Australian Industry Group

Modern Awards Review 2023 – 24
Making Awards Easier to Use

Proposals & Submission
(AM2023/21)

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AM2023/21 MODERN AWARDS REVIEW 2023 – 24

MAKING AWARDS EASIER TO USE

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1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) concerns the Award Review 2023 – 24 (**Review**). Specifically, it concerns the issue of *'making awards easier to use'*.

2. The modern awards system is far too complicated. It is comprised of a web of industrial instruments with overlapping coverage, the precise metes and bounds of which are, at times, unclear. Further, awards operate as part of a broader safety net, which consists of various sources of entitlements including, most notably, the National Employments Standard (**NES**). This patchwork of regulation often gives rise to unwarranted complexity and confusion.

3. Moreover, awards provide an overly prescriptive approach to the regulation of working arrangements and are littered with terms and conditions that are ambiguous. Their application or operation is frequently unclear to laypersons and indeed in some cases, to workplace relations practitioners alike. Despite the efforts of the Commission to improve the accessibility of awards, the system remains undesirably complex and difficult for parties to navigate in practice.

4. To some degree, modern awards are no longer *'modern'*. They do not reflect contemporary ways of working. In many instances, they contemplate arrangements that cannot be implemented by payroll systems or they do not expressly permit evolved methods of engagement between employers and employees.

5. In instituting the Review, the Fair Work Commission (**Commission**) has decided to focus on making certain awards easier to use. It has also determined that the Review will be conducted by reference to specific proposals advanced by interested parties, rather than a wide-ranging review.[1]

[1] President's statement – Modern Awards Review 2023-24 (15 September 2023) at [7].

6. Ai Group considers that the Review presents a meaningful opportunity for detailed and careful consideration to be given to how awards can be made easier to use. We envisage that the conduct of conferences before the Commission about specific proposals will allow parties to engage constructively about genuine improvements that can be made to awards.

7. Employees and employers can benefit from awards being made easier to use. Awards would become easier to interpret and simpler to apply. Employers would face a lesser compliance burden. There would be greater certainty as to applicable terms and conditions. They would better reflect modern and flexible ways of working, consistent with community expectations.

8. Having regard to the targeted nature of the Review, Ai Group advances various proposals accompanying this submission that are intended to make the following awards easier to use:

   (a) The *Clerks – Private Sector Award 2020* (**Clerks Award**);

   (b) The *Fast Food Industry Award 2020* (**FF Award**);

   (c) The *General Retail Industry Award 2020* (**GRIA**);

   (d) The *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**); and

   (e) The *Children's Services Award 2010* (**CS Award**).

   (**Relevant Awards**)

9. Some of the proposals we advance relate to only one, or a small number, of the above awards. However, we have also identified certain issues that arise in relation to all, or most, of the above awards (**Common Issues**). We deal with those matters at sections 5 – 11 of this submission.

10. As will become plain in the submissions that follow, the Common Issues are also potentially relevant to a number of modern awards that fall beyond the scope of this part of the Review; or, indeed, to all modern awards. There would as such be little, if any, justification for confining the Common Issues to the Relevant Awards. Accordingly, consideration should in due course be given to whether comparable variations to those we have proposed in the targeted context of the Review ought to also be made in the context of other awards.

11. The specific variations we advance are set out in draft determinations attached to this submission (**DD**). They have been developed to address various issues raised in this submission. We nonetheless acknowledge that there will be scope to refine such proposals in response to any matters raised by other parties in their written submissions or during the conferencing process to be facilitated by the Commission. Indeed, we anticipate that the process contemplated by the Commission will lend itself to further iterations of our proposals potentially being developed for consideration, if warranted.

12. Before dealing with the specific proposals we advance, we first propose to advance submissions about the scope of the Review.

2. THE SCOPE OF THE REVIEW

13. On 12 September 2023, The Honourable Tony Bourke, Minister for Employment and Workplace Relations, wrote to the President of the Commission, requesting that it conduct a review of awards, focussing on *'4 key priorities'*. The Minister went on to say that *'[c]onsistent with the Government's commitment to improving wages and conditions, it is the Government's view that outcomes should not result in any reduction in worker entitlements'*.

14. In a statement subsequently issued by the Commission announcing the Review, it set out the various subject matters to which the Review would relate. In relation to the issue of *'making awards easier to use'*, it invited parties to advance proposals that would achieve this objective, *'while not reducing entitlements for award-covered employees'*. This appears to reflect the Government's aforementioned policy position.

15. Respectfully, the efforts of the Commission and the parties to make awards easier to use through this Review should not be so constrained. If adopted, the foreshadowed approach will result in the imposition of an artificial barrier, that will unfairly and inappropriately confine the scope of matters that can be dealt with. The Review should be guided by the statutory framework that establishes the independent role of the Commission in the maintenance of the award system and not a preference for the Government or any other interested party. A consideration of what is *necessary* to ensure that modern awards constitute a fair and relevant safety net, as contemplated by the modern awards objective, should be the ultimate barometer of whether any changes are warranted.

16. To strictly adopt the approach called for by the Government would undermine the utility of the Review, be incompatible with the Commission's need to balance the interest of employers and employees, undermine the need to maintain a stable award system by imposing an unwarranted gloss on the statutorily imposed requirements regarding the Commission's maintenance of the award system and would arguably be inconsistent with the Commission's obligation to

perform its functions in a manner that is fair[2]. While there may be a political or indeed policy driven justification for the Government's request, the Commission should not be swayed by such considerations.

17. As will be clear from the submissions that follow, we do not seek to pursue variations through this process that are directed towards reducing entitlements as an end in itself. Rather, they are directed towards addressing genuine ambiguities or improving flexibility for employers and employees. We nonetheless acknowledge that on one view, in some cases, it could be argued that they may result in an outcome that is less beneficial for employees in certain circumstances *vis-à-vis* the operation of the relevant extant award provisions.

18. Proposals of this nature should not be precluded from being dealt with through the Review; nor should they give rise to a threshold or jurisdictional issue as to their potential impact. Such an approach risks foregoing the chance to purposefully utilise the Review to make awards easier to use in a range of valuable ways.

19. Whilst we acknowledge that such matters could be dealt with as a separate application to vary the relevant awards at any time; the Review, in our view, creates an important forum through which parties will have an opportunity to discuss proposed changes under the auspices of the Commission, with a view to endeavouring, wherever possible, to reach agreed outcomes. The utility and integrity of the Review would be substantially undermined if parties were required to pursue applications to secure the Commission's consideration of proposals to improve the award system separately and potentially in parallel to the conduct of the Review. The capacity for the Review to result in tangible improvements should be maximised, not curtailed.

[2] Section 577(1)(a) of the *Fair Work Act 2009*.

20. In the following section of this submission, we deal with the statutory framework that applies to the Review. For present purposes, we observe that when assessing any proposal to vary a modern award, including in the context of the Review, the Commission must be satisfied that it will only include terms that are *'necessary to achieve the modern awards objective.*[3] This requires a consideration of the factors listed at s.134(1) of the *Fair Work Act 2009* (**Act**), which in essence, relate to the interests of employees and employers, including the impact of any proposed variation on employees. As the Commission has observed on many occasions when exercising its modern award functions, its task is to balance the various competing considerations listed at s.134(1).[4] Thus, the appropriateness of any proposed variation that would or may result in changed employee entitlements would necessarily be closely considered by the Commission and would be made only if it is satisfied that the proposed provision is *'necessary'* in the relevant sense.

21. Our proposals to make awards easier to use are advanced on the basis of the submissions above.

[3] Section 138 of the *Fair Work Act 2009*.

[4] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [163].

3. THE STATUTORY FRAMEWORK

22. In response to Minister Burke's request, the Commission initiated the Review on its own motion under ss.576(2)(aa) and 157 of the Act.[5] Section 576(2)(aa) confers upon the Commission the function of*, inter alia*, promoting cooperative and productive workplace relations and preventing disputes.

23. To the extent that the Commission proposes to make a determination varying a modern award as part of the Review, s.157(1) provides that it must be satisfied that the variation is necessary to achieve the modern awards objective. The modern awards objective is set out in s.134(1) of the Act and requires the Commission to ensure that modern awards and the NES provide a fair and relevant minimum safety net of terms and conditions, taking into account the listed factors:

> **134 The modern awards objective**
>
> What is the modern awards objective?
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

[5] President's statement – Modern Awards Review 2023-24 (15 September 2023) at [7].

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

24. Section 138 is also relevant. It is in the following terms:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

25. The following observations previously made by the Commission regarding the above legislative provisions are apposite:

(a) *'Fairness'* for the purposes of the modern awards objective is to be assessed from the perspective of the employees and employers covered by the modern award in question.[6]

(b) *'Relevant'* in s.134(1) is intended to convey that a modern award should be suited to contemporary circumstances.[7]

[6] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37].

[7] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37].

(c) The need for a *'stable'* modern awards system suggests that a party seeking to vary a modern award must advance a merit argument in support of the proposed variation. The extent of such argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality.[8]

(d) The characteristics of the employees and employers covered by modern awards varies between awards. To some extent, the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.[9]

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[8] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[9] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

4. POTENTIAL REVIEW OF PART-TIME EMPLOYMENT PROVISIONS

26. Many modern awards contain highly restrictive provisions relating to the use of part-time employment. This is undoubtedly a barrier to employers offering permanent employment opportunities in favour of casual employment and to the optimal utilisation of labour within the economy. Ai Group is advancing several sensible and modest changes to the regulation of part-time employment in some of the awards the subject of this Review. These proposals are targeted at specific issues and are dealt with elsewhere in this submission.

27. We do however foreshadow that such proposals, and indeed the need for a broader reassessment of the suitability of award terms relating to part-time employment, may be affected by the potential passage of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* introduced by the Government on 4 September 2023, given its potential to radically alter the nature and availability of casual employment.

28. For context; on 7 December 2023 the Senate split this bill into two parts, the first of which passed both houses and was given Royal Assent on 14 December 2023 as the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*. Proposed provisions regarding casual employment are now contained in the second part, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No. 2 Bill**). The Closing Loopholes No. 2 Bill is yet to be passed by both houses of Parliament and is currently before a Senate Committee Inquiry, which is scheduled to report to Parliament by 1 February 2024.

29. The Closing Loopholes No. 2 Bill proposes a number of changes to the existing casual employment framework with a view to limiting the use of casual employment. This includes the proposed inclusion of a new definition of *'casual employee'* in the Act and an additional pathway for casual conversion to permanent employment. Such a pathway departs significantly in nature from the casual conversion mechanism previously and only relatively recently developed by a Full Bench of the Commission during the 4 yearly review of modern awards.

30. There is still uncertainty as to what will occur in relation to the potential passage of the Closing Loopholes No. 2 Bill and what impact this will have on the definition and accessibility of casual employment in the context of awards. If the notion of casual employment in the workplace relations system is fundamentally altered, or access to it is restricted, there would foreseeably be a pressing need to reassess the suitability of current award provisions related to part-time employment that have developed in a different context. Put simply, in such circumstances, provisions governing access to part-time employment may need to be made far less restrictive in order to ensure that awards meet the needs of both employers and employees. At the very least, there may be a need to ensure that employment arrangements that are not consistent with either any new definition of casual employment under the Act or requirements of awards relating to the definition or engagement of part-time employees are catered for. Ai Group foreshadows that it may seek to be heard further on this issue depending upon developments related to the potential passage of the proposed legislation.

5. MINIMUM ENGAGEMENT & PAYMENT PERIODS

31. Each of the Relevant Awards prescribe minimum engagement and / or payment periods in respect of part-time and casual employees, as follows:

Award	Part-time Minimum Engagement / Payment	Casual Minimum Engagement / Payment
Clerks Award	3 hour engagement[10]	3 hour payment[11]
FF Award	3 hour engagement[12]	3 hour engagement[13]
GRIA	3 hour engagement[14]	3 hour engagement[15]
SCHCDS Award	2 – 3 hour payment[16]	2 – 3 hour payment[17]
CS Award	2 hour engagement[18]	2 hour payment[19]

32. None of these awards enable an employer and employee to agree to reduce the minimum engagement / payment periods, except in a narrow range of circumstances for casual employees covered by the GRIA.[20]

33. Further, as found in a decision of a Full Bench of the Commission during the Modern Awards Review 2012, the model flexibility term does not enable an individual flexibility arrangement (**IFA**) to be made in respect of minimum engagement periods:

> **[110]** The starting point in resolving the existing uncertainty is to ascertain the intention of the 2008 AIRC Full Bench when it determined the scope of the model clause. In deciding that award terms dealing with arrangements for when work is performed would be within the scope of the model clause the AIRC Full Bench made reference to paragraph 576J(1)(c) of the WR Act. A provision in the same terms is now in s.139(1)(c) of the FW Act and it provides:

[10] Clause 10.5 of the Clerks Award.

[11] Clause 11.4 of the Clerks Award.

[12] Clause 10.2 of the FF Award.

[13] Clause 11.3 of the FF Award.

[14] Clause 10.9 of the GRIA.

[15] Clause 11.2 of the GRIA, save for the exception set out at clause 11.3.

[16] Clause 10.5 of the SCHCDS Award.

[17] Clause 10.5 of the SCHCDS Award.

[18] Clause 10.4(e) of the CS Award.

[19] Clause 10.5(c) of the CS Award.

[20] Clause 11.3 of the GRIA.

> "(1) A modern award may include terms about any of the following matters:
>
> …
>
> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours."

[111] It is tolerably clear that the AIRC Full Bench intended that the reference to 'arrangements for when work is performed' would include the matters specifically identified in s.576J(1)(c), of the WR Act (now s.139(1)(c) of the FW Act), that is 'hours of work, rostering, notice periods, rest breaks and variations to working hours'.

…

[114] First, contrary to VECCI's submission, s.139(1)(c) is not the only source of power for minimum engagement periods in modern awards. Properly understood such provisions deal with minimum wages (s.139(1)(a)) or are incidental (within the meaning of s.142) to casual employment (s.139(1)(b)). This characterisation is apparent from a consideration of the minimum engagement term in the *Clerks—Private Sector Award 2010*, which is the award VECCI is seeking to vary. The relevant clause is clause 12.4 and appears under the heading, Casual Employment:

> "12.4 Casual employees are entitled to a minimum payment of three hours' work at the appropriate rate."

[115] This provision is clearly dealing with minimum wages for casual employees, it is not dealing with arrangements for when work is performed.

[116] The second reason for rejecting VECCI's contention flows from a plain reading of the expression 'arrangements for when work is performed' [emphasis added]. A minimum engagement term says nothing about 'when work is performed', it simply prescribes the minimum payment to be made to casual employees for each engagement.[21]

34. It follows from the Commission's reasoning that an award term that prescribes a minimum *payment* period for part-time or casual employees also cannot be the subject of an IFA.

35. The aforementioned awards should be varied in the terms set out in the DD to enable an employer and employee to agree that the applicable minimum engagement / payment period can be reduced. The absence of such provisions often serve as a barrier to the implementation of mutually beneficial arrangements.

[21] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [110] – [111] and [114] – [116].

36. For example:

(a) Shorter minimum engagement periods would better facilitate the engagement of employees who are studying (e.g. after school or university commitments on a given day).

(b) Employees with other personal commitments, including caring responsibilities, may in some cases only be in a position to perform work for short periods of time.

(c) In some cases, the operational needs of an employer are such that they only require an employee to perform work for a short period of time; for instance, to cover peak periods in customer demands (such as meal times in a fast food outlet) or to facilitate the taking of breaks by other employees (e.g. in a small retail establishment to ensure that it can continue to operate whilst other employees have a break).

(d) In other instances, the needs of an employer's client are such that an employee is not required to perform more than a short period of work. For instance, in the context of the provision of disability services under the SCHCDS Award, clients commonly seek an employer's services for only one or two hours.

37. In the circumstances described at paragraphs (a) and (b) above, an employer may be willing to facilitate periods of work that are less than the minimum engagement / payment period. Conversely, an employee may be agreeable to performing work in circumstances like the ones described at paragraphs (c) and (d). Despite this, the Relevant Awards do not facilitate the implementation of such arrangements, even if agreed between an employer and employee.[22] Whilst it might be argued that awards that require a minimum *payment* do not, as such, require that employees be provided with an equivalent period of work; this ignores the impact on employers from having to pay the relevant amount to employees in circumstances where they are not performing productive work.

[22] Except to some extent under clause 11.3 in the GRIA.

38. Provisions of the nature we have proposed would apply only where an employer and employee have mutually agreed; thereby creating an important safeguard to the operation of the clause. An employer would not be at liberty to unilaterally reduce the period.

