdictional Issues decision, "*where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."*[44]

67. When the Full Bench rejected the same proposed variation during the Modern Awards Review 2012 they made specific reference to there being "*an insufficient evidentiary case presented in support of the submissions made for the variation.*"[45]

68. This failure to provide evidence when such a significant change is proposed is, we submit, fatal to the variations sought. As Justice Ross, who at the time was Vice President of the Australian Industrial Relations Commission, observed,

> "*While the Commission may rely on bar table statements it generally only does so in circumstances where no objection is taken to the assertion made. This practice has been the subject of favourable comment by the High Court. In The Queen v.*

[39] MBA 11 November 2014 Submission at 4.2
[40] Ibid
[41] AIG 14th October 2015 Submission at 192
[42] Ibid at 202
[43] HIA op cit at 5.4.3
[44] [2014] FWCFB 1788 at [23]
[45] [2013] FWCFB 3751 at [80]

Commonwealth Conciliation and Arbitration Commission; Ex Parte the Melbourne and Metropolitan Tramways Board, Barwick CJ said, at 243:

"The Commissioner was not disentitled to act upon the assertions of the Union advocate, merely because they were not made on oath, or because he might not have been competent as a witness according to the ordinary rules of evidence to make them. No doubt, if the correctness of this assertions were challenged, it would at the least be imprudent on the part of the Commissioner not to have further examined the matter, so as to satisfy himself of the actual facts, if need be, by evidence formally given. But there was nothing in the instant case which, it seems to me, the Commissioner might not properly regard in the circumstances as sufficiently "evidenced" by the statements of the union advocate.""[46]

69. The more recent Full Bench decision in *Victorian Employers' Chamber of Commerce and Industry* (AM2010/147) confirmed this approach where the Full Bench stated,

" The Tribunal nevertheless requires evidence (or uncontested submission - R v Commonwealth Conciliation and Arbitration Commission and Others; Ex parte The Melbourne and Metropolitan Tramways Board (1965) 113 CLR 228 at 243 (per Barwick CJ) and 252 (per Menzies J)) sufficient to allow it to make any jurisdictional findings that condition the exercise of power sought in the originating application.

.....

[16] The statements relied upon by VECCI are all statements prepared by employers who are a small, effectively self-selecting sample. This material lacks any of the statistical rigour of a properly designed and conducted survey. It represents little more than 20 employers saying that they think the change is a good idea and would be beneficial to them in their business. There were no statements from employees going to the impact of the proposed variation on employees or the attitudes of employees. There was no reliable survey evidence. There was no expert evidence. This is not to say that such evidence will invariably be necessary. However, some of the criteria in s.134(1) we think naturally lend themselves to that sort of evidence."[47]

70. In the present matter before the FWC there is a clear dispute between the parties as to the impact of the 7.6 hours minimum engagement. We dispute the assertions that:

[46] PR928815 at [21] to [22]
[47] [2012] FWAFB 6913 at [14]

- the 7.6 hour minimum provides no incentive to bargain[48] and that setting a 4 hour minimum will encourage collective bargaining[49];
- the 7.6 hour minimum acts as a disincentive to the use of casual labour[50];
- reducing the minimum engagement to 4 hours would act as an incentive to provide more casual employment opportunities and facilitate more flexible work arrangements[51];
- the 7.6 hour minimum has denied the right of many prior respondents to pre-modern awards or NAPSAs to properly engage casuals[52];
- the 7.6 hour minimum has led to employees missing out on work[53];
- the 7.6 hour minimum is inconsistent with the needs of employers and employees in modern workplaces covered by the award[54];
- the 7.6 hour minimum means that casual employees can only be engaged for the same duration as a typical full-time permanent employee[55];
- there would be a positive impact on businesses if the minimum engagement period was shortened from 7.6 to 4 hours[56];
- the 7.6 hour minimum is a barrier to the employment of women in the occupations of carpenter and joiner[57]; and
- reducing the minimum engagement period would not adversely impact the living standards and the needs of the low paid.[58]

71. As the employer organisations are the parties seeking to change the award the onus is on them to provide the evidence to support their assertions. In this matter they have failed to meet that onus, therefore their proposed variation should be rejected.

72. In regard to the employers claims that there is no rationale for the 7.6 hours minimum and that it is an outdated provision, we strongly disagree. The rationale for the 7.6 hour minimum is that casuals in off-site joinery shops have been traditionally employed for the full day. This

[48] HIA at 5.5.10
[49] HIA at 5.5.8
[50] HIA at 5.5.12
[51] HIA at 5.5.15
[52] MBA 11th November 2014 Submission at 4.4
[53] AIG at 206
[54] Ibid at 207
[55] Ibid at 211
[56] Ibid at 214
[57] Ibid at 226 – NB: The **Australian Jobs 2015** document refers to carpenter and joiners across the whole of the construction industry. If reducing the minimum engagement had any effect on the employment of women then this figure would be greater than 0 given that the minimum engagement under the Building and Construction General On-site Award 2010 is 4 hours.
[58] Ibid at 228

was the evidence before Commissioner Grimshaw when the *National Joinery and Building Trades Products Award 1993* was created.