39. The proposed provisions would be consistent with:

    (a) Ensuring that the safety net is fair to employers and employees;[23]

    (b) The need to achieve gender equality;[24]

    (c) The promotion of social inclusion through increased workforce participation;[25]

    (d) The need to promote flexible modern work practices and the efficient and productive performance of work;[26] and

    (e) Facilitating a positive impact on business.[27]

40. Consideration should also be given to implementing similar facilitative provisions in other awards across the modern awards system. The issues described above arise in a raft of other sectors. In the alternate, consideration should be given to whether the model award flexibility term ought to be varied to expressly permit the making of IFAs in respect of minimum engagement and payment periods.

[23] Section 134(1) of the Act.

[24] Section 134(1)(ab) of the Act.

[25] Section 134(1)(c) of the Act.

[26] Section 134(1)(d) of the Act.

[27] Section 134(1)(f) of the Act.

6. PAY AVERAGING

41. Many awards contain a misalignment between hours of work provisions and the payment of wages provisions. Specifically, awards commonly permit hours of work to be averaged over periods of up to four weeks, but often awards do not provide for pay to be averaged over a similar period.

42. For example, many employees work an 8-hour day for 19 days over a 4-week roster cycle and have a rostered day off on the 20th day. Typically, such employees are paid under an averaging arrangement. For employees paid weekly, typically payment for 0.4 hours per day (i.e. two hours per week) is withheld in the first three weeks of the roster cycle in order to enable the employee to receive a full week's pay in the fourth week of the cycle.

43. A small number of awards include pay averaging provisions, which facilitate arrangements of this nature.

44. For example, the Clerks Award includes the following:

> **17.4 Payment of wages under an averaging system**
>
> Employees who work ordinary weekly hours under an averaging system may be paid according to the average number of ordinary hours worked in order to avoid fluctuating wage payments.

45. Another example is the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) which includes the following: (emphasis added)

> **27.1 Period of payment**
>
> **(a)** Except as provided for in clause 27.1(b), wages must be paid weekly or fortnightly either:
>
> **(i)** according to the actual ordinary hours worked each week or fortnight; or
>
> **(ii)** <u>according to the average number of ordinary hours worked each week or fortnight</u>.

(b) By agreement between the employer and the majority of employees in the relevant enterprise, wages may be paid 3 weekly, 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.

…

27.5 Absences from duty under an averaging system

Where an employee's ordinary hours in a week are greater or less than 38 hours and such employee's pay is averaged to avoid fluctuating wage payments, the following is to apply:

(a) The employee will accrue a credit for each day they work ordinary hours in excess of the daily average.

(b) The employee will not accrue a credit for each day of absence from duty, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service.

(c) An employee absent for part of a day, other than on annual leave, long service leave, public holidays, paid personal/carer's leave, workers compensation, paid compassionate leave, paid training leave or jury service, accrues a proportion of the credit for the day, based on the proportion of the working day that the employee was in attendance.

46. The *Business Equipment Award 2020*[28], the *Contract Call Centres Award 2020*[29], the *Electrical, Electronic and Communications Contracting Award 2020*[30], the *Food, Beverage and Tobacco Manufacturing Award 2020*[31] and the *Vehicle Repair, Services and Retail Award 2020*[32] also contain pay averaging arrangements.

47. However, pay averaging is not contemplated by the FF Award, the GRIA or the SCHCDS Award. More specifically:

[28] Clause 15.2(a) of the award.

[29] Clause 16.1(c) of the award.

[30] Clause 13.8(e) of the award.

[31] Clause 19.1(a)(ii) of the award.

[32] Clause 17.3(b) of the award.

(a) Clauses 13.1 – 13.2 of the FF Award permit the ordinary hours of a full-time employee to be averaged over a period of up to four weeks. Nonetheless, pursuant to clause 16.1, wages must be paid weekly or fortnightly. Moreover, clause 16.2 problematically requires as follows:

> Wages must be paid for a pay period according to the actual hours worked by the employee in the period or they may be averaged over a fortnight.

(b) Clause 15.6 of the GRIA, in effect, permits a full-time employee's ordinary hours to be averaged over a period of up to four weeks or longer. Despite this, clause 16.1 requires that wages must be paid weekly or fortnightly (except in a narrow range of circumstances in which monthly pay periods are permitted). Further, clause 16.2 requires as follows:

> Wages must be paid for a pay period according to the actual hours worked by the employee in the period or they may be averaged over a fortnight.

(c) The SCHCDS Award contemplates the averaging of ordinary hours over a period of up to four weeks at clause 25.1. However, clause 24.1 requires that wages must be paid weekly or fortnightly.

48. Similarly, this issue arises in a raft of awards that are not the subject of this part of the Review. For example:

(a) The *Airline Operations – Ground Staff Award 2020;*[33]

(b) The *Concrete Products Award 2020;*[34]

(c) The *Electrical Power Industry Award 2020;*[35]

(d) The *Health Professionals and Support Services Award 2020;*[36]

(e) The *Legal Services Award 2020;*[37]

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[33] Clauses 14.2(a), 14.2(e) and 19.1 – 19.3 of the award.

[34] Clauses 13.1(a), 14.1 and 17.1 of the award.

[35] Clauses 13.1 and 16 of the award.

[36] Clauses 13.1(a) and 21 of the award.

[37] Clauses 13.1(a), 13.1(d) and 16 of the award.

(f) The *Nurses Award 2020;*[38]

(g) The *Road Transport and Distribution Award 2020;*[39]

(h) The *Storage Services and Wholesale Award 2020;*[40] and

(i) The *Waste Management Award 2020*.[41]

The 4 Yearly Review

49. The potential misalignment between the accrual of entitlements and payments made by an employer in a pay period was identified by the Commission during the Payment of Wages common issues proceedings.

50. In a decision of 1 December 2016, a Full Bench of the Commission stated: (emphasis added)

> **2.4 Accrual of wages and other amounts**
>
> **[123]** <u>As discussed above, s.323 of the FW Act deals with the method and frequency with which employers must pay an employee 'amounts payable to the employee in relation to the performance of work', and appears to have the effect that such amounts must be paid no later than one month after accrual. Section 323 does not specify when 'amounts payable to the employee in relation to the performance of work' become payable, that is, when the entitlement to payment accrues.</u>
>
> **[124]** The FW Act does specify when various payments under the NES accrue. For example, the entitlement under the NES to payment in lieu of untaken paid annual leave and to redundancy pay is expressed to arise upon termination of employment (see ss.90(2) and 119(1)). As discussed at paragraphs [74] – [78] above, it seems that the FW Act requires payment in lieu of notice under the NES to be made before or at the time of termination of employment (s.117(2)) and the entitlement to redundancy pay under the NES would seem to arise when an employee's employment is terminated in certain circumstances (s.119(1)). Entitlement under the NES to payment for paid annual leave or for paid personal/carer's leave, is expressed to arise when an employee takes a period of such leave (ss.90(1) and 99) and similarly with compassionate leave (s.106), absence on jury service (s.111(2)) and absence on a public holiday (s.116).

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[38] Clauses 13.1(c), 13.3 and 16 of the award.

[39] Clauses 13.1, 13.7 and 18 of the award.

[40] Clauses 13.1(a), 13.1(f), 13.4 and 16 of the award.

[41] Clauses 13.1, 13.3 and 17 of the award.

[125] Notably, the FW Act does not appear to specify when wages accrue. In contrast, s.67 of the *Fair Work Act 1994* (SA) provides:

> 67—Accrual of wages
>
> (1) Wages accrue under a contract of employment from week to week.
>
> (2) However—
>
> (a) if an employee is employed on an hourly basis, wages accrue from hour to hour; and
>
> (b) if an employee is employed on a daily basis, wages accrue from day to day; and
>
> (c) if a person is employed on neither an hourly nor a daily basis, but the period of employment is less than a week, wages accrue at the end of the period of employment.

[126] Academic commentary suggests that, absent express provision for accrual in an award, if wages are required to be paid periodically under the award (for example, weekly, fortnightly or monthly) then they will be taken to accrue with at least the same frequency.

[127] This would seem to accord with the terms of many award 'payment of wages' clauses. For example, the 'minimum weekly wages' clause (cl.17) of the *General Retail Industry Award 2010* contains only a table of weekly wage rates for the award classifications and does not expressly provide for accrual of wages whether on a weekly, daily, hourly or other basis. However, the wording in the 'payment of wages' clause of that award (cl.23, as reproduced at paragraph [11] above) '[w]ages will be paid weekly or fortnightly', might be read as entailing that wages must accrue at least weekly or fortnightly.

[128] In contrast to the 'minimum weekly wages' clause of the *General Retail Industry Award 2010*, express provision is made in the award for accrual, for example, of a meal allowance (see cl.18.1) and payment at overtime rates (see cl.20.1) during a pay period. It should be noted that some award terms may also provide for payment to be made in a subsequent pay period. For example, the 'time off instead of payment for overtime' model term includes the requirement that:

> 'If time off for overtime that has been worked is not taken within the period of 6 months... [after the overtime is worked,] the employer must pay the employee for the overtime, in the next pay period following those 6 months ...'

…

[130] It has been suggested that an employee's wages under an award will be taken to accrue hourly if the award specifies an hourly wage rate for the employee (perhaps in addition to a daily, weekly, annual or other rate) or the award specifies that wages are to be calculated on the basis of hours worked, but not all awards make such provision.

…

> **[136]** The issue of when payments accrue under modern awards might arise in the context of the Fair Work Ombudsman (FWO) assisting employees or former employees to recover unpaid wages and other amounts. The Full Bench would appreciate receiving information from FWO as to whether lack of clarity as to accrual of wages and other amounts, particularly in respect of incomplete pay periods, is an issue for FWO in practice.[42]

51. Ai Group is not aware of any information provided by the Fair Work Ombudsman in response to the Commission's information request at [136] above.

52. As demonstrated earlier in this submission, some awards expressly require that on a given pay day, an employee must be paid the wages accrued for the hours worked during the relevant pay period.[43] It is not clear whether an employee can be paid in accordance with the average hours worked under such awards. The ability to average an employee's ordinary hours is of little practical utility if pay averaging is not permitted; especially if the award prescribes pay periods that are shorter in duration that the maximum period over which ordinary hours can be averaged.[44] Employers are potentially compelled to pay employees for actual hours worked, irrespective of the averaging system in place in respect of ordinary hours of work.

53. In other cases, it is not clear that the award deals with the issue of when wages accrue, as observed by the Commission in the aforementioned decision. In any event, the risk that such awards nonetheless, indirectly or implicitly, require that wages accrue hourly, weekly or per pay period and thereby, do not permit pay averaging, should be alleviated.

Potential Civil Penalties

54. If an employer withholds pay from an employee in a pay period in order to provide consistent payments to the employee during the roster cycle, the employer may be exposed to a civil penalty for breaching the relevant award, in circumstances where the award does not provide for pay averaging.

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[42] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [123] – [136].

[43] See for example clause 18.2 of the GRIA, subject to the ability to average wages over a fortnight.

[44] See for example clause 16.1 of the FF Award.

55. The maximum civil penalties under the Act for a body corporate that contravenes an award are 300 penalty units (currently $93,900) or 3,000 penalty units (currently $939,000) for a *'serious contravention'*. The maximum civil penalties for an individual who contravenes an award are 60 penalty units (currently $18,780) or 600 penalty units (currently $187,800) for a *'serious contravention'*.

56. In addition to the civil penalties in the Act, the recently passed *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* will introduce criminal penalties into the Act from 1 January 2025. These criminal penalties are in the form of a new wage theft offence in s.327A, which will apply to intentional failures to pay particular amounts to an employee on or before the day when payment is due. This will capture employers intentionally failing to pay employees amounts they are owed under modern awards as well as intentional *late* payment of such amounts. As with the existing civil penalties in the Act, employers who withhold pay from employees in order to provide consistent payments across a roster cycle may also fall foul of the wage theft offence if the relevant award does not provide for pay averaging. The potential punishment where a conviction is established is significant. The maximum punishment for an individual who is convicted of a wage theft offence is a term of imprisonment of up to 10 years or a fine of the greater of three times the underpayment amount or 5,000 penalty units (currently $1,565,000). The maximum punishment for a body corporate is a fine of the greater of three times the underpayment amount or 25,000 penalty units (currently $7,825,000). The exposure to such significant penalties, in particular potential jail time for individuals, is a disproportionate consequence for employers in circumstances where relevant awards do not provide for pay averaging.

Ai Group's Proposal

57. Ai Group proposes that the following clause is introduced in the FF Award, GRIA, CS Award and SCHCDS Award, alongside other provisions relating to the payment of wages, as set out in the DD:

> Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

58. Consideration should also be given to introducing such a clause in all awards that permit the averaging of ordinary hours but do not expressly permit pay averaging; particularly where the award specifically states that wages accrue or must be paid in respect of a period that is shorter than the averaging period.

59. The above term is consistent with the following principle identified by the Full Bench in the aforementioned Payment of Wages proceedings:

> **[132]** The obligations and entitlements of employers and employees in respect of wages and other amounts payable under modern awards (and when they become payable) should be expressed in clear and simple terms. The modern award system should be simple and easy to understand.[45]

60. The proposed clause is in the interests of both employers and employees. It would clearly permit pay averaging arrangements and provide certainty as to the method of remuneration that may apply where an employee's ordinary hours are averaged. The benefit of an ability to average ordinary hours of work would be properly realised.

61. Further, employees benefit from pay averaging through receiving consistent, rather than fluctuating, wage payments. Consistent wage payments make it easier for employees to manage spending, prepare household budgets and obtain loans.

[45] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [132].

62. The following elements of the modern awards objective weigh strongly in favour of the proposed clause:

(a) The relative living standards and the needs of the low paid;[46]

(b) The need to promote flexible modern work practices and the efficient and productive performance of work;[47]

(c) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[48] and

(d) The need to ensure a simple and easy to understand modern award system.[49]

[46] Section 134(1)(a) of the Act.

[47] Section 134(1)(d) of the Act.

[48] Section 134(1)(f) of the Act.

[49] Section 134(1)(g) of the Act.

7. PAY PERIODS

63. The payment of wages provisions in many awards are overly restrictive and do not meet the needs of employers or employees. Relevantly, many awards require that employees must be paid weekly or, at most, that employees may be paid weekly or fortnightly. A large number of awards do not contemplate monthly or four-weekly pay cycles.[50] This includes the FF Award, GRIA,[51] and SCHCDS Award. Further, pay cycles cannot be varied through IFAs.

64. The ability to pay monthly and four-weekly would introduce important new flexibilities. Specifically:

    (a) Reducing the frequency with which employees must be paid would have a positive impact on the regulatory burden and employment costs facing employers. Processing employees' pay on a weekly or fortnightly basis requires the dedication of significant resources (including time). Further, employers often incur various costs (directly and indirectly) on each occasion that they process employees' pay.

    (b) The ability to pay award-covered employees on a monthly or four-weekly basis may better enable an employer to align their pay cycles with those of award-free employees, who are commonly paid once a month. This may enable an employer to process their employees' pay more efficiently.

    (c) Employees being paid by way of an annualised wage are generally receiving above-award rates of pay (in some cases, their pay far exceeds award rates). In such circumstances, employers should have the benefit of improved flexibility as to the frequency with which pays are to be processed.

    (d) The option to pay four-weekly would align with the ability to average ordinary hours over a period of up to four weeks. For the reasons explained in the preceding chapter, a requirement to pay weekly or fortnightly potentially undermines the utility of such averaging arrangements. Monthly

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[50] *4 yearly review of modern awards—Payment of wages* [2016] FWCFB 8463 at [22].

[51] Except in the narrow range of circumstances contemplated by clause 18.1 of the award.

pay periods do not address this issue either, because a month does not necessarily equate to a four week period. Over the course of a calendar year, there are more four weekly periods than there are months.

65. Importantly, extending a pay period does not diminish an employee's substantive entitlements or affect the amount payable to them.

66. Accordingly, the FF Award, GRIA and the SCHCDS Award should be varied to include a facilitative provision that allows an employer and the majority of employees, or an individual employee, to reach agreement that they will be paid on a monthly or four-weekly basis. We propose the following amendments:

    (a) In relation to the FF Award, a new clause 16.2 should be introduced, as follows:

        16.2 Notwithstanding clause 16.1, by agreement between the employer and the majority of affected employees, wages may be paid 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.

    (b) A provision in the same terms should be inserted as a new clause 18.2 in the GRIA.

    (c) Similarly, the above provision should be inserted at clause 24.2 of the SCHCDS Award.

    (d) The CS Award should be varied similarly, noting that it already permits monthly pay periods.

67. The Clerks Award should also be varied, as follows:

17.2 Pay period

(a) The employer may determine the pay period of employees as being either weekly or fortnightly.

(b) The employer and an individual employee, or the majority of employees, may agree to monthly or four-weekly pay periods.

~~**(c)** If an agreement is made under clause 17.2(b), payment must be made on the basis of 2 weeks in advance and 2 weeks in arrears.~~

68. These variations are set out in our DD attached to this submission.

69. A provision that allows for agreement with the majority is important in this context. The efficiencies flowing from paying monthly / four weekly are best realised if they apply to an entire workforce or cohort.

70. Our proposal is intended to enable particular cohorts within a workforce to agree to monthly or four weekly pay periods. This could include, for example, a majority of affected employees working at a particular locations (be it a store or restaurant) or a majority of employees working within a particular classification.

71. The following elements of the modern awards objective weigh strongly in favour of the proposed award variations:

    (a) The need to promote flexible modern work practices and the efficient and productive performance of work;[52]

    (b) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[53] and

    (c) The need to ensure a simple, easy to understand, stable and sustainable modern award.[54]

72. The proposed clause is in substantially the same terms as clause 27.1(b) of the Manufacturing Award:

27.1 Period of payment

(a) Except as provided for in clause 27.1(b), wages must be paid weekly or fortnightly either:

(i) according to the actual ordinary hours worked each week or fortnight; or

(ii) according to the average number of ordinary hours worked each week or fortnight.

[52] Section 134(1)(d) of the Act.

[53] Section 134(1)(f) of the Act.

[54] Section 134(1)(g) of the Act.

(b) <u>By agreement between the employer and the majority of employees in the relevant enterprise, wages may be paid 3 weekly, 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee</u>.

73. The above facilitative provision was implemented in the *Metal, Engineering and Associated Industries Award 1998,* as a result of the Metal Industry Award Simplification Decision of Marsh SDP. The Manufacturing Award was based on the terms of this pre-modern metal industry award.

74. Marsh SDP's decision includes the following relevant extract: (emphasis added)

5.11 Payment of Wages

5.11.1 Period of Payment

5.11.1(a) states:

"Wages shall be paid weekly or fortnightly, either:

(i) according to the actual ordinary hours worked each week or fortnight; or

(ii) according to the average number of ordinary hours worked each week or fortnight."

This is an agreed clause. It falls within the scope of s.89A(6) and is consistent with the hospitality decision. The MTIA proposes the inclusion of an additional provision:

5.11.1(b) states:

"(i) By agreement between the employer and the majority of employees in the relevant enterprise, wages may be paid three weekly, four weekly or monthly.

(ii) Without detracting from 5.11.1(b)(i), an employer and individual employee may agree to the employee being paid over a different period to the pay period implemented for most employees in the enterprise, provided the period is one referred to in 5.11.1(a) or 5.11.1(b)(i)."

MTFU oppose the wording of 5.11.1(b).

5.11.1(b)(i)

<u>This is a facilitative clause which if introduced may provide greater flexibility at the workplace level and greater convenience to employees</u>. Clause 5.11.1(b)(i) is consistent with the hospitality decision (at p.18) and will be subject to clause 2.2.3 (Facilitation by Majority Agreement). However, given the wide span of facilitation provided by the clause it will also be subject to the additional requirements of clause 2.2.3(c).

This additional protection will not restrict the operation of the clause in non union workplaces.

5.11.1(b)(ii)

Turning to clause 5.11.1(b)(ii), I am satisfied that the insertion of this clause into the award is justified and it will be subject to clause 2.2.2 (Facilitation by Individual Agreement). [55]

75. Various other awards also contemplate the payment of wages on a monthly or four-weekly basis. For example:

   (a) The *Business Equipment Award 2020* permits an employer to pay wages weekly, fortnightly, 4-weekly, half-monthly or monthly.[56]

   (b) The *Telecommunications Services Award 2020*[57]*,* the *Contract Call Centres Award 2020*[58] and the *Food, Beverage and Tobacco Manufacturing Award 2020*[59] permit an employer to pay wages weekly or fortnightly. By agreement with an individual employee or the majority of employees, wages can be paid 4-weekly or monthly.

   (c) The *Professional Employees Award 2020,* does not contain any limitations on pay cycles. Therefore, the requirement in s.323 of the Act, that wages be paid at least monthly, applies.

76. In the context of 4 yearly review proceedings concerning the payment of wages, a Full Bench made the following observation:

[32] It is not readily apparent that the differences between the various modern award payment of wages provisions in terms of frequency of payment, paydays, payment in arrears, the types of payments they are expressed to regulate and other differences in the wording of provisions, in fact reflect different characteristics of the enterprises covered by the various awards.[60]

77. The ability to pay monthly or four weekly should not be limited to awards such as those identified above. Further, consideration should be given to also introducing this flexibility in other awards that do not already allow for it.

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[55] Print P9311.

[56] Clause 15.1 of the award.

[57] Clauses 16.1 – 16.2 of the award.

[58] Clauses 16.1 – 16.2 of the award.

[59] Clause 19.1 of the award.

[60] *4 yearly review of modern awards – Payment of wages* [2016] FWCFB 8463 at [32].

8. INDIVIDUAL FLEXIBILITY ARRANGEMENTS

78. The matters that can be dealt with in an IFA that is made under the model flexibility term in modern awards are:

    (a) arrangements for when work is performed;

    (b) overtime rates;

    (c) penalty rates;

    (d) allowances; and

    (e) annual leave loadings.

79. The above list of matters should be expanded to include pay periods. IFAs are an important aspect of the workplace relations system and their implementation can make awards easier to use. Their use should be encouraged, not deterred. The omission of this subject matter is operating as a barrier to employers and employees agreeing upon various mutually beneficial work arrangements.

The Part 10A Award Modernisation Process

80. The following decisions are of relevance to the development of the model flexibility term in awards:

    (a) A Statement of 29 April 2008 of the Australian Industrial Relations Commission (AIRC) President,[61] which contained two draft model award flexibility terms – one submitted jointly by Ai Group and the Australian Chamber of Commerce and Industry, and the other submitted by the Australian Council of Trade Unions.

    (b) A Full Bench decision of 20 June 2008 (**June 2008 Decision**) which settled the terms of the model flexibility term.[62]

[61] *Award Modernisation* [2008] AIRCFB 387.

[62] *Award Modernisation* [2008] AIRCFB 550.

81. In the June 2008 Decision, the Full Bench gave the following reasons for not including minimum wages in the list of matters able to be addressed in an IFA: (emphasis added)

> **[168]** Dealing first with s.576J(1)(a), minimum wages, we note that there is another award matter which deals with flexibility in relation to wages. Pursuant to s.576J(1)(f) awards may include terms about annual wage and salary arrangements, including alternatives to the separate payment of wages or salaries and other monetary entitlements. Award terms made under that paragraph must include appropriate safeguards to ensure that individual employees are not disadvantaged. In light of the fact that separate provision is made for flexibility in relation to the way in which wages, salaries and other monetary entitlements may be paid it is unnecessary to include terms about minimum wages in the model clause. Indeed it may be inappropriate to do so. It is difficult to see how the trading-off of minimum wages against other benefits could meet a genuine need for individual flexibility without at the same time weakening the function of the award as a safety net in an unacceptable way. There does not appear to be any sound basis for including award terms about minimum wages within the operation of the model clause. It follows also that award terms made under s.576J(1)(f), which is itself a flexibility provision, should not be included in the operation of the model flexibility clause either. <u>We should emphasize that by excluding minimum wages from the model clause we obviously do not intend to limit arrangements which increase wages. Our concern is to guard against minimum wages being traded off</u>.[63]

82. The above extract highlights that the key reasons why the AIRC did not include minimum wages on the list of matters that an IFA can deal with were:

    (a) *Firstly*, because of the fact that s.139(1)(f) enables awards to include annualised wage arrangements; and

    (b) *Secondly*, because of the need to guard against minimum wages being traded off, resulting in an employee receiving less than the award rate.

83. There is no mention of pay cycles in the June 2008 Decision and no indication that the Full Bench gave consideration to whether the flexibility term should address pay cycle issues.

[63] *Award Modernisation* [2008] AIRCFB 550 at [168].

84. In the June 2008 Decision, the Full Bench identified the importance of the flexibility term being reviewed after it had operated for a reasonable period, in order to assess whether the term *'has achieved its purpose of providing flexibility to meet the genuine individual needs of employers and employees*':

> **[192]** … For a number of reasons, it is obviously desirable that there be a review of the operation of the model flexibility clause after it has been operating for a reasonable period. This review would provide an opportunity to assess whether the clause has achieved its purpose of providing flexibility to meet the genuine individual needs of employers and employees. An important related issue for consideration would be whether the provision has provided sufficient protection from disadvantage for employees. The experience of employers, employees and unions would be extremely helpful in such a review as would the views of the authority responsible for ensuring the observance of modern awards.[64]

The Merits of Ai Group's Proposal

85. Employers and employees often enter into IFAs to achieve a simplified salary structure. The following example highlights this and the reasons why there is substantial merit in allowing IFAs to deal with pay cycles:

> An employee works in a call centre which operates on a 24-hour / 7-day a week basis under the Clerks Award. The employee works a roster of rotating day and night shifts, with ordinary hours averaged over four weeks. The employee enters into an IFA with the employer in order to achieve a simplified salary structure.

86. Given the regular pattern of hours that the employee in this example works, an IFA can be readily drafted to ensure that the employee is better off overall compared to the Clerks Award. The IFA would typically:

    (a) Include a minimum salary that ensures the employee is better off overall compared to the award (e.g. this may be 30% higher than the award rate, depending upon the value of the various entitlements that have been taken into account within the minimum salary);

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[64] *Award Modernisation* [2008] AIRCFB 550 at [192].

(b) Identify the specific award provisions that no longer individually apply because the relevant amounts have been taken into account within the minimum salary (e.g. the relevant minimum award rate in clause 16 of the Award, the shift penalty rates in clause 31, and the annual leave loading in clause 32.3);

(c) Include a formula which increases the minimum salary on 1 July each year to take into account the increased award wage rates and allowances determined in the Annual Wage Review; and

(d) Clarify that the IFA only applies where the employee remains in the same classification and continues to work the shift roster identified in the IFA.

87. Many employees value IFA arrangements like these because they are able to receive a constant salary which is substantially above the award. Employers also often support these arrangements because the regulatory burden is reduced.

88. The one problem with the above mutually beneficial arrangement is the inability for the employer and the employee to agree within the IFA for the employee to be paid 4-weekly, which aligns with the roster that the employee works.

89. As mentioned in the preceding submissions, the Clerks Award includes a facilitative provision enabling monthly pay periods to be agreed upon, but not 4-weekly pay periods. The award enables monthly pay cycles to be agreed upon, but illogically states that monthly payments are to be made *'on the basis of 2 weeks in advance and 2 weeks in arrears'.* Two weeks plus two weeks does not equal a month except in February of non-leap years.

Pay Record and Pay Slip Requirements

90. Given that the IFA in the above example would vary the effect of the Clerks Award to replace the separate award entitlements to shift penalties and annual leave loading with an entitlement to receive a specified salary, it is no longer necessary for the employer to identify the shift penalties and annual leave loading in pay records and on pay slips.

91. Varying the model flexibility term to enable pay cycles to be dealt with in an IFA, would remove a current *'limit'* on *'arrangements which increase wages'*. At the same time, such a variation would continue to ensure that minimum award wages are not able to be *'traded off'*.

92. It is also relevant that IFAs made under the model flexibility term, are subject to substantial safeguards, including the following:

    (a) An IFA can only be made once an employee has started working for an employer.

    (b) Both parties must genuinely agree to an IFA, without coercion or duress.

    (c) The IFA must result in the employee being better off overall at the time the agreement was made than the employee would have been if no IFA had been agreed upon. We return to this below.

    (d) The IFA must be in writing and signed by the employer and employee (and, if the employee is under 18 years of age, the employee's parent or guardian).

    (e) The IFA must state each term of the award that the employer and employee have agreed to vary, and detail how the application of each term has been varied.

    (f) The employee must be given a copy of the IFA.

    (g) The IFA must be kept as a time and wages record.

    (h) Where an employer proposes an IFA, a written proposal must be provided to the employee. Aso, if the employee's understanding of written English is limited, the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

    (i) An IFA may be terminated at any time by written agreement by the parties.

    (j) An IFA may be terminated by the employer or the employee by giving 13 weeks' written notice to the other party.

(k) An employee's right to refuse to agree to an IFA is protected by the general protections in the Act.

(l) If an IFA is made in a manner that does not comply with the requirements in the flexibility term, this constitutes a breach of the award (see s.145(3) of the Act).

93. If the flexibility term is varied to enable an IFA to provide for a longer pay cycle than that prescribed in the relevant award, the IFA would need to result in the employee being better off overall. The better off overall requirement could be achieved in a variety of ways. However, even if pay cycles are considered in isolation, an employee who is covered by an award that provides for fortnightly pay periods and who is paid 4-weekly on the basis of two weeks in advance and two weeks in arrears, is clearly better off overall compared to the award.

Proposed Variation

94. The amendment that Ai Group proposes to the model flexibility term is as follows:

X. Individual flexibility arrangements

X.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer:

(a) arrangements for when work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading; or

(f) pay periods.

…

95. This is set out in the DD filed.

96. Given the better off overall requirement, the other extensive safeguards prescribed in the flexibility term, and the requirement in s.323 of the Act that employees be paid at least monthly, the simple amendment above is proposed. No further detail is necessary.

97. In this regard, the following comments of the Full Bench in the June 2008 Decision are particularly relevant:

> **[176]** Before leaving the matters to be included in the model clause there is another question to be considered – whether limits should be put on the flexibility available in relation to the particular award terms we have specified. That approach has some attraction in that it would provide some additional protections for employees. The difficulty with the proposal is that the limitations might not be appropriate in all circumstances and their adoption might lead to unfairness to employers and employees in some cases. Bearing in mind that the clause will have the potential to apply in a very broad range of cases it would be undesirable to place limits on what the parties might agree as appropriate to their needs. On balance we think that additional restrictions would be too prescriptive and the other protections the clause will contain should be adequate.[65]

98. The following elements of the modern awards objective weigh strongly in favour of the proposed award variation:

    (a) The need to promote flexible modern work practices and the efficient and productive performance of work;[66]

    (b) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[67] and

    (c) the need to ensure a simple, easy to understand, stable and sustainable modern award system.[68]

[65] *Award Modernisation* [2008] AIRCFB 550 at [176].

[66] Section 134(1)(d) of the Act.

[67] Section 134(1)(f) of the Act.

[68] Section 134(1)(g) of the Act.

9. ANNUAL LEAVE LOADING

100. At the outset, it is apt to note that during the plain language redrafting process (**PLR Process**) of the FF Award, the Commission, in response to a submission made by the Shop, Distributive and Allied Employees' Association (**SDA**) concerning certain differences in the drafting of the annual leave loading provisions in the FF Award, GRIA and Clerks Award, stated the following: (emphasis added)

> **[22]** I have noted, however, the SDA's submission concerning the different drafting of the annual leave loading provisions in the Fast Food Award, the Retail Award and the Clerks Award. There appears to me to be no good reason why the annual leave loading provisions in these awards and perhaps other awards, which are all intended to have the same effect, should be drafted differently. This issue cannot be resolved in the present matter, but it may be addressed by the Commission in a separate process in the future.[69]

101. The submissions and proposals advanced in this section of our submission ought to be considered in light of the Commission's remarks above. The Review is potentially an appropriate process for endeavouring to achieve greater consistency and simplicity[70] between, not only the abovementioned awards, but also, as the Commission itself contemplated, other awards that are not part of this aspect of the Review.

102. In our view, should the Commission be minded to adopt the proposals that we have advanced below, consideration should also be given to whether the same (or a similar) approach should be taken in respect of other awards containing annual leave loading provisions. We acknowledge that whilst there would likely be a need to develop specific wording for variations to individual awards outside of the Review, the underlying intent and purpose of those variations (i.e. to make modern awards easier to use) would apply equally.

[69] *4 yearly review of modern awards – Plain language re-drafting — Fast Food Industry Award 2010* [2022] FWC 1444 at [22].

[70] Section 134(1)(g) of the Act.