73. During the hearings leading up to the arbitration of the award the following comments were made by witnesses called by the employer organisations:

    - Mr Howard (MBA SA) - "*My own personal view is that casual employment is casual employment. However, I believe there should be a restriction placed on casual employment if you seek to employ the person on the average of a 38-hour week on an ongoing basis. I do not personally believe that would be true casual employment. While members have not sought that, they have sought, from time to time to employ people on a true casual basis and if they have sought them for an average of 38 hour week they have been for a minimum period to meet demands associated with their work output.*"[59]
    - Mr Coull (Kincraft – a joinery company) - "*We have got to pay them for a full day. With a casual guy, in terms of the union, it doesn't allow us the full –in terms of the award, it doesn't allow us the full scope. We do contracts sometimes that take six months, sometimes nine months and we want casual employment for that term, but under the award we can't do that.*"[60]
    - Mr Coull (Kincraft – a joinery company) - "*This year I employed three casual people, one of those casuals on two separate occasions. Probably all up maybe four months for one guy.*"[61]
    - Mr Kinnear (Kinnear Joinery) - "*It's mainly on – new chaps that come in to make sure they're suitable and the job suits them. We've had joiners come in and we have had on a short period of time on casual rates to just make sure that the job suits them and vice versa.*"[62]
    - Mr Kinnear (Kinnear Joinery) - "*No it wouldn't suit me. I'd prefer that they took their rostered day with an option of changing the rostered days than half staff working, and half not. I prefer not to work the shorter 7.6.*"[63]

74. In the decision[64] making the award, Commissioner Grimshaw arbitrated the issue of casual employment and stated,

[59] Transcript, C No.20543 of 1990 and ors, 23rd September 1992 at p.171-172
[60] Ibid at p.181
[61] Ibid at p.185
[62] Ibid at p.199
[63] Ibid at p.199

"*CLAUSE 30 CASUAL EMPLOYMENT*

The employers sought the removal of all restrictions currently existing on the usage of casuals, they being the limitation of employing casuals for more than twelve weeks in any twelve months without the consent of the branch secretary of the union.

The submissions, exhibits and evidence in this matter seemed to centre on two aspects being the use of casuals and requiring the consent of the union secretary for any change.

Nothing of any substance was put to demonstrate a need for any changes to the use of casuals, for example the evidence suggested a greater need for part-time employees than any extension of casuals, in fact the evidence unchallenged suggests little if any benefits financially occur to the employer with lengthy use of casuals, rather the reverse.

Without detailing all the evidence and submissions as with other clauses dealt with, no substantial compelling case has been made out to justify altering the standards currently applying. I therefore decide this clause shall be as contained in Exhibit CFMEU10."

75. The decision of Commissioner Grimshaw was appealed by the QMBA and others. In the appeal decision[65] the Full Bench stated the following in regard to the casual issue,

> "*We now turn to the issue of part-time and casual employment. Dealing firstly with casuals, the Employers had put before the Commissioner a clause which sought a reduction in the minimum daily engagement of casuals from 7.6 hours to 4 hours and the removal of a limit placed on the engagement of casuals for a period of no more than 12 weeks in any 12 month period, except with the consent of the Secretary of the State Branch of the union. The Employers complained that the Commissioner, in his decision, addressed the issue of the removal of the restriction on casuals working beyond the 12 weeks, without the permission of the union, but did not address the issue of the reduction from 7.6 to 4 hours.*
>
> *Accepting that this is so, and that this Full Bench should now consider this issue itself, there would appear, however, to have been no evidence or at least no sufficient evidence of any complaint concerning the operation of this part of the clause. No difficulties could be identified in its operation. Accordingly, there was no basis upon which the Commissioner should have been required to exercise his discretion to alter the Award, nor for us now to do so. It seems clear to us that the real issue that was*

[64] Print K6181
[65] Print M2644

highlighted, in the evidence to which we were taken, was the perception that there was a limit on the engagement of employees to either the category of casual, and that engagement was limited to a 12 week period, or full-time. All of the evidence seemed to overlook the fact that there is no bar in the Award on the engagement of a full-time person for a fixed term. Each of the persons who gave evidence seemed to desire an ability to employ a person for a particular or specific project or job. It seems clear to us that the issue of concern to the Employers may have arisen out of a misunderstanding of the flexibility that they already have, consistent with the Award, to engage a person for a fixed term albeit during that time as a full-time employee."

76. In 2002 when the award went through the award simplification process the parties consented to the new award provisions and the minimum engagement of casuals remained at 7.6 hours.[66]

77. In 2003 the issue of the minimum engagement of casuals was again raised by the employers when the CFMEU sought to increase the casual loading to 25%. As noted in paragraph [17] of the decision[67] of Commissioner Harrison,

> "*the MBA advised that without prejudice to its primary position, that the Union's application be dismissed, it would not be opposed to increasing the casual loading if the award was varied to provide greater flexibility in the engagement of casuals.*"

In the table setting out the position of the parties it is clear that the MBA sought to reduce the minimum engagement to 4 hours.

78. Commissioner Harrison approved the increase in the casual loading but rejected the variations sought by the MBA stating,

> *"[39] I have given consideration to the MBA and Employers First submissions that the award should be varied to provide increased flexibility to restrictions placed on engagement periods for casuals. The argument put forward by the respondents, that increasing the loading for casuals to 25 percent would result in a significant reduction in the number of casuals employed, is not in my view, a strong one.*
>
> *[40] ……..I am not prepared in this application to confuse the issues of casual loading and increased flexibility in terms and periods of engagement of casual employees, nor to offset the casual loading with changes to these existing provisions.*

[66] See the decision in PR920659 and order in PR920660 (http://www.airc.gov.au/alldocuments/PR920660.htm)
[67] PR937301

On the facts before me, the current estimation of numbers of casual employees in the industry, is that they represent only 2 percent of the workforce."

79. During the award modernisation process the exposure draft[68] for the Joinery and Building Trades Award released on 23rd January 2009 reflected the conditions of the *National Joinery and Building Trades Products Award 2002* and included the 7.6 hours minimum engagement for casuals.

80. Following the release of the exposure draft a number of employer organisations made submissions seeking a reduction in the minimum engagement period to 4 hours, including:

- The AFEI[69]
- ABI[70]

81. The award modernisation Full bench however decided to stay with the provision from the exposure draft in the modern award published on 3rd April 2009.[71]

82. During the Modern Awards Review 2012 the MBA again sought to reduce the minimum engagement under the *Joinery and Building Trades Award 2010*. The Full Bench that heard the matter summarised the submissions of the parties as follows:

> *"[30] The MBA application seeks to vary clause 12.3 by deleting the words "minimum daily engagement of 7.6 hours" and replacing them with the words "minimum of four hours' work per engagement".*
>
> *[31] If the application is denied by the Full Bench, the MBA seeks a minimum engagement period of 7.6 hours per engagement. The application is supported by the AIG, ABI and AGGA.*
>
> *[32] The application is opposed by the CFMEU and AMWU.*
>
> *[33] The submissions in support of the application include that:*
>
> *• a minimum daily engagement of 7.6 hours is not casual employment as it is usually defined by law, and as such is anomalous and contrary to the modern awards objective;*
>
> *• the variation would make the JBT Award consistent with the Building and Construction General On-site Award 2010 4 (Building Award); and*

[68] http://www.airc.gov.au/awardmod/databases/building/Exposure/joinery_exposure.pdf
[69] http://www.airc.gov.au/awardmod/databases/building/Submissions/AFEI_build_join_submission_ed.pdf at 6.
[70] http://www.airc.gov.au/awardmod/databases/building/Transcripts/240209AM200813-24.pdf at PN1554
[71] http://www.airc.gov.au/awardmod/databases/building/Modern/joinery.pdf

• the existing clause is not consistent with some other modern awards or some former relevant state awards.

[34] The submissions in opposition to the variation include that:

• the existing clause was contained in the underlying predecessor federal award to the JBT Award;

• the casual clause in the JBT Award allows employment on an irregular or intermittent basis with no certainty as to the period over which such employment will be offered, consistent with the characterisation of casual employment; and

• there is no evidence that the operation of the existing clause has been contrary to the modern awards objective."[72]

83. The Full Bench in considering the application decided that:

"[66] Relevant to our consideration of the variations sought in the applications before us is the history of the award modernisation process, particularly that in respect of the JBT Award. We outline that history below, before turning to deal with the variations sought in the applications before us.

…….

[71] It is apparent that many of the types of variations sought in the applications relevant to this decision have previously been considered by the AIRC and/or FWA.

[72] We will now deal with the variations sought in turn.

…..

(ii) Part-time employees, Casuals and Payment of wages

[80] We are not persuaded we should make the variations sought to clauses 11.8, 12.3 and 26.3 of the JBT Award concerning part-time employees, casuals and payment of wages. There was an insufficient evidentiary case presented in support of the submissions made for the variations. We are unable to conclude that such variations are warranted on the bases that the JBT Award is not achieving the "modern awards objective" or is operating other than "effectively, without anomalies or technical problems arising from the Part 10A award modernisation process" because of the extant clauses 11.8, 12.3 and 26.3 in the JBT Award."

84. We submit that on a proper consideration of the history of the award provision there is a clear rationale for the current minimum engagement provision in the *Joinery and Building*

[72] [2013] FWCFB 3751

Trades Award 2010 and that it has been considered on no less than 5 occasions previous to the current matter.

85. In regard to the argument that the minimum engagement provision in the *Joinery and Building Trades Award 2010* is anomalous or inconsistent with casual provisions in other awards, we submit that this argument should be rejected.

86. As identified in paragraph 3 above, the Preliminary Jurisdictional Issues decision recognised that,

> "*Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective*."

87. The Metal industry Casuals Case decision confirmed that casual provisions should be considered on a case by case basis (see paragraph 44 above).

88. The AIG in their submission of 14th October 2105 recognise that:

> "*7. There is currently a great deal of diversity amongst the casual employment and part-time employment provisions of modern awards. This highlighted by the table in Annexure B.*
>
> *8. Such diversity is necessary and appropriate. Any attempt by the Commission to develop model provisions for casual and part-time employment would not be workable or appropriate."*

89. In the recent Full Bench decision on the Stevedoring Industry Award 2010[73], Vice President Watson in rejecting an argument about the ordinary hours of work in that award being inconsistent with other awards, said,

> *"[65] I am not satisfied that the Stevedoring Employers have established a sufficient case for the variation or that the variation is necessary to meet the modern awards objective. A 35 hour week is present in some awards for the similar historical reasons as the stevedoring industry. There is nothing inherently contrary to the modern awards objective in the continuation of this prescription*."