A. Employees Performing Variable Patterns of Work

103. Annual leave loading clauses in modern awards commonly require the employer to calculate the applicable weekend and / or shift penalties that would have been payable to an employee during a period of annual leave, had they instead worked during that period. The relevant clauses require the requisite calculation to be made by reference to, for example, *'the ordinary hours of work in the period'*[71] or the ordinary hours the employee *'would have worked … if they were not on leave during the period'*[72]. Such clauses typically require the employer to compare (and pay) the higher of the aforementioned amount or the annual leave loading (generally 17.5% of the minimum rate) for the ordinary hours that fall within a period of leave.

104. Provisions of this nature assume that it is practicable to identify an employee's ordinary hours of work during a period of leave, including *when* they would have been worked, in order to calculate the weekend and shift premiums that would have been payable. However, in some instances, this is simply not feasible. That is, in some cases, an employer does not know or is otherwise unable to identify the pattern of ordinary hours that would have been worked during a period of leave, because an employee's ordinary hours of work and in particular, their pattern of work, is not fixed or pre-determined, or it is variable.

105. Generally, modern awards prescribe the parameters within which ordinary hours must be worked; however, they do not regulate precisely when they are to be worked or fix the pattern of hours that must be worked. Further, it is also not uncommon for modern awards to permit full-time employees' ordinary hours to be averaged over a number of weeks. Thus, an employee's pattern of work may vary week-to-week, including changes to whether the employee works weekends and / or on shifts. To that end, employers may not know or be able to ascertain with certainty the relevant penalties that would have been payable to an employee had they worked instead of taking a period of leave.

[71] Clauses 28.3(c) and (d) of the GRIA and clauses 32.3(c) and (d) of the Clerks Award.

[72] Clause 22.2(c) of the FF Award.

106. It is also relevant that many awards do not require the publication of rosters[73] and of those that do, not all require the roster to be published at a prescribed time. Thus, in many cases, the requisite calculation would not be able to be undertaken by reference to a roster either.

107. Accordingly, annual leave loading provisions of the nature described above should be varied to provide that, in effect, where an employer is unable to determine the relevant weekend / shift penalties for a particular period of leave, the annual leave loading will apply by default.

108. By way of example, we have set out a proposed new clause for incorporation into clause 28.3 of the GRIA, which would seek to give effect to this:

> **(e)** Notwithstanding clauses 28.3(c) and 28.3(d), where the number of hours that would attract the penalty rates specified in clauses 28.3(c)(ii) or 28.3(d)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for ordinary hours of work in the period.

109. Of the Relevant Awards, the SCHCDS Award, FF Award, and Clerks Award also contain an annual leave loading clause which warrants a variation of the kind proposed above for GRIA. We note of course that the proposed subclause above would need to be tailored to ensure internal consistency within those awards.

110. The practical application of the existing provisions is uncertain in circumstances where an employee's hours of work are not set or known. The proposed amendment would ensure that there is clarity and certainty as to how the extant annual leave loading provisions apply in such circumstances. It would ensure that the awards are simple and easy to understand.[74]

[73] Including the Clerks Award and the FF Award.

[74] Section 134(1)(g) of the Act.

B. References to Weekend and Shift *'Rates'*

111. As mentioned above, annual leave loading clauses in modern awards often provide that when an employee takes a period of annual leave, an employer is required to pay either a 17.5% annual leave loading or applicable shift and / or weekend penalties, whichever is the higher. In many cases, such clauses refer to the shift / weekend penalty *'rates'* as opposed to just the shift / weekend *'penalties'*, *'allowances'* or *'loadings'*, which would exclude the applicable minimum hourly rate. For example, clause 32.3 of the Clerks Award is in the following terms: (emphasis added)

> **32.3 Annual leave loading**
>
> **(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 16 — Minimum rates for the employee's ordinary hours of work in the period.
>
> **(b)** The additional payment is payable on leave accrued.
>
> **(c)** For an employee who would have worked on day work only had they not been on leave, the additional payment is the greater of:
>
> **(i)** 17.5% of the minimum hourly rate for the employee's ordinary hours of work in the period; or
>
> **(ii)** The minimum hourly rate for the employee's ordinary hours of work in the period inclusive of <u>weekend penalty rates</u> as specified in clause 24 — Penalty rates (employees other than shiftworkers).
>
> **(d)** For an employee who would have worked on shiftwork had they not been on leave, the additional payment is the greater of:
>
> **(i)** 17.5% of the minimum hourly rate for the employee's ordinary hours of work in the period; or
>
> **(ii)** The minimum hourly rate for the employee's ordinary hours of work in the period inclusive of shift and <u>weekend penalty rates</u> for shiftwork as specified in clause 31 — Penalty rates for shiftwork.

112. A literal reading of, for example, clause 32.3(c) would mean that where an employee is on annual leave, they are to be paid their base rate of pay (however described), plus the higher of 17.5% <u>or</u> the weekend penalty rates prescribed by clause 24, which are in the order of 125% and 200% of the minimum hourly rate. This is plainly an anomalous outcome.

113. Generally, prior to the 4 yearly review process, many awards identified weekend and shift penalties as a separate and distinct amount (e.g. a penalty of 25% of the minimum hourly rate). As a consequence of changes made to the drafting of awards during the 4 yearly review, awards now generally express weekend and shift *rates* (inclusive of the minimum hourly rate) instead (e.g. a rate of 125% of the minimum hourly rate).

114. Ai Group raised concerns about the implications that this changed approach would have for annual leave loading provisions during the review, as summarised in the following decision:

> **[581]** Ai Group raised concerns about the various ways that penalty rates are referred within exposure drafts. Ai Group's position is that where an award provides that a shiftworker be paid 15% extra, that rate can be referred to as a "loading" or an "allowance" but not as a "penalty rate". Where an award provides that a shiftworker be paid 115% of the ordinary hourly rate, this rate may be referred to as a "penalty rate" but not a "loading or an allowance". We note that in most exposure drafts we have adopted the second approach referred to by Ai Group with the majority of the exposure drafts having penalty rates expressed a percentage of the ordinary or minimum hourly rate for example "115% of the ordinary hourly rate".
>
> …
>
> **[583]** Ai Group contend that this terminology is particularly problematic in annual leave clauses that provide that an employee be paid the higher of the annual leave loading or the "shift loading". Ai Group submits that the way some exposure drafts are worded could be interpreted as an employee on annual leave is to be paid the higher of 17.5% or a shift loading of, for example 130%. The Ai Group further submits that this could lead to some shiftworkers being paid 230% while on annual leave.[75]

115. Having regard to the above, the Commission referred the issue to a separate Full Bench, dealing with the PLR Process.[76] Relevantly, in doing so, the Commission found that this issue gave rise to an ambiguity: (emphasis added)

> **[586]** The exposure drafts that we have identified that may have issues with the interaction between the penalty rates clause and annual leave loading are listed in Attachment B. In our view, <u>these exposure drafts may be ambiguous because the annual leave loading clause isolates the loading component of the shiftwork provision and compares it to annual leave loading. As the redrafted penalty rates clause no longer identifies the loading component of the shiftwork penalty separately, the annual leave loading clause is not comparing like with like</u>.[77]

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[75] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 5536 at [581] and [583].

[76] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 5536 at [582] and [591].

[77] *4 yearly review of modern awards – Award stage – Group 3* [2017] FWCFB 5536 at [586].

116. Ai Group continued to raise this issue as part of the PLR Process and advanced a proposal seeking to address this issue.[78] Despite discussions between interested parties about the issue, a consensus as to how this ambiguity should be addressed was not reached and an award-by-award approach was determined to be appropriate.[79]

117. The issue was later considered in the PLR Process regarding the FF Award. As part of this process, the Commission expressed the following provisional views: (emphasis added)

> **[173]** We also agree that the current drafting creates ambiguity in the calculation of the relevant loading which needs to be addressed. Both the current award and the PLED refer to 'relevant weekend penalty rates' and because the penalty rates clause in the PLED no longer identify the loading component of the penalty rate separately, the annual leave loading clause is no longer comparing like with like.
>
> **[174]** The current award wording at clause 28.3(b)(i), for example, provides that the annual leave loading is '17.5% or the relevant weekend penalty rates, whichever is the greater but not both.' The relevant weekend penalty rate in clause 21 of the PLED is either 125% or 150% of the minimum hourly rate. If the current award wording replaced the wording at clause 22.3(b)(i) of the PLED, the loading to be added to the employee's base rate of pay would be calculated as the greater of either 17.5% or the relevant weekend penalty rate of 125% or 150%.[80]

118. The Commission ultimately determined to give effect to its provisional views: (emphasis added)

> **[13]** The Full Bench's provisional view concerning the redrafting of clause 22.3 of the PLED was based on four principal conclusions:
>
> …
>
> (2) There was a drafting ambiguity in the calculation of the loading in clause 22.3 of the PLED. Because the "relevant weekend penalty rate specified in clause 21.1" of the PLED is expressed as being either 125% or 150% of the minimum hourly rate (as distinct from a "loading" of 25% or 50%, as expressed in clause 25.5(b)-(d) of the current Fast Food Award), the comparison between these rates and the annual leave loading was no longer like with like and would lead to employees working weekends being unintentionally lead to significantly higher annual entitlements to payment for annual leave. This problem would be resolved by the introduction of a definition of "relevant

[78] *4 yearly review of modern awards – plain language project – annual leave loading terms – ambiguity - Statement* [2019] FWC 8468 at [3] – [16].

[79] *4 yearly review of modern awards – plain language project – annual leave loading terms – ambiguity – Statement* [2019] FWC 8582 at [2].

[80] *4 yearly review of modern awards – Plain language re-drafting — Fast Food Industry Award 2010* [2022] FWCFB 48 at [173] – [174].

weekend percentage penalty" (as per the proposed new clause 22.3(a)). It was acknowledged that that a clause requiring the reader to deduct the minimum rate from the penalty rates and then compare the remainder to the annual leave loading would introduce some complexity into the award, but, on balance, it was considered that such a clause was the clearest way to express the entitlement to annual leave loading.[81]

119. Clause 22.2 of the FF Award now reads: (emphasis added)

22.2 Annual leave loading

(a) In clause 22.2 a **relevant weekend penalty amount** is an applicable penalty rate prescribed by clause 21 — Penalty rates for working on weekends, less the minimum hourly rate.

(b) During a period of accrued annual leave an employee will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in clause 15 — Minimum rates .

(c) The loading for a period of annual leave will be the greater of the following 2 amounts:

(i) 17.5% of the employee's minimum hourly rate for all ordinary hours the employee would have worked if they were not on leave during the period; or

(ii) the relevant weekend penalty amounts payable to the employee for all ordinary hours they would have worked on a weekend if they were not on leave during the period.

NOTE: Section 90(2) of the Act contains provisions relating to an employee's entitlement to payment for any untaken paid annual leave when employment ends.

120. In our submission, to the extent that an award requires a comparison and payment of the higher of 17.5% annual leave loading and the applicable shift and / or weekend penalties, the relevant clause should be varied to reflect clause 22.2 of the FF Award; namely by:

(a) Replacing any references to weekend / shift penalty *'rates'*, with a reference to the relevant weekend / shift *'penalties'*; and

(b) Inserting a definition of relevant weekend / shift penalties in the terms found at clause 22.2(a) of the FF Award.

[81] *4 yearly review of modern awards – Plain language re-drafting — Fast Food Industry Award 2010* [2022] FWC 1444 at [13](2).

121. Such a variation should be made to clause 32.3 of the Clerks Award, clause 31.3 of the SCHCDS Award and clause 28.3 of the GRIA, as set out in the DD.

122. The same approach above should also be taken in respect of other modern awards that are not a part of this Review, in which this issue arises. This would, in our submission, enhance simplicity and consistency across the modern awards system.[82]

123. We note that as part of the PLR Process, the Commission previously identified a total of 56 awards with annual leave loading provisions that contain a requirement to undertake the comparative exercise of the nature contemplated by clause 22.2(c) of the FF Award.[83] Of those awards, not all contain references to the weekend / shift penalty rates, but rather, references to the applicable '*penalties*', '*allowances*' and/or '*loadings*'. As such, those awards may not require variation. Nonetheless, it appears that at least the following awards are potentially impacted by this issue, however this should not be taken to be a comprehensive list:

(a) The *Asphalt Industry Award 2020*;[84]

(b) The *Banking, Finance and Insurance Award 2020*;[85]

(c) The *Business Equipment Award 2020*;[86]

(d) The *Electrical Power Industry Award 2020*;[87]

(e) The *Food, Beverage and Tobacco Manufacturing Award 2020*;[88]

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[82] Section 134(1)(g) of the Act.

[83] *4 yearly review of modern awards – plain language project – annual leave loading terms – ambiguity – Statement* [2019] FWC 8468 at [3] and Attachment A.

[84] Clause 21.3 of the award.

[85] Clause 22.3 of the award.

[86] Clause 23.3 of the award.

[87] Clause 21.3 of the award.

[88] Clause 25.6 of the award.

(f) The *Gas Industry Award 2020*;[89]

(g) The *Graphic Arts, Printing and Publishing Award 2020*;[90]

(h) The *Joinery and Building Trades Award 2020*;[91]

(i) The Manufacturing Award;[92]

(j) The *Road Transport and Distribution Award 2020*;[93]

(k) The *Seafood Processing Award 2020*;[94]

(l) The *Storage Services and Wholesale Award 2020*;[95]

(m) The *Sugar Industry Award 2020*;[96]

(n) The *Waste Management Award 2020*;[97] and

(o) The *Wine Industry Award 2020*.[98]

C. The Requirement to Make an '*Additional Payment*'

124. Clause 32.3(a) of the Clerks Award provides that during a period of annual leave, an employer must pay an employee an '*additional payment*' in accordance with the minimum rates clause in the award: (emphasis added)

> **32.3 Annual leave loading**
>
> **(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 16 — Minimum rates for the employee's ordinary hours of work in the period.

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[89] Clause 20.2 of the award.

[90] Clause 31.7 of the award.

[91] Clause 27.3 of the award.

[92] Clause 34.4 of the award.

[93] Clause 24.4 of the award.

[94] Clause 27.5 of the award.

[95] Clause 24.3 of the award.

[96] Clause 31.3 of the award.

[97] Clause 22.2 of the award.

[98] Clause 24.4 of the award.

125. The emphasised text above is confusing, as it seems to erroneously suggest that the minimum rates clause in the award provides an employee with an entitlement to an additional payment. This of course is not correct.

126. In our submission, the issue above can be addressed by adopting the approach that was taken in respect of the FF Award as part of the PLR Process. Clause 22.2(b) of the FF Award reads as follows: (emphasis added)

> **(b)** During a period of accrued annual leave an employee will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in clause 15 — Minimum rates.

127. There are two key differences between clause 22.2(b) of the FF Award and clause 32.3(a) of the Clerks Award:

    (a) Clause 22.2(b) of the FF Award uses the appropriate term '*loading*', instead of '*additional payment*'; and

    (b) Clause 22.2(b) of the FF Award makes clear that the '*loading'* is to be calculated by reference to the period of leave and the minimum hourly rate, rather than suggesting that the minimum hourly rate clause confers an entitlement to an additional payment beyond the minimum rate of pay.

128. In respect of the first point of difference, it is noted that the use of the term '*additional payment*' as presently found in not only clause 32.3 of the Clerks Award but also 28.3 of the GRIA, was considered by the Commission during the PLR Process. Relevantly, the Commission found that: (emphasis added)

> (1) The use of the expression "additional payment" in clause 22.3 of the PLED, rather than the appellation of "loading" in clause 28.3 of the current Fast Food Award, might give rise to an ambiguity or uncertainty, and accordingly there should be a reversion to the existing terminology to retain consistency with the FW Act.[99]

[99] *4 yearly review of modern awards – Plain language re-drafting — Fast Food Industry Award 2010* [2022] FWC 1444 at [13](1).

129. In our submission, the Commission should adopt the same approach that was ultimately adopted in respect of the FF Award. In particular, the term *'additional payment'* as found in clause 32.3 of the Clerks Award and clause 28.3 of the GRIA clause, should be replaced with the term '*loading'*.

130. As to the second point of difference, clause 32.3(a) of the Clerks Award should be varied (consistent with clause 22.2(b) of the FF Award) to make clear that the *'loading'* is to be calculated by reference to the period of leave and the minimum hourly rate, rather than suggesting that the minimum hourly rate clause confers an entitlement to an additional payment beyond the minimum rate of pay.