90. The majority in the same decision said that,

[73] [2015] FWCFB 1729

"*Key Considerations Regarding Applications to Vary an Award as part of the 4 yearly Review*

[141] The Commission's general approach to considering applications to vary modern awards as part of the 4 yearly review was set out in the preliminary issues decision issued by a Full Bench of the Commission in March 2014. Among other things, the Full Bench stated:

> *"[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.*
>
> *[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made."*
> *(Underlining added)*

[142] In its decision in respect of 4 yearly review of the Security Services Industry Award 2010 (the Security Award decision) when discussing the approach to considering applications to vary modern awards this Full Bench stated:

> *"[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations." (Underlining added)*

[143] We adopt the approach outlined in the Security Award decision to the determination of the issues in relation to this Award.

……..…..

[150] The question that ensues from such a finding is whether these unique factors continue to justify the existing level of penalty rates in the Award or some lower level taking into account the modern awards objective and the history of the existing provision. It is here where the evidence becomes critical in considering the changes proposed by the Applicants. To that end, consistent with the approach adopted in the Security Award decision, the onus falls on the Applicants "to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes".

[151] The examination of the proposed variations against the modern awards objective in submissions and the proceedings before us was limited. For instance, the Applicants' written submissions provided no indication of what the employment effects of the proposed variations might be other than a generalised statement that the changes may allow for more employees to be employed and rostered. We do not accept that it is not possible to model the potential effects of the changes, including on employment, in circumstances where the Applicants can draw on data relating to the mix of shifts worked at their operations and other relevant considerations concerning their operations such as labour requirements. As we noted at paragraph [134], Mr Nugent's evidence detailed the

proportion of day, evening, night, Saturday, Sunday, and public holiday shifts at the various categories of employees at the Port of Brisbane performed during the 2013/14 financial year.

[152] The Applicants' submissions were similarly superficial and somewhat cursory regarding a number of the other elements of the modern awards objective.

……

[161] While it is not disputed that the level of penalty rates in this industry are above those in comparable industries, we are not satisfied that the Applicants have established the case for their proposed variation to penalty rates or that the variation is necessary to meet the modern awards objective. In our view, the evidence before us indicates that there are factors unique to this industry when compared to other industries that work on a 24/7 basis. However, the Applicants and other parties who appeared before us failed to go the next step and provide probative evidence which would have enabled us to determine whether the existing or some other level of penalty rates was appropriate. On such a significant issue, it is just too simplistic to argue that the level of penalty rates should be reduced in the absence of such probative evidence and on the basis that the existing level of penalty rates in the Award are above those applying in other modern awards. We acknowledge that there is an important issue to be tested here. However, simply showing that the existing level of penalty rates are above those applying in comparable awards and industries is in our view insufficient, in the absence of probative evidence, to satisfy us that the Award needs to be varied to meet the modern awards objective. As discussed earlier, the Award achieved the modern awards objective at the time that it was made and the Applicants have not established that the Award no longer meets that objective." (Emphasis added)

91. The employer organisations have provided no evidence to support their assertion that the 7.6 hour minimum acts as a disincentive to the use of casual labour. Indeed they have provided no evidence from employers as to the current use of casual labour. The only statistics they have provided are statistics for the whole building and construction industry and even then the statistics they rely on are not an indication as to the level of casual employment, let alone casual employment under the *Joinery and Building Trades Products Award 2010* (see paragraphs 25 to 27 above).

92. In regard to collective bargaining there is no evidence that reducing the minimum engagement to 4 hours will encourage enterprise bargaining, nor that the current 7.6 hour

minimum provides no incentive to bargain. Indeed the only evidence relied on[74] shows that award reliance for setting pay rates is very low for employers covered by the *Joinery and Building Trades Award 2010*.

93. As for the employer's argument that a casual employee can only be engaged for the same duration as a typical full-time permanent employee, this is nothing more than empty rhetoric. A full time employee is engaged for 38 hours per week (clause 10) and must receive a minimum of one week's notice (clause 16.2 and s.117 of the FW Act), whereas a casual employee is engaged by the hour with a minimum daily engagement of 7.6 hours (clause 12.3), and can be terminated by one hour's notice (clause 12.4).

94. We therefore submit that there is no merit to the employer organisations proposed reduction in the minimum engagement of casuals under the *Joinery and Building Trades Award 2010*, and that the employers have provided no probative evidence to support such a variation. Accordingly the Full Bench should reject the proposed variation.

Casual Conversion Clause – Multiple Awards

95. As indicated in paragraphs 7 to 13 above, the AIG and RCSA have proposed variations to multiple awards which seek to remove the requirement upon employers to notify casual employees of their right to request to convert to permanent employment after a specified period of service.[75]

96. The main arguments advanced in support of the proposed variation are:

    - The specific merits of the notification requirement has not separately been considered by decisions of the Commission and its predecessors

    - The notification requirement imposes a disproportionate burden upon employers

97. The CFMEU C&G opposes the proposed variation and supports the submissions made by other unions in opposing the variation.