131. We note that whilst 28.3(b) of the GRIA does not suffer from the same issue, we nevertheless submit that both clause 32.3(a) of the Clerks Award and 28.3(b) of the GRIA should be amended to reflect clause 22.2(b) of the FF Award. This would achieve consistency, simplicity and in turn make these awards easier to use.

132. In summary, we propose that, in relation to the Clerks Award:

(a) Clause 32.3(a) be varied as follows:

> During a period of accrued ~~paid~~ annual leave an employee~~r~~ will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in ~~must pay an employee an additional payment in accordance with~~ clause 16 — Minimum rates ~~for the employee's ordinary hours of work in the period~~.

(b) Clause 32.3(b) be deleted; and

(c) Clauses 32.3(c) and 32.3(d) be varied by replacing the words *'additional payment'* with *'loading'*.

133. Similarly, in relation to the GRIA:

(a) The heading to clause 28.3 should be replaced with, *'Annual leave loading'*;

(b) Clause 28.3(a) be varied as follows:

> During a period of accrued ~~paid~~ annual leave an employee~~r~~ will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in ~~must pay an employee an additional payment in accordance with~~ clause 17 — Minimum rates ~~for the employee's ordinary hours of work in the period~~.

(c) Clause 28.3(b) be deleted; and

(d) Clauses 28.3(c) and 28.3(d) be varied by replacing the words *'additional payment'* with *'loading'*.

134. These proposed variations are also set out in our DD.

10. THE CALCULATION OF MINIMUM HOURLY & WEEKLY RATES

135. The Relevant Awards contain both weekly and hourly minimum rates of pay for most, if not all, classifications.[100] It appears that in each case, the minimum hourly rate is derived by dividing the minimum weekly rate (rounded to two decimal places) by 38 and rounding the resulting amount to two decimal places.[101] However, where a minimum hourly rate is multiplied by 38, it does not necessarily equate to the corresponding minimum weekly rate prescribed by the award.

136. The issue arises in practice where an employer pays a full-time employee for a 38 hour week using the hourly rate in the relevant award. For most classifications, this would result in an amount that deviates from the relevant weekly rate prescribed in the award.

137. The issue is particularly pronounced in the FF Award, SCHCDS Award and the CS Award, which do not contain an express requirement that full-time employees must be paid the weekly rate for their classification, as opposed to the hourly rate multiplied by 38.[102] For example, the FF Award provides as follows:

15.1 Adult rates

An employer must pay an adult employee, as defined in clause 2 — Definitions , the minimum hourly rate applicable to the employee's classification for ordinary hours of work as follows:

Table 3—Minimum rates

Employee classification	Minimum weekly rate (full-time employee)	Minimum hourly rate

[100] The partial exception to this is the SCHCDS Award, which contains only weekly rates for some classifications.

[101] Fair Work Commission, *Method for adjusting rates in modern awards—Annual Wage Review 2021-22*.

[102] Clause 15.1 of the FF Award, clause 15 of the SCHCDS Award and clause 14.1 of the CS Award.

138. Whist it appears that it is intended that a full-time employee is to be paid the minimum weekly rate (given that the award identifies full-time employees in the heading of the column showing the weekly rate for each classification) it does not go so far as to create an obligation to pay the weekly rate to full-time employees or to make clear that the minimum hourly rate should not be used where an employee works 38 ordinary hours in a week. Further, the inclusion of only hourly rates in Schedule A to the award suggests that hourly rates can be used to pay full-time employees for an ordinary weeks' work.[103]

139. Clause 14.1 of the CS Award does not prescribe or even indicate which rate is to be used for full-time employees. It relevantly provides:

> **14.** Minimum wages
>
> **14.1** The total minimum weekly rate of wages payable to persons employed pursuant to this award will be as set out in the following table.

Classification	Minimum weekly rate	Minimum hourly rate

140. Similarly, the SCHCDS Award does not specifically mention full-time employees when setting out the weekly rates.[104]

141. By contrast, the Clerks Award clearly requires full-time employees to be paid the weekly rate as opposed to the hourly rate:

> **16.1 Adult employees**
>
> An employer must pay an employee who is 21 years of age or older the rate applicable to the employee classification specified in column 1 of **Table 3—Minimum rates** for ordinary hours of work as follows:
>
> **(a)** for a full-time employee, the minimum weekly rate specified in column 2; or
>
> **(b)** for a part-time employee, the minimum hourly rate specified in column 3.
>
> **Table 3—Minimum rates**

Column 1 Classification	Column 2 Minimum weekly rate (full-time employee)	Column 3 Minimum hourly rate

[103] See for example clause A.1.1, the second column, headed *'Ordinary hours'*.

[104] Clauses 15 - 17 of the SCHCDS Award.

Calculations

142. The tables below set out the quantum of the potential discrepancy that may result if full-time employees under the FF Award, the CS Award and the SCHCDS Award are paid a weekly rate calculated by multiplying the hourly rate by 38 instead of the relevant weekly rate in the award. The calculation of the weekly rate based on the hourly rate has been rounded to the nearest $0.10 in accordance with what we understand is the Commission's practice, except in relation to the SCHCDS Award.[105]

Fast Food Award

143. The table below shows the difference between the minimum weekly rate prescribed by the award *vis-à-vis* the minimum hourly rate multiplied by 38 for all classifications in the FF Award:

Classification	Award weekly rate ($)	Award hourly rate ($)	Weekly rate based on hourly rate x 38 ($)	Difference in weekly rate if hourly rate is used ($)
Fast food employee level 1	939.60	24.73	939.70	0.10
Fast food employee level 2	995.00	26.18	994.80	-0.20
Fast food employee level 3—in charge of one or no person	1010.30	26.59	1010.40	0.10
Fast food employee level 3—in charge of 2 or more people	1022.70	26.91	1022.60	-0.10

[105] Fair Work Commission, *Method for adjusting rates in modern awards—Annual Wage Review 2021-22*.

CS Award

144. The CS Award contains 40 classifications in total. Weekly and hourly rates of pay are provided for all classifications. The tables below contain a sample of classifications to illustrate the various inconsistencies:

CS Award Table 1: Support worker classifications				
Classification (On commencement only)	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Level 1.1 - On commencement	878.00	23.11	878.20	0.20
Level 2.1 - On commencement	909.90	23.94	909.70	-0.20
Level 2.2 - After 1 year*	939.80	24.73	939.70	-0.10
Level 3.1 - On commencement	995.00	26.18	994.80	-0.20

CS Award Table 2: Children's Services Employee classifications				
Classification (On commencement only)	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Level 1.1 - On commencement	878.00	23.11	878.20	0.20
Level 2.1 - On commencement	909.90	23.94	909.70	-0.20
Level 3A.1** - On commencement	979.70	25.78	979.60	-0.10
Level 3.1 - On commencement	995.00	26.18	994.80	-0.20
Level 4A.1 - On commencement	1061.70	27.94	1061.70	0.00
Level 4.1 - On commencement	1172.00	30.84	1171.90	-0.10
Level 5A.1 - On commencement	1225.60	32.25	1225.50	-0.10
Level 5.1 - On commencement	1225.60	32.25	1225.60	0.00
Level 6A.1 - On commencement	1413.30	37.19	1413.20	-0.10

CS Award Table 3: Children's Services Employee – Director classifications				
Classification (On commencement only)	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Level 6.1 - On commencement	1413.30	37.19	1413.20	-0.10
Level 6.4 - On commencement	1502.60	39.54	1502.50	-0.10
Level 6.7 - On commencement	1552.80	40.86	1552.70	-0.10

SCHCDS Award

145. Of the classifications in the SCHCDS Award, only the Social and Community Services (**SACS**) and Crisis Accommodation classifications include hourly rates as well as weekly rates. These are set out in clause 15. The tables below include a sample of the relevant 38 classifications. Unlike in the other awards above, the weekly rates which have been used for the analysis below are not rounded to the nearest $0.10, which results in a differential that is not rounded to the nearest $0.10.

SCHCDS Award Table 1: Social and Community Services employees classifications				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
SACS Level 2 – pay point 1	1223.85	32.21	1224.00	0.15
SACS Level 3 – pay point 1	1367.86	36.00	1368.00	0.14
SACS Level 4 – pay point 1	1577.80	41.52	1577.80	0.00
SACS Level 5 – pay point 1	1804.98	47.50	1805.00	0.02
SACS Level 6 – pay point 1	1972.04	51.90	1972.20	0.16
SACS Level 7 – pay point 1	2132.84	56.13	2132.90	0.06
SACS Level 8 – pay point 1	2314.06	60.90	2314.20	0.14

SCHCDS Award Table 2: Crisis Accommodation employee classifications				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Crisis accommodation employee Level 1 – pay point 1	1367.86	36.00	1368.00	0.14
Crisis accommodation employee Level 2 – pay point 1	1577.8	41.52	1577.76	-0.04
Crisis accommodation employee Level 3 – pay point 1	1804.98	47.5	1805.00	0.02
Crisis accommodation employee Level 4 – pay point 1	1972.04	51.9	1972.20	0.16

Calculation of Minimum Weekly Rates in Other Awards

146. We note that these concerns also arise under a number of other modern awards that do not form part of this component of the Review. By way of example, we set out below our analysis of the *Business Equipment Award 2020* and the Manufacturing Award.

Business Equipment Award 2020

Business Equipment Award Table 1: Technical Stream classifications				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Technical employee				
Level 1	881.80	23.21	882.00	0.20
Level 2	914.50	24.07	914.70	0.20
Technician				
Level 3	944.50	24.86	944.70	0.20
Level 4	995.00	26.18	994.80	-0.20
Level 5	1056.60	27.81	1056.80	0.20
Level 6	1115.20	29.35	1115.30	0.10

Business Equipment Award Table 2: Clerical and Admin Stream classifications				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Level 1	915.10	24.08	915.00	-0.10
Level 2	945.00	24.87	945.10	0.10
Level 3	995.00	26.18	994.80	-0.20
Level 4	1085.40	28.56	1085.30	-0.10
Level 5	1164.10	30.63	1163.90	-0.20

Business Equipment Award Table 3: Commercial Travellers Stream classifications				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
Salesperson Level 1	969.30	25.51	969.40	0.10
Salesperson Level 2	1063.30	27.98	1063.20	-0.10
Salesperson Level 3	1230.30	32.38	1230.40	0.10

Manufacturing Award

Manufacturing Award				
Classification	**Award weekly rate ($)**	**Award hourly rate ($)**	**Weekly rate based on hourly rate x 38 ($)**	**Difference in weekly rate if hourly rate is used ($)**
C14 / V1	859.30	22.61	859.20	-0.10
C13 / V2	882.80	23.23	882.70	-0.10
C12 / V3	914.90	24.08	915.00	0.10
C11 / V4	945.00	24.87	945.10	0.10
C10 / V5	995.00	26.18	994.80	-0.20
C9 / V6	1026.20	27.01	1026.40	0.20
C8 / V7	1057.40	27.83	1057.50	0.10
C7	1085.60	28.57	1085.70	0.10
V8	1088.60	28.65	1088.70	0.10
C6 / V9	1140.70	30.02	1140.80	0.10
C5 / V10	1164.10	30.63	1163.90	-0.20
C4 / V11	1195.30	31.46	1195.50	0.20
C3 / V12	1257.90	33.1	1257.80	-0.10
C2(a) / V13	1289.30	33.93	1289.30	0.00
C2(b) / V14	1345.70	35.41	1345.60	-0.10
Driver classifications				
D1	957.10	25.19	957.20	0.10
D2	968.70	25.49	968.60	-0.10
D3	980.20	25.79	980.00	-0.20
D4	993.90	26.16	994.10	0.20

Ai Group's Proposal

147. As can be seen from our analysis, in many awards, it is not clear whether full-time employees are to be paid the minimum weekly rate (however described) for a weeks' work or whether their weekly wage can be calculated using the minimum hourly rate. The relevant awards do not include an express requirement to pay full-time employees the weekly rate for a week's work or make clear that the hourly rate should not be used for this purpose. Further, the summary of rates appended to the awards only contain hourly rates.

148. An employer may use the minimum hourly rate to calculate the weekly wage if, for example, this best suits their payroll system or on the basis that it is necessary to reduce the weekly wage to an hourly rate for other purposes anyway (e.g. to calculate penalty rates, overtime etc). Where an employer does so, they would, in many cases, pay an employee more or less than the weekly wage prescribed by the award, by as much as $0.20. This is an anomalous outcome. The cumulative effect of paying full-time employees in this way could be significant, particularly when considered across an entire workforce, over an extended period of time.

149. We consider this is likely an unintended consequence of two factors:

  (a) *First*, the failure of the minimum rates clauses in the FF Award, CS Award and SCHCDS Award to make clear whether full-time employees are to be paid the weekly rate where they work 38 ordinary hours in a week; and

  (b) *Second,* the application of the rounding rules to weekly and hourly rate. The hourly rates are calculated by dividing the weekly rate by 38 and then rounded to the nearest $0.01, which creates a potential discrepancy when calculating a weekly rate and rounding it to the nearest $0.10.

150. The issue we have raised should be addressed through the Review. It is anomalous and confusing. Plainly, the possibility that a full-time employees' weekly wage could be calculated in different ways should not continue.

151. Accordingly, Ai Group proposes that a clause be inserted into the relevant minimum rates clauses in the FF Award, CS Award and SCHCDS Award to clarify that the obligation on employers to pay full-time employees in respect of a 38 ordinary hour week will be satisfied if they are paid either the award weekly rate or a weekly rate based on the award hourly rate multiplied by 38. The provision should apply retrospectively, from the time that hourly rates were first inserted into each award.

152. We propose that this clause should be drafted as follows:

> **X.X** An employer is taken to satisfy its obligation to pay a full-time employee for a 38 ordinary hour week where the employer pays an amount that is equivalent to the minimum weekly rate prescribed by clause X or the minimum hourly rate multiplied by 38.

153. The Commission should also consider making similar variations across the awards system, wherever this issue arises. In our estimation, it affects most modern awards. The terminology used to describe the minimum weekly rate and the minimum hourly rate may need to be adapted in certain awards to reflect the language found in the relevant minimum wages provision.

The CS Award

154. We further consider that clause 14.1 of the CS Award, which provides for minimum rates of pay, is unclear. It provides:

> **14.1** The total minimum weekly rate of wages payable to persons employed pursuant to this award will be as set out in the following table.

155. The table then goes on to set out minimum weekly and hourly rates for each classification. In our submission, the reference in clause 14.1 the minimum weekly rate only, is confusing. This is particularly so in light of clauses 10.4(g) and 10.5(a) which provide that part-time and casual employees must be paid an hourly rate. To ensure clause 14.1 aligns with these obligations and clarifies the existence of the hourly rates, we propose that it be amended as follows:

> **14.1** The ~~total~~ minimum hourly and weekly rates ~~of wages~~ payable to employees in each classification level under ~~persons employed pursuant to~~ this award ~~will be as~~ are set out in the following table.

156. This proposed variation is also set out in the DD.

Conclusion

157. In summary, for the above reasons, we submit that the Commission should:

  (a) Vary the relevant minimum payment clauses in the FF Award, the CS Award, and the SCHCDS Award to insert the proposed clause above with retrospective effect, clarifying that an employer's payment obligations to full-time employees will be met if they pay either the award weekly rate or an amount equivalent to the award hourly rate multiplied by 38.

  (b) Vary clause 14.1 of the CS Award to make clear that minimum hourly and weekly rates are set out.

  (c) Make similar variations to those described at paragraph (a) above to other awards.

158. The following elements of the modern awards objective weigh in favour of the proposed variations:

  (a) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[106] and

  (b) The need to ensure a simple, easy to understand, stable and sustainable modern award system.[107]

[106] Section 134(1)(f) of the Act.

[107] Section 134(1)(g) of the Act.

11. ELECTRONIC COMMUNICATIONS

159. A number of clauses in the Relevant Awards require particular steps to be taken *'in writing'* or by way of written notice (**Writing-Related Obligations**) and / or provide for documents to be signed by relevant parties (**Signature Provisions**). In most cases, it is not clear whether the Writing-Related Obligations and Signature Provisions can be satisfied using electronic means of communication. They are therefore ambiguous and uncertain.

160. In addition, it has become increasingly common for employers and employees to utilise electronic means of communication; including email, text messages and smart phone applications. In this context, to the extent that the awards do not permit the satisfaction of Writing-Related Obligations and Signature Provisions using electronic means of communication, they do not reflect contemporary work practices.

161. Therefore, the relevant provisions of the awards should be varied to expressly provide that Writing-Related Obligations and Signature Provisions can be met by utilising electronic means.