98. As previously mentioned in this submission, the Preliminary Jurisdictional Issues decision clearly articulated that where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence. We submit that the AIG and RCSA have failed to provide sufficient probative evidence to justify the variation being sought.

[74] AIG Submission at 229
[75] Ibid at paragraph 4a.

99. In regard to the disproportionate burden on employers the AIG and RCSA rely on the same evidence, namely the witness statements of Carly Fordred, Adele Last and Stephen Noble (we note the witness statement of Jan Baremans was withdrawn by the RCSA on 22nd February 2016).

100. The witness statement of Carly Fordred contains the Casual Conversion Survey conducted by the RCSA. The FWC has issued an Order Requiring the Production of Documents[76] in regard to the responses to this survey, for which we understand the RCSA now seek a return date of 29th February 2016. Accordingly the CFMEU C&G would seek the indulgence of the FWC to make further comment on the survey once the documents covered by the Order are presented. In its current form the survey results set out in Attachment "CF4" to the witness statement provides no evidence in regard to the use of casual conversion clauses under specific awards, nor does it identify the awards for which the employers were providing a response. Only 11 companies are covered by awards (listed in Attachment A to the survey - which was not provided) that require the employer to notify a casual in writing of their right to elect to convert. Significantly the number of employers who responded to individual questions range from a low of 8 to a maximum of 28. This is out of 3000 company and individual members of the RCSA. Such a poorly designed survey coupled with a very low response rate can hardly be of any statistical relevance, nor be sufficient evidence to support an award variation.

101. The witness statements of Adele Last and Stephen Noble are also subject to Orders Requiring the Production of Documents. The CFMEU C&G would therefore seek the same indulgence of the FWC to allow us make further comment on the statements once the documents covered by the Order are presented.

102. In regards to the evidence of Adele Last, putting aside the extent to which it relies on hearsay evidence (see paragraph 14), the total number of notification letters on file since 1st January 2010 is only 52. This is less than 8.7% of their current workforce of approximately 600 and we suspect a significantly less a percentage of the total number of employees they have engaged over the last 6 years. Sending out 52 letters over a 6 year period (an average of less than 9 per year) could hardly be seen as a burden, and we would also question the estimate of the process taking up to 32 hours per year.

103. In regard to the evidence of Stephen Noble there is no information as to the number of workers who had been assessed as eligible for casual conversion nor the specific awards that covered the individual worker. Further, if it only takes 15 minutes for administration and

[76] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/AM2014196-197-F52-FWC-150216.pdf

5 minutes for the time spent by a consultant, a total of 20 minutes, this would hardly be seen as a burden[77] for a "one off" requirement.

104. In regard to the RCSA submission the majority of it appears to be nothing more than a defence of casual employment and a call to eliminate red tape. There is nothing of substance that addresses the modern awards objective and why the award needs to be changed.

105. The AIG submission is equally bereft of substance and is reliant on a number of unsubstantiated claims (e.g. "it is now widely recognised that very few casual employees wish to convert to full-time or part-time employment"[78] and "The notification requirement imposes a burden on many thousands of employers"[79]).

106. We therefore submit that the AIG and RCSA have failed to meet the requirements set out in the Preliminary Jurisdictional Issues decision and their proposed variation should be refused.

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[77] A duty or misfortune that causes worry, hardship, or distress (source: http://www.oxforddictionaries.com/definition/english/burden)
[78] AIG at paragraph 55
[79] Ibid at paragraph 62

Appendix 1 – Copy of Exhibit 1 in AM2014/1 and ors

Casual Rates Calculations - Building and Construction General On-site Award 2010												
Old Wage Group	**Classification Level**		**Hourly Rate**		**Existing Casual Rate**			**Casual Rate Based on Provisional View of Full Bench (and no follow the job loading)**		**Reduction per hour**		**New Percentage**
					(25% loading)							
Advanced Engineering Construction Tradesperson level II	ECW9		$24.91		$31.14			$30.80		$0.34		23.64%
Carpenter-diver	CW8		$32.37		$40.46			$30.66		$9.79		-5.26%
Foreperson (as defined)	CW8		$25.66		$32.08			$30.66		$1.41		19.49%
Advanced Engineering Construction Tradesperson level I	ECW8		$24.50		$30.63			$30.29		$0.34		23.62%
Sub-foreperson	CW7		$25.10		$31.37			$29.98		$1.40		19.43%
Dogger/Crane Hand (as defined) (fixed cranes)	CW7		$24.28		$30.35			$29.18		$1.17		20.19%
Operator	CW7		$23.54		$29.43			$29.18		$0.24		23.98%
Special Class Engineering Construction Tradesperson level III	ECW7		$23.96		$29.95			$29.60		$0.35		23.54%

Operator	CW6		$22.91		$28.64			$28.41		$0.23		24.01%
Special Class Engineering Construction Tradesperson level II	ECW6		$23.33		$29.16			$28.82		$0.34		23.55%
Trainee Dogger/Crane Hand (as defined) (fixed cranes)	CW5		$23.05		$28.81			$27.68		$1.12		20.13%
Operator	CW5		$22.34		$27.93			$27.68		$0.24		23.93%
Refractory Bricklayer (incl. Refractory allowance)	CW5		$25.63		$32.04			$30.26		$1.79		18.03%
Special Class Tradesperson, Carver	CW5		$23.86		$29.83			$28.48		$1.35		19.34%
	bricklayer		$23.62		$29.53			$28.25		$1.28		19.56%
	Painter/Glazier		$23.24		$29.05			$27.87		$1.18		19.94%
	Plasterer		$23.72		$29.65			$28.34		$1.31		19.47%
	rooftiler		$23.47		$29.34			$28.10		$1.24		19.71%
Operator	CW5		$22.34		$27.93			$27.68		$0.24		23.93%
Special Class Engineering Construction Tradesperson level I	ECW5		$22.76		$28.45			$28.10		$0.35		23.46%
Marker or Setter Out, Letter Cutter	CW4		$23.21		$29.01			$27.69		$1.32		19.31%
	bricklayer		$22.97		$28.71			$27.46		$1.25		19.54%
	Painter/Glazier		$22.59		$28.23			$27.09		$1.15		19.93%
	Plasterer		$23.07		$28.83			$27.55		$1.28		19.45%

	rooftiler		$22.82		$28.52			$27.31		$1.21		19.69%
Signwriter	CW4		$22.59		$28.23			$27.09		$1.15		19.93%
Operator	CW4		$21.71		$27.14			$26.90		$0.24		23.89%
Engineering Construction Tradesperson level II	ECW4		$22.12		$27.65			$27.31		$0.34		23.47%
Artificial Stoneworker, Carpenter and/or Joiner, Bridge and Wharf Carpenter, Floorsander , Marble and Slate Worker, Stonemason, Tilelayer	CW3		$22.56		$28.19			$26.90		$1.29		19.27%
Caster, Fixer, Floorlayer Specialist, Plasterer	CW3		$22.41		$28.02			$26.76		$1.25		19.41%
Bricklayer	CW3		$22.32		$27.90			$26.67		$1.23		19.50%
Roof Tiler, Slater Ridger, Roof Fixer	CW3		$22.17		$27.71			$26.52		$1.18		19.66%
Painter, Glazier	CW3		$21.94		$27.42			$26.30		$1.12		19.90%
Shophand, Quarryworker, Rigger, Dogger, Machinist	CW3		$21.74		$27.17			$26.11		$1.06		20.11%
Operator	CW3		$21.08		$26.35			$26.11		$0.24		23.86%
Engineering Construction Tradesperson level I1	ECW3		$21.49		$26.86			$26.52		$0.34		23.43%
Refractory Bricklayers Assistant (incl. Refractory Allowance)	CW1(d)		$22.45		$28.06			$26.61		$1.45		18.53%

Labourer (2) - Scaffolder (as defined), Powder Monkey, Hoist or Winch Driver, Foundation Shaftsworker (as defined), Steel Fixer including Tack Welder, Concrete Finisher (as defined)	CW2		$21.15		$26.44			$25.40		$1.04		20.08%
	ECW2		$20.51		$25.64			$25.40		$0.24		23.83%
Labourer (3) - Trades Labourer, Jack Hammerman, Mixer Driver (concrete), Gantry Hand or Crane Hand, Crane Chaser, Cement Gun Operator (except in VIC), Concrete Cutting or Drilling Machine Operator, Concrete Gang including Concrete Floater (as defined), Roof Layer (malthoid or similar material), Dump Cart Operator, Concrete Formwork Stripper, Mobile Concrete Pump Hoseman or Line Hand, Plasterer's assistant, Terrazzo Assistant, Stonemason's Assistant	CW1(d)		$20.74		$25.92			$24.90		$1.02		20.06%
	ECW1(d)		$20.11		$25.14			$24.90		$0.24		23.81%
After 12 months in the industry	CW1 (c)		$20.37		$25.47			$24.46		$1.01		20.06%
	ECW1 (c)		$19.75		$24.69			$24.46		$0.23		23.85%

After 3 months in the industry	CW1 (b)		$20.10		$25.13			$24.12		$1.01		19.99%
	ECW1(b)		$19.49		$24.36			$24.12		$0.24		23.77%
New Entrant	CW1 (a)		$19.72		$24.65			$23.66		$0.99		20.00%
	ECW1(a)		$19.12		$23.90			$23.66		$0.24		23.74%
(NB Building Tradesperson and labourer rates are calculated on the basis of daily hire)												

Appendix 2 – Calculation of Casual Hourly Rates Based On the MBA Proposal

Old Wage Group	Classification Level	Hourly Rate	Existing Casual Rate (inclusive of follow the job loading for daily hire)	Casual Rate - MBA Proposal (Based on no follow the job loading)	Reduction per hour	New Percentage
			(25% loading)	(25% loading)		
Advanced Engineering Construction Tradesperson level II	ECW9	$24.91	$ 31.14	$ 31.14	-$ 0.00	25.01%
Carpenter-diver	CW8	$ 32.37	$ 40.46	$ 39.26	$ 1.20	21.30%
Foreperson (as defined)	CW8	$ 25.66	$ 32.08	$ 31.10	$ 0.98	21.19%
Advanced Engineering Construction Tradesperson level I	ECW8	$ 24.50	$ 30.63	$ 30.63	$ -	25.02%
Sub-foreperson	CW7	$ 25.10	$ 31.37	$ 30.41	$ 0.96	21.16%
Dogger/Crane Hand (as defined) (fixed cranes)	CW7	$ 24.28	$ 30.35	$ 29.43	$ 0.92	21.20%
Operator	CW7	$ 23.54	$ 29.43	$ 29.43	$ -	25.02%
Special Class Engineering Construction Tradesperson level III	ECW7	$ 23.96	$ 29.95	$ 29.95	$ -	25.00%