Writing-Related Obligations

162. There are various Writing-Related Obligations in different clauses in the Relevant Awards. These include provisions relating to working arrangements for part-time employees, time off instead of payment for overtime and various annual leave-related provisions, among others.

163. For example:

    (a) Clause 10 of the Clerks Award, which applies to part-time employees, requires employers and employees to *'agree in writing'* on various matters.[108]

[108] Clauses 10.2 and 10.3 of the Clerks Award. See also clause 10.3 of the FF Award.

(b) Clause 14.3 of the GRIA requires employers to notify employees *'in writing'* of their classification and of any changes to it.[109]

(c) The model clause concerning the making of individual flexibility arrangements requires that any such arrangement must be documented in writing.[110]

(d) The model clause concerning consultation about major workplace change requires that employers must give employees information *'in writing'* about major workplace change as part of the required consultation process.[111]

(e) The model superannuation clause provides that employees can authorise their employer *'in writing'* to pay superannuation contributions and to later adjust this amount by *'written notice'*.[112]

(f) The model clause regarding the taking of annual leave in advance provides that an employer and an employee are to *'agree in writing'*.[113]

(g) The model term relating to time off in lieu of overtime (**TOIL**) provides for employees and employers to *'agree in writing'* that an employee may take time off instead of payment for overtime.[114]

(h) The model clause regarding excessive annual leave accruals provides that an employer can *'direct [an] employee in writing'* to take annual leave.[115] The model also provides that an employee can request by *'written notice to*

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[109] See also clause 13.2 of the SCHDS Award, clauses 12.2 and 12.3 of the FF Award and clause 12.3 of the Clerks Award.

[110] See clause 5 of the Clerks Award, clause 7 of the SCHCDS Award, clause 7 of the CS Award, clause 5 of the Fast Food Award and clause 5 of the GRIA.

[111] See clause 8.2 of the SCHCDS Award, clause 34.2 of the GRIA, clause 28.2 of the FF Award, clause 8.2 of the CS Award and clause 38.2 of the Clerks Award.

[112] See clause 19.3 of the FF Award, clause 20.3 of the GRIA, clause 23.3 of the SCHCDS Award, clause 20.3 of the CS Award and clause 20.3 of the Clerks Award.

[113] See clause 24.8(a) of the CS Award, clause 28.8(a) of the GRIA, clause 31.4(a) of the SCHCDS Award, clause 22.3(a) of the FF Award and clause 32.4(a) of the Clerks Award.

[114] See clause 28.2(a) of the SCHCDS Award, clause 21.3 of the GRIA, clause 23.3 of the CS Award and clauses 23.1 and 29.1 of the Clerks Award.

[115] See clause 28.6(a) of the SCHCDS Award, clause 31.7(a) of the SCHCDS Award, clause 22.6(a) of the FF Award, clause 24.6(a) of the CS Award and clause 32.7(a) of the Clerks Award.

the employer' one or more periods of annual leave in circumstances of excessive accrual.[116]

164. The Writing-Related Obligations in the Relevant Awards typically do not clarify whether electronic means of communication can be used in order to satisfy the provisions. However, there are some exceptions to this. For example, the GRIA includes notes clarifying the meaning of *'in writing'* as follows (emphasis added):

> **10. Part-time employees**
>
> …
>
> **10.5** At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:
>
> **(a)** the number of hours to be worked on each particular day of the week (the guaranteed hours); and
>
> **(b)** the times at which the employee will start and finish work each particular day; and
>
> **(c)** when meal breaks may be taken and their duration.
>
> NOTE: An agreement under clause 10.5 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.
>
> **10.6 Changes to regular pattern of work by agreement**
>
> The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:
>
> **(a)** if the agreement is to vary the employee's regular pattern of work for a particular rostered shift – before the end of the affected shift; and
>
> **(b)** otherwise – before the variation takes effect.
>
> NOTE 1: An agreement under clause 10.6 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.
>
> …

[116] See clause 28.7 of the GRIA, clause 31.8(a) of the SCHCDS Award, clause 22.7(a) of the FF Award, clause 24.7(a) of the CS Award and clause 32.8 of the Clerks Award.

165. Likewise, the CS Award includes the following in clause 10.4 (emphasis added):

10.4 Part-time employment

…

(c) At the time of engagement the employer and the part-time employee will agree in writing on a regular pattern of work, specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day.

(d)

(i) Changes in the agreed regular pattern of work may only be made by agreement in writing between the employer and employee. Changes in the days to be worked or in starting and/or finishing times (whether on-going or ad hoc) may also be made by agreement in writing. An agreement in writing may be made by any electronic means of communication.

…

166. The model TOIL clause generally includes the following note (emphasis added):

Note: An example of the type of agreement required by this clause is set out at Schedule H. There is no requirement to use the form of agreement set out at Schedule H. An agreement under clause 23.3 can also be made by an exchange of emails between the employee and employer, or by other electronic means.[117]

167. The above clarifications in the GRIA and CS Award are useful in that they confirm that electronic methods of communication will satisfy the relevant Writing-Related Obligations. However, this is not consistent across the remaining Writing-Related Obligations in the GRIA and the CS Award, as some of them do not contain similar clarification. For example, the GRIA does not clarify references to writing in clause 8.3 (emphasis added):

8.3 Moving between types of employment

(a) A full-time or casual employee can only become a part-time employee with the employee's written consent.

(b) Moving to part-time employment does not affect the continuity of any leave entitlements.

[117] See for example clause 23.3 of the CS Award.

(c) A full-time employee:

(i) may request to become a part-time employee; and

(ii) if that request is granted by the employer, may return to full-time employment at a future date agreed in writing with the employer.

168. Similarly, clause 10.10 of the GRIA, which refers to changes to regular patterns of work for part-time employees, does not clarify whether a *'written notice'* can be given electronically.[118] This inconsistency is more confusing when considered in the context of clauses 10.5 and 10.6 extracted above, which contain notes clarifying the potential use of electronic means to meet the Writing-Related Obligations contained therein.

169. Inconsistencies in approach can also be found in the CS Award; including in clause 24.4, which requires various *'written notice[s]'* to be provided in relation to temporary shutdown periods,[119] and that directions or agreements regarding employees taking particular leave during such periods be *'in writing'*, without clarifying whether electronic means of communication can be used.[120] In addition, clause 24.9 does not clarify that an agreement in writing regarding cashing out annual leave can occur by electronic means.[121]

170. These differences in approach do not appear to be based on any clear rationale. In the circumstances, a consistent approach should be adopted throughout the respective awards.

171. Variations to the Relevant Awards in this regard would also be consistent with the provisional view expressed by the Commission in relation to Ai Group's recent application to vary the *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**) by inserting a similar clarification in clause 10.4, which relates to part-time employees. Specifically, the Commission has provisionally determined that it will, *inter alia*, vary clause 10.4 of the Vehicle Award as follows

[118] Clause 10.10(a) of the GRIA.

[119] Clauses 24.4(c) and (d) of the CS Award.

[120] Clauses 24.4(f)(i) and 24.4(h) of the CS Award.

[121] Clause 24.9(c) of the CS Award.

pursuant s.160(1) of the Act, on the basis that it would resolve uncertainty regarding the form of any written agreement under the clause:[122]

> **10.4** Any agreed variation to the hours of work will be recorded in writing (including by electronic means) ….

172. In circumstances where electronic forms of communication are frequently used in modern workplaces by employers and employees, the insertion of the words '*(including by electronic means)*' in clauses containing Writing-Related Obligations that do not already make this express would address any uncertainty about whether such forms of communication can be used to meet these obligations. This would ensure that the modern awards system is relevant in the contemporary context, reduce the regulatory burden associated with using non-electronic forms of communication to comply with the relevant clauses and make all Writing-Related Obligations consistent within each of the Relevant Awards.

Signature Provisions

173. The Relevant Awards also contain various provisions which require particular documents to be signed; but do not clarify whether electronic means can be used. For example, clause 28.8(b)(ii) of the GRIA requires an agreement to allow an employee to take annual leave in advance to be signed by the employer, the employee and their parent or guardian if they are under 18 years of age.[123] Clause 22.4(e) of the FF Award contains the same requirement for an agreement to cash out annual leave.[124] Both of these form part of model clauses that appear in a number of awards. In all cases, it is not clear whether an electronic signature or other acknowledgement would be sufficient to satisfy the Signature Provisions.

174. For the reasons set out above, contemporary work practices including those related to record-keeping and communication may not be compatible with an award-derived requirement that documents are physically signed. This is particularly so given the prevalence of arrangements involving the performance

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[122] *Application by the Australian Industry Group* [2023] FWC 2995 at [7]

[123] See also clause 31.4(b)(ii) of the SCHCDS Award, clause 22.3(b)(ii) of the FF Award, clause 24.8(b)(ii) of the CS Award and clause 32.4(b)(ii) of the Clerks Award.

[124] See also clause 28.9(e) of the GRIA, clause 31.5(e) of the SCHCDS Award, clause 24.9(e) of the CS Award and clause 32.9(e) of the Clerks Award.

of work from home or other remote locations. An obligation that documents are physically signed by an employer and employee is unnecessarily onerous and imposes an unwarranted regulatory burden on the parties.

175. Similar issues were addressed in 4 yearly review proceedings regarding the development of the annualised wage model clauses. In one of its decisions about the matter, a Full Bench of the Commission accepted a submission that inserting words clarifying that a signature requirement could also be satisfied by acknowledgement that a record was correct in writing (including by electronic means) would help ensure compatibility with electronic pay and records systems.[125] The model clause now found in the Clerks Award relevantly provides as follows (emphasis added):

18.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

176. Similar variations should be made in this Review in respect of Signature Provisions. We propose that each Signature Provision should be varied to insert the words *'or confirmed using electronic means'*.

[125] *Four yearly review of modern awards – Annualised Wage Arrangements* [2019] FWCFB 4368 at [21].

Writing-Related Obligations and Signature Provisions in other Awards

177. We further note that a similar lack of clarification around the scope of Writing-Related Obligations and Signature Provisions exists in other modern awards that do not form part of this aspect of the Review. For example, the Manufacturing Award contains the following Writing-Related Obligations and Signature Provisions, among others (emphasis added):

10. Part-time employees

…

10.3 Before commencing part-time employment, the employee and employer must agree in writing on:

(a) the hours to be worked by the employee, the days on which they will be worked and the starting and finishing times for the work; and

(b) the classification applying to the work to be performed in accordance with Schedule A —Classification Structure and Definitions.

10.4 The terms of the agreement in clause 10.3 may be varied by consent in writing.

…

34.12 Annual leave in advance

(a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.

(b) An agreement must:

(i) state the amount of leave to be taken in advance and the date on which leave is to commence; and

(ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

…

34.13 Cashing out of annual leave

…

(c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.

…

(e) An agreement under clause 34.13 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

…

178. It is not clear whether electronic means can be utilised to discharge the obligations set out in the above provisions.

179. There is a similar absence of clarification in the vast majority of other awards, noting that many of the provisions we have identified above are model clauses that appear in a large number of awards.

180. There is no apparent reason why a different approach should be taken in those awards. Therefore, consideration should be given to varying them in comparable terms. This would ensure simplicity and consistency across the modern award system.[126]

Summary of Proposals

181. In summary, for the above reasons we submit that the Commission should:

(a) Vary the relevant Writing-Related Obligations to insert the words *'(including by electronic means)'* into each clause in the Relevant Awards to consistently clarify that electronic means of communication can be used to discharge these obligations;

(b) Vary the Signature Provisions to insert the words '*or confirmed using electronic means*' into each clause in the Relevant Awards to consistently confirm that electronic means can be used to discharge signature obligations; and

(c) Similar variations should also be made to other awards.

[126] Section 134(1)(g) of the Act.

182. The following elements of the modern awards objective weigh in favour of the proposed variations to the Writing-Related Obligations and Signature Provisions:

(a) The need to promote flexible modern work practices and the efficient and productive performance of work;[127]

(b) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[128] and

(c) The need to ensure a simple, easy to understand, stable and sustainable modern award system.[129]

183. We have reflected each of our proposals in the DD accompanying these submissions.

[127] Section 134(1)(d) of the Act.

[128] Section 134(1)(f) of the Act.

[129] Section 134(1)(g) of the Act.

12. THE CLERKS AWARD

A. Minimum Engagement Period for Part-time Employees (Clause 10.5)

184. Clause 10.5 of the Clerks Award is in the following terms:

> **10.5** An employer must roster a part-time employee on any shift for a minimum of 3 consecutive hours.

185. Clause 10.5 creates an obligation to *'roster'* a part-time employee for at least three consecutive hours. Where an employer does not direct an employee to perform three consecutive hours of work, this requirement would not be satisfied, even if the employer paid the employee for at least three hours. This is at odds with the approach taken at clause 11.4, which relates to casual employees.

186. The clause should be amended to provide for circumstances in which an employer does not in fact require a part-time employee to perform three continuous hours of work. We also note that the award does not contain rostering provisions and to that extent, the obligation to *'roster'* an employee is inappropriate.

187. Accordingly, clause 10.5 should be replaced with the following:

> **10.5** An employer must engage a part-time employee for a minimum of 3 hours' work on each occasion or provide a minimum payment of 3 hours. This obligation applies even where the employee is required to work for fewer than 3 consecutive hours, provided the employee is ready, willing and able to perform such work.

188. Self-evidently, the proposed provision would not have any adverse implications for an employee's earnings. It would simply serve to ensure that employers are not obligated to provide a minimum period of work.

189. An employer would not be required to provide payment for three hours work in the event that the employee did not actually complete three hours of work in circumstances where it was nonetheless made available to them. This would arise in a narrow range of circumstances. It would address the practical reality that there are occasions when employees unexpectedly cease work for their own reasons.

B. Remote work (New Clause 13.9)

190. Clause 13 relates to the ordinary hours of employees other than shiftworkers. Specifically, clause 13.6(a) requires that ordinary hours must be worked *'continuously'*, except for rest breaks and meal breaks. Further, clause 13.3 requires that ordinary hours must be performed within the hours of 7:00am – 7:00pm Monday – Friday, or 7:00am – 12:30pm on Saturday. Although clause 13.4 provides some scope for the spread of hours to be moved by up to one hour, the award does not otherwise contemplate an ability to perform ordinary hours of work outside the aforementioned spread. An employee is entitled to overtime rates for work performed beyond the spread.[130]

191. In recent years, it has become increasingly common for employees to work from home or from some other location that is not an employer's designated workplace. Such working arrangements are particularly prevalent amongst certain industries and occupations, including in respect of employees performing work of a clerical and administrative nature that is covered by the Clerks Award.

192. Many employees working from home wish to take breaks (other than meal breaks and rest breaks) during ordinary hours to attend to personal matters. This can include transporting children to and / or from school or early education facilities, attending personal appointments (e.g. doctors' appointments), running errands, engaging in physical activity etc. Often, these employees work autonomously and exercise at least some control over how and when they undertake their work.

193. Some employees may seek to *'make up'* the time spent off work outside the spread of hours. This arises most commonly in the context of parents of young children, who wish to spend time with their children when they would otherwise be required to work; and to subsequently *'make up'* this time at night, after their children have gone to bed.

[130] Clause 21.1(c) of the Clerks Award.

194. Many employers are amenable to accommodating arrangements of the nature described above (and do in fact permit them); however, a strict application of clauses 13.3 and 13.6(a) prevents their implementation. To that end, the award does not provide a *'relevant'* safety net, that is consistent with contemporary community expectations and employee desires to work flexibly. It renders unlawful arrangements that would be of obvious benefit to many employees.

195. Clause 13.8 is in the following terms:

> **13.8** The employer and an employee may agree that the employee may take time off during ordinary hours and make up that time by working at another time during ordinary hours.

196. This provision, in essence, facilitates *'make up time';* however, it requires that the time worked to make up for time off must be performed *'during ordinary hours'*. Thus, such time must be worked within the spread of hours. Whilst clause 13.8 goes some way to addressing the matters we have raised, it does not do so entirely. It is also somewhat unclear whether it permits ordinary hours to be worked other than continuously.

197. In addition, in respect of part-time employees, clause 10.5 requires that an employee must be rostered to perform at least three consecutive hours of work on each shift. Similarly, clause 11.4 requires that a casual employee must be paid for at least three hours per engagement. These provisions also potentially preclude the types of arrangements contemplated above, or they may discourage employers from agreeing to flexible working arrangements of this nature.

198. The key rationale underpinning minimum engagement periods was described as follows by a Full Bench during the 4 yearly review of modern awards: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. <u>However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like.</u> An employment arrangement may become exploitative if the income provided for the employee's labour

is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[131]

199. The principle that employees should be sufficiently compensated *'for each attendance at the workplace to justify the expense and inconvenience associated with that attendance'* is plainly not relevant where an employee is working from home or another location of their choosing. Moreover, our proposal is directed towards ensuring that employees can take time off work and make up that time flexibly, in ways that suit them.

200. Accordingly, a new clause 13.9 should be inserted in the following terms, which makes clear that clauses 13.3 (the spread of hours), clause 13.6(a) (the requirement to perform ordinary hours of work continuously), clause 10.5 (the minimum engagement period for part-time employees) and clause 11.4 (the minimum payment period for casual employees) will not apply where an employer and employee agree and the employee is working remotely:

13.9 If an employee is working from a location other than a workplace designated by the employer, the employer and employee may agree that clauses 10.5, 11.4, 13.3 and 13.6(a) (as applicable) will not apply when the employee is so working.

C. Ordinary Hours on a Weekend (Clause 13.3)

201. The Clerks Award permits the working of ordinary hours on Saturday only between 7.00am and 12.30pm and it does not permit the performance of ordinary hours on a Sunday; except where facilitated by clause 13.5, which is in the following terms:

13.5 Setting ordinary hours by a different award

(a) Clause 13.5 applies if each of the following applies:

(i) one or more employees covered by this award work in association with other employees who are covered by a different modern award; and

[131] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

(ii) that different modern award sets a spread of hours other than that set out in clause 13.3 ; and

(iii) those other employees work ordinary hours outside the spread of hours set out in clause 13.3 .

(b) The employer may direct the employees mentioned in clause 13.5(a)(i) who are covered by this award to perform work within the spread of ordinary hours prescribed by the modern award that covers the majority of employees at the workplace.

202. Given the increasing incidence of businesses operating 7 days a week, including customer call centres, the award should be varied to include an ability to perform ordinary hours throughout weekends.

203. Further, many employees are amenable to, or indeed would prefer to, work on weekends *vis-à-vis* weekdays. The reasons for this include:

(a) The opportunity to work at times that attract penalty rates;

(b) Greater availability of parents, because another family member is available to care for their children; and

(c) Greater availability of those with study commitments.

204. Further, as the Commission has previously observed: (emphasis added)

> … There is a disutility associated with weekend work, above that applicable to work performed from Monday to Friday. Generally speaking, for many workers Sunday work has a higher level of disutility than Saturday work, <u>though the extent of the disutility is much less than in times past</u>. …[132]

205. The prohibition on working ordinary hours on a weekend beyond 12.30pm on Saturdays reflects a bygone era. Since then, community expectations and social mores related to working arrangements and patterns have changed significantly. Society's perception of working on weekends has evolved and with that, so too should the award.

206. Ai Group proposes that clause 13.3 be replaced with the following:

> Ordinary hours may be worked between 7.00am and 7.00pm on Monday to Sunday.

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[132] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [68].

207. The description of the spread of hours in clause 13.4 would also need to be updated.

208. An employee would be entitled to the penalty rate prescribed by clause 24.2 for work performed on a Saturday. In respect of Sundays, clause 24.3(a) should be deleted. With that change, employees would be entitled to the penalty rate prescribed by clause 24.3(b) and the minimum payment period prescribed by clause 24.3(c).

209. The proposed change would ensure that the award is no longer out of step with other awards; the majority of which contemplate ordinary hours being worked on a weekend. Further, they would ensure that the safety net is:

(a) Fair for employers and employees;[133]

(b) Relevant;[134]

(c) Consistent with the need to ensure flexible modern work practices and the efficient and productive performance of work;[135] and

(d) Consistent with the needs of business.[136]

D. Taking a Meal Break (New Clause 15.4)

210. Clause 15.3 of the Clerks Award is in the following terms:

> **15.3** An employee who works more than 5 hours at a time is entitled to one 30 to 60 minute unpaid meal break, to be taken within the first 5 hours of work and within 5 hours after resuming work after a meal break.

211. It provides that an employee who performs more than five hours work is entitled to a meal break within the first five hours of work. An employee is entitled to subsequent meal breaks for every further period of five hours worked.

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[133] Section 134(1)(a) of the Act.

[134] Section 134(1)(a) of the Act.

[135] Section 134(1)(d) of the Act.

[136] Section 134(1)(f) of the Act.

212. Unlike a number of other awards, the Clerks Award does not afford a mechanism that allows an employer and employee to agree that the employee will forfeit the meal break if they work more than five hours but not more than six hours.[137]

213. Ai Group proposes the introduction of such a provision, in the following terms:

> **15.4** Notwithstanding clause 15.3, an employer and an employee who works up to six hours may agree that the employee will forfeit the meal break. Such agreement may be reached in relation to one or more specific periods of work, or on an ongoing basis.

214. The Commission granted similar variations sought by Ai Group to the *Nurses Award 2020*[138] and the *Health Professionals and Support Services Award 2020*[139] during the 4 yearly review of modern awards.

215. The proposed amendment would create greater flexibility regarding the taking of meal breaks. It is common for employees who are parents to work shifts that 5 – 6 hours in length. Employees with study commitments are often also engaged to work such shifts. In these circumstances, employees would often prefer to forfeit the meal break such that they can finish work earlier. For example, an employee required to perform 5.5 ordinary hours of work is entitled to a meal break of at least 30 minutes. Combined, this results in a period of six hours. If the employee could forfeit the meal break, it would enable them to finish work after 5.5 hours.

216. It would also enable an employer and employee to agree that a meal break will not be taken for the purposes of ensuring that certain operational needs are met. This may arise where, for example, there are unexpected staff absences.

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[137] See for example clause 22.1(a) of the CS Award, clause 15.1(c) of the *Health Professionals and Support Services Award 2020,* clause 18.1(b) of the *Manufacturing and Associated Industries and Occupations Award 2020* and clause 14.1(a) of the *Nurses Award 2020*.

[138] *4 yearly review of modern awards—Nurses Award 2010* [2018] FWCFB 7374 at [117] – [145].

[139] *4 yearly review of modern awards— Health Professionals and Support Services Award 2010* [2018] FWCFB 7350 at [176] – [186].

217. Two important safeguards would ensure that where the proposed clause applied, an employee would not be required to work for an extended period without a break:

(a) Employees are entitled to paid tea breaks pursuant to clause 15.2. Our proposal would not interfere with this entitlement.

(b) The proposed provision would not apply if the employee was required to perform more than six hours of work.

E. Annualised Wage Arrangements (Clause 18)

218. Clause 18 of the Clerks Award deals with annualised wage arrangements in the following terms:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:

(i) clause 13.8 (Make-up time); and

(ii) clause 16 — Minimum rates; and

(iii) clause 19 — Allowances; and

(iv) clause 21 — Overtime (employees other than shiftworkers); and

(v) clause 22 — Rest period after working overtime (employees other than shiftworkers); and

(vi) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers); and

(vii) clause 24 — Penalty rates (employees other than shiftworkers); and

(viii) clause 26 — Ordinary hours of work and rostering for shiftwork; and

(ix) clause 28 — Overtime for shiftwork; and

(x) clause 29 — Time off instead of payment for overtime for shiftwork; and

(xi) clause 30 — Rest period after working overtime for shiftwork; and

(xii) clause 31 — Penalty rates for shiftwork; and

(xiii) clause 32.3 — Annual leave loading.

(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

18.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.

(c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

18.3 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES_, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

219. The provision reflects *'Model Clause 1'*, as determined by a Full Bench of the Commission during the 4 yearly review of modern awards, in the context of *'common issues'* proceedings concerning annualised wage arrangements.[140]

220. Ai Group proposes the following amendments to the clause:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:

(i) clause 10.6 – Part-time employees; and

(ii) clause 13.8 (Make-up time); and

(iii) clause 16 — Minimum rates; and

(iv) clause 19 — Allowances; and

(v) clause 21 — Overtime (employees other than shiftworkers); and

(vi) clause 22 — Rest period after working overtime (employees other than shiftworkers); and

(vii) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers); and

(viii) clause 24 — Penalty rates (employees other than shiftworkers); and

(ix) clause 26 — Ordinary hours of work and rostering for shiftwork; and

(x) clause 28 — Overtime for shiftwork; and

(xi) clause 29 — Time off instead of payment for overtime for shiftwork; and

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140 *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 4368 at [23].

(xii) clause 30 — Rest period after working overtime for shiftwork; and

(xiii) clause 31 — Penalty rates for shiftwork; and

(xiv) clause 32.3 — Annual leave loading.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

18.2 Changes to part-time employees' hours of work

(a) Clause 18.2 applies to a part-time employee who is being paid an annualised wage and their employer, if in accordance with clause 10.3 or clause 10.4, the employee's hours of work agreed under clause 10.2 are varied on an ongoing basis.

(b) The employer must review the matters described in clause 18.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 18.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 18.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

18.~~2~~3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within ~~each~~ 12 months from the commencement of the annualised wage arrangement, ~~or upon the termination of employment of the employee~~ or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within ~~14~~ 28 days.

(c) The reconciliation process described by clause 18.3(b) must also be undertaken:

(i) Every 12 months, or as soon as reasonably practicable thereafter;

(ii) Upon the termination of the employee's employment.

(~~c~~d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.~~2~~3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 18.3(d).

18.~~3~~4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

221. We explain each of the proposed changes in the submissions that follow.

222. *First,* the provision should apply to part-time employees, in addition to full-time employees.

223. In the aforementioned proceedings, when determining the terms of the various model clauses, the Commission said as follows about their applicability to part-time employees:

> **[50]** There were differing submissions received concerning the applicability of annualised wage arrangements to part-time employment. While some parties supported such arrangements being made applicable or made available to part-time employees, we do not consider that any workable, specific proposal to that end has been advanced. It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards. The course we propose to take is to adopt standard annualised wage provisions for full-time employees, and then interested parties may if they wish make an application with respect to a specific modern award to vary the provision to extend its operation to part-time employees.[141]

224. Thus, the Commission's decision that the model clauses would not apply to part-time employees did not reflect any finding that it would be inappropriate for such clauses to do so or any other such conclusion as to its merits. Rather, there was an absence of any workable proposal that could have applied universally to all of the awards that were the subject of those proceedings.

225. Proposed clause 18.2 relates to part-time employees. It would, in effect, require an employer to review the annualised wage paid to an employee, the award provisions that are satisfied by the annualised wage, the method by which the wage was calculated and the outer limit number of hours for the purposes of clause 18.1(b)(iv), if the employee's hours are varied by agreement on an ongoing basis. The proposed clause affords an employer the ability to change the arrangement with the employee to reflect the revised pattern of hours.

226. Other elements of the provision, particularly clauses 18.1(c) and 18.3, would also serve as important safeguards.

227. *Second,* the extant provision requires an employer to undertake a reconciliation process, for the purposes of ensuring that the annualised wage paid to an employee is not less than the amounts that would have been payable to the employee pursuant to the award. The clause requires that the process must be

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[141] *4 yearly review of modern awards – Annualised Wage Arrangements* [2019] FWCFB 1289 at [50].

undertaken *'each 12 months from the commencement of the annualised wage arrangement'*.

228. Some employers pay a number of employees covered by the award an annualised wage. However, those annualised wage arrangements may be implemented on different dates. Thus, their anniversary dates would also differ. The existing provision requires an employer to reconcile each employee's annualised wage precisely 12 months after the arrangement commenced.

229. The clause imposes an unfair and unnecessary regulatory burden on employers in this regard. It precludes employers from implementing more efficient means of ensuring that employees receiving an annualised wage have not been disadvantaged, by undertaking the reconciliation process for a number of employees simultaneously.

230. The proposed clauses 18.3(b) – 18.3(c) have been drafted with these concerns in mind. It would remain the case that an employer must reconcile the annualised wage paid to an employee with the amounts that would have been payable under the award. However, the process would need to be undertaken *'within'* 12 months, or as *'soon as reasonably practicable thereafter'*. This added flexibility would allow employers to better streamline the process required to be undertaken.

231. *Third,* the existing clause 18.2(b) requires that any shortfall identified as a result of the reconciliation process must be paid to the employee *'within 14 days'*. This is not always a sufficient period of time. This difficulty may be compounded where the process is undertaken in relation to a number of employees collectively. Thus, our proposed clause 18.3(b) proposes a longer timeframe of 28 days.

232. *Fourth,* the extant clause 18.2(b) requires an employer to keep a record of starting and finishing times and unpaid breaks. We have proposed an additional clause 18.3(e), which would require an employee to comply with any employer direction to keep records of their hours of work for the purposes of clause 18.3(d) of our proposal. It is appropriate that an award-derived obligation for employees to comply with such a direction is included. An employee's failure to keep such

records can render it impracticable for an employer to comply with clause 18.3(d). For example, in order for an employer to keep the relevant records, it may be necessary for an employee to complete a timesheet. Employers commonly report that employees refuse or fail to do so.

F. Exemption Rates (New clause 19)

233. On 19 December 2008, as a product of the Part 10A Award Modernisation Process, the AIRC issued a determination making the *Clerks – Private Sector Award 2010* (**Clerks Award 2010**).[142] It was to include an exemption rate, in the following terms:

> **17. Exemption rate**
>
> **17.1** Except as to the provisions of:
>
> - Clause 14—Redundancy;
> - Clause 24—Superannuation;
> - Clause 29—Annual leave;
> - Clause 30—Personal/carer's leave and companionate leave;
> - Clause 31—Public holidays; and
> - Clause 32—Community service leave,
>
> this award will not apply to employees employed by the week who are in receipt of a weekly wage in excess of 15% above the Level 5 wage rate in clause 16; provided that the wage is not inclusive of overtime payments and/or shift allowances due to the employee under this award.
>
> **17.2** The exemption rate will be calculated in multiples of one dollar, amounts of less than 50 cents being taken to the lower multiple and amounts of 50 cents or more being taken to the higher multiple.

234. In its accompanying decision, the AIRC said as follows: (emphasis added)

> **[226]** Extensive submissions were made about the content of the exposure draft for this award. The ASU identified a number of areas of disadvantage for current and future employees. Employers identified a number of areas which they contended limited existing flexibilities and increased costs for employers. Particular submissions were made in support of the classification structure, hours, and flexibilities contained in the

[142] PR985112.

NSW clerical NAPSA especially given the very large proportion of clerical employees covered by that instrument.

> **[227]** The approach we have adopted is to have regard to the range of existing provisions, acknowledging that there will be some positive and negative changes for both employers and employees. Further, it is appropriate to consider the overall package of award minimum obligations in assessing the impact.
>
> **[228]** A number of changes to the exposure draft have been made as a result of these considerations. We have decided to include an exemption provision in line with the NSW NAPSA clause in recognition of the longstanding and widespread use of the concept in federal clerical awards and in NAPSAs.
>
> ...
>
> **[231]** We confirm our view that a case has not been made out for an annualised salaries or a salary packaging clause. As we have indicated above we have decided to include an exemption rate in the award. We note the availability of annualised salary and salary packaging either as part of the contract of employment, other agreements, or with respect to overaward benefits.[143]

235. Subsequently, on 2 May 2009, the Minister for Employment and Workplace Relations varied the award modernisation request, to include the following:

> 2. The creation of modern awards is not intended to:
>
> ...
>
> (f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation.

236. In correspondence sent to the President of the AIRC on the same date, the Minister said as follows: (emphasis added)

> I note the Commission's comments in the 3 April 2009 decision about award exemption clauses. The request now reflects more clearly the Government's intention that the creation of modern awards should not exempt, or have the effect of exempting from the safety net provided by modern awards, employees other than those expressly listed in the request. Employees who are not high income employees should be protected by a complete and comprehensive modern award safety net of basic entitlements unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation. For example, the Clerks – Private Sector Award 2010 exempts employees employed by the week from certain provisions of the modern award (for example, over time pay, shift and other allowances). The Government considers that this award should not seek to exclude basic award conditions for employees who should be protected by a complete and comprehensive safety net, through both modern awards and the National Employment

[143] *Award Modernisation* [2008] AIRCFB 1000 at [226] – [231].

Standards (NES), given that there is not a history of exemption from these provisions in a wide range of awards and NAPSAs.