Operator	CW6		$ 22.91		$ 28.64			$ 28.64		$ -		25.01%
Special Class Engineering Construction Tradesperson level II	ECW6		$ 23.33		$ 29.16			$ 29.16		$ -		24.99%
Trainee Dogger/Crane Hand (as defined) (fixed cranes)	CW5		$ 23.05		$ 28.81			$ 27.93		$ 0.88		21.20%
Operator	CW5		$ 22.34		$ 27.93			$ 27.93		$ -		25.02%
Refractory Bricklayer (incl. Refractory allowance)	CW5		$ 25.63		$ 32.04			$ 31.14		$ 0.90		21.48%
Special Class Tradesperson, Carver	CW5		$ 23.86		$ 29.83			$ 28.91		$ 0.92		21.16%
	bricklayer		$ 23.62		$ 29.53			$ 28.63		$ 0.91		21.17%
	Painter/Glazier		$ 23.24		$ 29.05			$ 28.16		$ 0.89		21.18%
	Plasterer		$ 23.72		$ 29.65			$ 28.75		$ 0.90		21.21%
	rooftiler		$ 23.47		$ 29.34			$ 28.45		$ 0.89		21.21%
Operator	CW5		$ 22.34		$ 27.93			$ 27.93		$ -		25.02%
Special Class Engineering Construction Tradesperson level I	ECW5		$ 22.76		$ 28.45			$ 28.45		$ -		25.00%
Marker or Setter Out, Letter Cutter	CW4		$ 23.21		$ 29.01			$ 28.13		$ 0.88		21.21%
	bricklayer		$ 22.97		$ 28.71			$ 27.84		$ 0.87		21.19%
	Painter/Glazier		$ 22.59		$ 28.23			$ 27.38		$ 0.86		21.20%

	Plasterer		$ 23.07		$ 28.83			$ 27.95		$ 0.88		21.18%
	rooftiler		$ 22.82		$ 28.52			$ 27.65		$ 0.87		21.18%
Signwriter	CW4		$ 22.59		$ 28.23			$ 27.38		$ 0.85		21.22%
Operator	CW4		$ 21.71		$ 27.14			$ 27.14		$ -		25.01%
Engineering Construction Tradesperson level II	ECW4		$ 22.12		$ 27.65			$ 27.65		$ -		25.00%
Artificial Stoneworker, Carpenter and/or Joiner, Bridge and Wharf Carpenter, Floorsander , Marble and Slate Worker, Stonemason, Tilelayer	CW3		$ 22.56		$ 28.19			$ 27.34		$ 0.85		21.21%
Caster, Fixer, Floorlayer Specialist, Plasterer	CW3		$ 22.41		$ 28.02			$ 27.16		$ 0.86		21.18%
Bricklayer	CW3		$ 22.32		$ 27.90			$ 27.05		$ 0.85		21.20%
Roof Tiler, Slater Ridger, Roof Fixer	CW3		$ 22.17		$ 27.71			$ 26.86		$ 0.85		21.17%
Painter, Glazier	CW3		$ 21.94		$ 27.42			$ 26.59		$ 0.83		21.22%
Shophand, Quarryworker, Rigger, Dogger, Machinist	CW3		$ 21.74		$ 27.17			$ 26.35		$ 0.82		21.21%
Operator	CW3		$ 21.08		$ 26.35			$ 26.35		$ -		25.00%
Engineering Construction Tradesperson level I1	ECW3		$ 21.49		$ 26.86			$ 26.86		$ -		24.99%
Refractory Bricklayers Assistant (incl. Refractory Allowance)	CW1(d)		$ 22.45		$ 28.06			$ 27.28		$ 0.78		21.53%

Labourer (2) - Scaffolder (as defined), Powder Monkey, Hoist or Winch Driver, Foundation Shaftsworker (as defined), Steel Fixer including Tack Welder, Concrete Finisher (as defined)	CW2		$ 21.15		$ 26.44			$ 25.64		$ 0.80		21.23%
	ECW2		$ 20.51		$ 25.64			$ 25.64		$ -		25.01%
Labourer (3) - Trades Labourer, Jack Hammerman, Mixer Driver (concrete), Gantry Hand or Crane Hand, Crane Chaser, Cement Gun Operator (except in VIC), Concrete Cutting or Drilling Machine Operator, Concrete Gang including Concrete Floater (as defined), Roof Layer (malthoid or similar material), Dump Cart Operator, Concrete Formwork Stripper, Mobile Concrete Pump Hoseman or Line Hand, Plasterer's assistant, Terrazzo Assistant, Stonemason's Assistant	CW1(d)		$ 20.74		$ 25.92			$ 25.14		$ 0.78		21.23%
	ECW1(d)		$ 20.11		$ 25.14			$ 25.14		$ -		25.01%
										$ -		
After 12 months in the industry	CW1 (c)		$ 20.37		$ 25.47			$ 24.69		$ 0.78		21.19%
	ECW1 (c)		$ 19.75		$ 24.69			$ 24.69		$ -		25.01%
										$ -		
After 3 months in the industry	CW1 (b)		$ 20.10		$ 25.13			$ 24.36		$ 0.77		21.17%
	ECW1(b)		$ 19.49		$ 24.36			$ 24.36		$ -		24.99%

										$ -		
New Entrant	CW1 (a)		$ 19.72		$ 24.65			$ 23.90		$ 0.75		21.22%
	ECW1(a)		$ 19.12		$ 23.90			$ 23.90		$ -		25.00%
(NB Building Tradesperson and labourer rates are calculated on the basis of daily hire)												

Appendix 3 – Historical Treatment of Casual Labour – Building and construction Tradespersons and Labourers

Award	Reference	Non casual Wage rate	Casual Provision
Anthony Award	16 CAR 1136	@ 1144 Carpenters on buildings – Melbourne Total wage rate included a base rate, margin for skill, tool allowance and payment for lost time.	@ 1145 "Casual Labour The claim is for persons employed for less than six days consecutively to be paid 6d. per hour extra. I am awarding that the period shall be five days and the rate 3d. per hour extra."
Adam Award	17CAR19		@21 Referred to Archer Award Decision of Justice Higgins – held that the rate of pay for casual or intermittent labour liable to be broken by stoppages should be considerably higher than that for permanent work.
Allan Award	20 CAR 311	@325 (d) Carpenters and joiners employed by the hour and carpenters and joiners employed on buildings shall be paid an hourly rate which is to be calculated in each of the said areas by adding the sum of £1 12s 6d. to the base for such area mentioned in Table "A" and dividing the result by the	@329 CASUAL LABOUR 8. Any employee for whom an hourly rate is fixed by this award who is employed for a period of less than five days, exclusive of hours of overtime worked, shall be classed as a casual hand, and be paid 3d. per hour extra for the whole of

		figure 44 and calculating the answer to the nearest farthing.	the time for which he is employed. But this rate shall not be paid to any employee who is summarily dismissed for misconduct, or incompetence, or who voluntarily leaves the work.
Ackland Award	56 CAR 238	@243 The minimum ordinary rates of payment to be paid by employers to adult employees shall be as follows:- Section A – to an employee engaged by the week – a weekly rate comprised of the total basic wage prescribed in Table "A" together with the additions prescribed in Table "B" (Table B included additions for margin for skill; war loading; tool allowance; and disabilities allowance) Section B – to an employee engaged by the hour – an hourly rate (calculated to the nearest farthing) equivalent to one-forty-fourth of the fifty-two forty-eighths of the weekly rate which would be payable in pursuance of Section A of this clause had the employee been engaged by the week.	@245 "Section B - …….provided nevertheless that a casual hand shall be paid an additional amount at the rate of 4d. per hour with a minimum payment as for two hours of employment."

Carpenters and Joiners Award 1967	138CAR99	@101 "2 - Casual Rate and Hourly Rate (a)(1) Victoria and Tasmania The calculation of the hourly rate for a carpenter employed 'on site' on construction work or a carpenter or joiner engaged in shop fitting work on site, shall take into account half payment for any of the holidays prescribed in paragraph 3 of this Appendix, the non-application to such employees of sick leave under clauses B30 or D31 of this Award and eight days in respect of the incidence of loss of wages for periods of unemployment between jobs. For this purpose the hourly rate calculated to the nearest cent (less than half a cent to be disregarded) shall be the equivalent of one-fortieth of fifty-two over forty-eight point four (52/48.4) of the amount obtained by the addition of the appropriate amounts contained in paragraph 1 of this Appendix (including $1.40c loading), and clauses B5 and B6 or D5 and D6 of this Award.	@101 "2 - Casual Rate and Hourly Rate (b) In addition to the rate appropriate for the type of work, a casual hand shall be paid an additional ten per cent of the rate per hour with a minimum payment as for three hours of employment. The penalty rate herein prescribed shall be deemed to include inter alia, compensation for annual leave. Provided that a casual hand employed under Division D of this Award shall be an employee engaged and paid as such."
NBTCA	Print C6006	"9. Rates of Pay 1. Except as elsewhere provided in this paid rates	"9. Rates of Pay 9. In addition to the rate appropriate for the type of work,

		award (as defined) the rates of pay payable to an adult employee (other than an adult apprentice) in the undermentioned localities shall be that prescribed herein calculated as an hourly rate in accordance with 9.8. …. 8.(a) The calculation of the hourly rate for an employee other than a carpenter-diver shall take into account a factor of eight days in respect of the incidence of the loss of wages for periods of unemployment between jobs. (b) For this purpose the hourly rate, calculated to the nearest cent (less than half a cent to be disregarded) shall be calculated by multiplying the sum of the appropriate amounts prescribed in 9.2, 9.3 and 9.4 herein, clause 10 and clause 11 by fifty two over fifty point four (52/50.4), adding to that sub-total the amount prescribed in 9.6 herein and dividing the total by forty (40).”	a casual hand shall be paid an additional 20 per cent of the rate per hour with a minimum payment as for three hours employment. The penalty rate herein prescribed shall be deemed to include inter alia, compensation for annual leave.

[i] [2013] FWC 1415.
[ii] [2013] FWC 1799.