237. The Australian Municipal, Administrative, Clerical and Services Union (**ASU**) then applied to delete clause 17 from the Clerks Award 2010. It argued that, contrary to the Minister's amended request, the exemption rate provision in the award had the effect of excluding *'certain employees who are not high income employees from most award provisions'*.[144]

238. In considering the ASU's application, the AIRC observed that exemption rate provisions and annualised salary clauses were common amongst the relevant pre-modern awards:

> **[14]** Exemption provisions are contained in the common rule clerical NAPSAs applying in New South Wales, Queensland, Western Australia, Australian Capital Territory and Tasmania. In addition, annual salaries clauses which provide for the non-application of certain award provisions when annual salaries of a certain level are paid are contained in various other clerical instruments. A clause of one type or another is contained in the following current instruments:
>
> **New South Wales**
>
> - *Clerical and Administrative Employees (State) Award*
> - *Clerical and Administrative Employees in Temporary Employment Services (State) Award*
> - *Real Estate Industry (Clerical and Administrative) Employees (State) Award*
> - *Clerical Employees in Metropolitan Newspapers (State) Award*
> - *Clerical and Administrative Employees in Permanent Building Societies (State) Award*
> - *Clerical and Administrative Employees Legal Industry (State) Award*
> - *Clerical and Administration Employees, Hire Cars and Taxis (State) Award*
>
> **Queensland**
>
> - *Clerical Employees' Award- Permanent Building Societies- State 2003*
> - *Clerical Employees Award State 2002*

[144] *Re Clerks – Private Sector Award 2010* [2009] AIRCFB 922 at [9].

Western Australia

- *Permanent Building Societies (Administrative and Clerical Officers) Award 1975*
- *Clerks (Timber) Award No. 61 of 1947*
- *Clerks' (Taxi Services) Award of 1970*
- *Clerks (Commercial Radio and Television Broadcasters) Award of 1970*
- *Clerks (Commercial, Social and Professional Services Award) No. 14 of 1972*
- *Clerks' (Credit and Finance Establishments) Award*
- *Clerks' (Hotels, Motels and Clubs) Award 1979*
- *Clerks' (Wholesale & Retail Establishments) Award No. 38 of 1947*

Australian Capital Territory

- *Clerks (A.C.T.) Award 1998*

Tasmania

- *Clerical and Administrative Employees (Private Sector) Award*

Pre reform Awards

- *Clerks (Road Transport Industry) Award 2002*
- *Clerical Industry – Shipping Officers Award 2003*
- *Clerical and Administrative Staff – International Freight Forwarding and Customs Clearing Industry Award 2003*
- *Clerical and Salaried Staffs' (Agribusiness) Award 1999*[145]

239. The AIRC also considered a number of arbitrated outcomes concerning exemption rate provisions in pre-modern awards, some of which described them as a *'notional bargain'* between an employer and employee.[146]

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[145] *Re Clerks – Private Sector Award 2010* [2009] AIRCFB 922 at [14].

[146] *Re Clerks – Private Sector Award 2010* [2009] AIRCFB 922 at [11], [15] and [18].

240. Ultimately, the AIRC concluded as follows: (emphasis added)

> **[21]** Clerical employment occurs in most enterprises. In some cases, such as capital city corporate office work, significant overaward arrangements apply. In other areas, such as in small businesses in regional and country areas, overaward arrangements are not the norm. The minimum rates in the award need to be formulated for all situations. Clerical employees often play a key support role to more senior employees and management as well as providing an important interface with external customers and clients. The need for flexible working arrangements to meet the needs of the business is probably more important in the modern business world where operating hours no longer conform to a standard nine to five pattern. A number of modern awards reflect the need for flexible working hours in particular areas of employment by not providing for ordinary weekly hours and overtime arrangements.
>
> **[22]** The New South Wales NAPSA, *Clerical and Administrative Employees (State) Award*, contains an exemption provision whereby employees who are paid a weekly wage in excess of 15% above the wage rate set for the highest grade in the award (equivalent to $845.14) are exempt from a number of award provisions. The exemption rate in the *Clerks—Private Sector Award 2010* is $851.00 per week.
>
> **[23]** The dilemma faced by us in formulating the terms of the modern award is the widely divergent provisions in clerical instruments and in particular the existence of exemption or annual salaries provisions in clerical awards and NAPSAs in New South Wales, Queensland, Australian Capital Territory, Western Australia and Tasmania. Inserting or omitting an exemption provision will have an impact where the resultant provision is not consistent with the terms of the current instrument. We considered that adopting a provision which reflected the terms of the instrument applying widely in the largest state, where similar provisions of one sort or another apply in four of the six states and one of the two territories, was consistent with our approach in award modernisation of generally adopting appropriate minimum provisions applying to the critical mass of relevant employees.
>
> **[24]** We also note the clear intent of the change to the Minister's request and the submission made in her letter to the Commission regarding her view of the test to be applied and the incidence of exemption provisions in current instruments. In this connection we also consider that it is relevant that, for the first time, the legislation determines that an award will not apply to persons who reach a certain level of income.
>
> **[25]** In all of the circumstances we consider that the exemption provision should be removed but that flexible working arrangements should be available with respect to clerical employment and that these should be subject to appropriate safeguards and processes to ensure that employees clearly understand and agree to any arrangements which may differ from base award entitlements. We propose to delete the exemption provision in cl.17. However, we propose to insert an annualised salaries clause. The wording of the clause is in line with clauses in some other modern awards. It provides for an alternative way to remunerate employees, safeguards against disadvantage and a formal process to establish and maintain the annualised salary arrangement. The clause will read as follows:

"17. Annualised Salaries

17.1 Annual salary instead of award provisions

(a) An employer may pay an employee an annual salary in satisfaction of any or all of the following provisions of the award:

(i) clause 16—Minimum weekly wages;

(ii) clause 19—Allowances;

(iii) clauses 27, 28 and 29—Overtime and penalty rates; and

(iv) clause 30.3—Annual leave loading.

(b) Where an annual salary is paid the employer must advise the employee in writing of the annual salary that is payable and which of the provisions of this award will be satisfied by payment of the annual salary.

17.2 Annual salary not to disadvantage employees

(a) The annual salary must be no less than the amount the employee would have received under this award for the work performed over the year for which the salary is paid (or if the employment ceases earlier over such lesser period as has been worked).

(b) The annual salary of the employee must be reviewed by the employer at least annually to ensure that the compensation is appropriate having regard to the award provisions which are satisfied by the payment of the annual salary.

17.3 Base rate of pay for employees on annual salary arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annual salary under this clause comprises the portion of the annual salary equivalent to the relevant rate of pay in cl.16—Minimum weekly wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties."[147]

241. During the 4 yearly review of modern awards, the annualised salaries provision extracted above was replaced with a provision about annualised wage arrangements.[148] That provision imposes a considerably more onerous compliance burden on employers than its predecessor and is significantly less flexible.

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[147] *Re Clerks – Private Sector Award 2010* [2009] AIRCFB 922 at [21] – [25].

[148] PR716593.

242. As has previously been accepted by the Commission, it is no longer encumbered by the Minister's request during the Part 10A award modernisation process.[149] Rather, *'[t]he Commission can include exemption rate clauses in modern awards provided that:*

- *it is satisfied that they are necessary to achieve the modern awards objective in s.134 of the Act;*
- *they are about matters set out in s.139 of the Act*
- *they are not terms that must not be included in a modern award, and*
- *they do not have the effect that employees earning above a certain rate stop being covered by the award altogether (unless the Commission is satisfied that those employees would instead be covered by another modern award (other than the Miscellaneous Award) that is appropriate for them).*[150]

243. The Commission has also acknowledged that an *'exemption rate clause could reduce award complexity and the regulatory burden on business and may encourage collective bargaining'*.[151]

244. Ai Group proposes that an exemption rate be introduced in the Clerks Award, in the following terms:

19. Exemptions

19.1 This clause applies to:

(a) Full-time employees who are paid a salary that exceeds the minimum annual wage prescribed by clause 16.1 for level 5 by at least 15%; and

(b) Part-time employees who are paid a salary that exceeds the minimum annual wage prescribed by clause 16.1 for level 5 by at least 15%, calculated on a pro-rata basis;

provided that in respect of employees classified as Call Centre Technical Associate, this clause applies to full-time employees who are paid a salary that exceeds the minimum annual wage prescribed at clause 16.1 for that classification level by at least 15% and to part-time employees on a pro-rata basis.

[149] *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 at [91].

[150] *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 at [91].

[151] *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 at [92].

19.2 The following provisions of the award do not apply to the employees, where applicable:

(a) Clause 10 – Part-time employees;

(b) Clause 13 – Ordinary hours of work (employees other than shiftworkers)

(c) Clause 14 – Rostering arrangements (employees other than shiftworkers)

(d) Clause 15 – Breaks

(e) Clause 17 – Payment of wages

(f) Clause 19 – Allowances

(g) Clause 21 – Overtime (employees other than shiftworkers)

(h) Clause 22 – Rest period after working overtime (employees other than shiftworkers)

(i) Clause 23 – Time off instead of payment for overtime (employees other than shiftworkers)

(j) Clause 24 – Penalty rates (employees other than shiftworkers)

(k) Clause 26 – Ordinary hours of work and rostering for shiftwork

(l) Clause 27 – Breaks for shiftwork

(m) Clause 28 – Overtime for shiftwork

(n) Clause 29 – Time off instead of payment for overtime for shiftwork

(o) Clause 30 – Rest period after working overtime for shiftwork

(p) Clause 31 – Penalty rates for shiftwork

(q) Clause 32.3 – Annual leave loading

(r) Clause 37.2 – Public holidays

245. Clause 16.1 would also need to be amended to include a minimum annual wage for Level 5 and Call Centre Technical Associates. If calculated on the basis that the annual wage equates to the minimum weekly wage multiplied by 313/6,[152] the relevant annual wages would be as follows:

[152] Fair Work Commission, *Method for adjusting rates in modern awards—Annual Wage Review 2021-22*.

Level 5	$59,908.20
Call centre technical associate	$65,625.67

246. The exemption rate provision would thus apply to:

(a) Full-time employees classified at Levels 1 – 5 and Call Centre Principal Customer Contact Specialist, who are paid an annual salary that is **no less than $68,894.43**.

(b) Full-time employees classified as Call Centre Technical Associate, who are paid an annual salary that is **no less than $75,469.52**.

(c) Part-time employees, on a pro-rata basis.

247. The proposed exemption rate provision would not only allow, but also encourage, employers and employees to strike a *'bargain'* that would result in an employee receiving a salary that exceeds the base rates prescribed by the award. The operation of the proposed clause 19.1 would result in an inverse relationship between an employee's classification level and the quantum of the salary that the employee must be paid in order for the employee to be exempt from the various provisions listed at clause 19.2. This is demonstrated by the table below, which compares the full-time minimum annual wage that would be payable at each classification level (using the aforementioned formula) as compared to the exemption rate that would apply:

Classification	Minimum annual wage (i.e. minimum weekly rate x (313/6))	Exemption rate	% Difference
Level 1 – Year 1	$45,519	$68,894.43	**51.4%**
Level 1 – Year 2	$49,767	$68,894.43	**38.4%**
Level 1 – Year 3	$51,301	$68,894.43	**34.3%**
Level 2 – Year 1	$51,906	$68,894.43	**32.7%**
Level 2 – Year 2	$52,866	$68,894.43	**30.3%**
Level 3	$54,822	$68,894.43	**25.7%**
Call centre principal customer contact specialist	$55,208	$68,894.43	**24.8%**
Level 4	$57,571	$68,894.43	**19.7%**
Level 5	$59,908	$68,894.43	**15.0%**
Call centre technical associate	$65,626	$75,469.52	**15.0%**

248. This provides a significant safeguard for employees classified at lower levels. It is also consistent with the approach adopted in various pre-modern awards.

249. The proposed provision would make the Clerks Award easier to use in a significant and meaningful way. It would:

(a) Provide a pathway for remunerating employees by way of a salary that is well above the base rates prescribed by the Award, without having to engage the annualised wages provision, which imposes a substantial regulatory burden upon employers. In particular, clauses 18.1(b), 18.1(c), 18.2(b) and 18.2(c) are complex, cumbersome and in some cases, unworkable. They undermine, to a large degree, the benefits of the previous annualised salaries clause, that was contained in the Clerks Award 2010.

(b) Provide a pathway for remunerating employees by way of a salary that does not rely on common law offset arrangements. Many employers covered by the Clerks Award presently remunerate employees by way of a salary, pursuant to contractual arrangements, which are intended to satisfy their obligation to pay various entitlements prescribed by the award. However, as previously recognised by the Commission, *'this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty'*.[153]

(c) Provide a mechanism for remunerating employees by way of a fixed amount, alleviating the need to separately calculate various entitlements that would otherwise be payable to an employee.

(d) Result in employees generally receiving a fixed and certain amount of remuneration each pay period, irrespective of the number of hours worked, which would provide income security and predictability of earnings for the purposes of budgeting and obtaining finance.

[153] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

(e) Alleviate the need for employers and employees to create, maintain and verify records as to the employees' hours of work. The requirements to do so under clause 18 of the award and the *Fair Work Regulations 2009* result in considerable additional costs and compound the regulatory burden facing employers. Further many employees do not wish to produce records of the hours worked and resist their employers' directions to do so. Employees often perceive that such requirements impede upon their independence and autonomy or misapprehend that the records are intended for some other purpose (e.g. for the employer to monitor and assess their working hours). Senior employees particularly resent being asked to use a *'bundy clock'* of any form.

(f) Permit employees' hours of work to be arranged in more flexible ways, because the strictures of the award would not apply. This is particularly relevant given the increased prevalence of remote working arrangements, as discussed earlier.

G. Returning to Duty Remotely (Clause 21.5)

250. Clause 21.5 of the award is in the following terms: (emphasis added)

21.5 Return to duty

(a) An employer must pay an employee at the overtime rate specified in clause 21.4 where an employee is required to return to duty after the usual finishing hour of work for that day.

(b) The employer must pay an employee a minimum payment of 3 hours under a requirement in clause 21.5(a).

(c) Clause 21.5 does not apply where the work is continuous (subject to a meal break of not more than one hour) with the start or finish of ordinary working time.

251. Some employees covered by the Clerks Award are required to perform work *remotely* after the usual finishing time for that day. This includes performing certain functions from home, via telephone or online. Often, such work takes little time to complete and certainly requires far less than three hours. Sometimes, such work is undertaken at the employee's initiative, rather than any direction from the employer.

252. It is not clear whether clause 21.5 applies in the above scenarios. On one view, the provision is limited to circumstances in which an employee physically returns to duty. In the event that it were to apply; it is obviously unfair and inappropriate that employees are paid at least three hours for each instance of work performed. We refer in particular to [196] – [197] of our submissions above.

253. Clause 21.5 should be varied to make clear that it does apply to circumstances such as those described above and in such scenarios, the minimum payment period does not apply. This could be effected as follows:

21.5 Return to duty

(a) An employer must pay an employee at the overtime rate specified in clause 21.4 where an employee is required to ~~return to duty~~ perform work after the usual finishing hour of work for that day.

(b) The employer must pay an employee a minimum payment of 3 hours under a requirement in clause 21.5(a), except where the work is performed at a location that is not a designated workplace.

(c) Clause 21.5 does not apply where the work is continuous (subject to a meal break of not more than one hour) with the start or finish of ordinary working time.

13. THE FF AWARD

A. Timing & Duration of Meal Breaks for Part-time Employees (Clause 10.3(d))

254. At the time of engaging a part-time employee, clause 10.3 of the Award requires the employer and employee to agree in writing on a regular pattern of work which (amongst other things) must include *'when meal breaks may be taken'* and their duration (clause 10.3(d)).

255. Ai Group proposes that the award be varied to remove the requirement for the timing and duration of meal breaks to form part of the agreed pattern of work for a part-time employee. Importantly, Ai Group is *not* proposing any removal or reduction of the meal break entitlement itself as set out in clause 14.1 of the award. We are also *not* proposing to remove the meal break timing protections afforded to employees pursuant to clause 14.5 (subject to the voluntary facilitative provision being proposed, dealt with in our submission below).

256. The existing requirement to reach agreement with a part-time employee regarding the duration and timing for taking meal breaks is unduly restrictive. Plainly, an employer will not be in a position to forecast all of the operational requirements and circumstances that are relevant to when employees are afforded a break or the length of that break. Relevant considerations include the timing of other employees' breaks so as to ensure that the employers' operations can continue, staff absences, fluctuations in customer demand etc.

257. It is also relevant that the award does not require that agreement be reached with other types of employees, such as full-time employees, regarding the timing and duration of their meal breaks. The proposal we advance would ensure that a fair and equitable approach is adopted in relation to all employees.

258. Currently, in order to vary the timing of meal breaks and their duration, an employer is required to enter into a written variation with the employee, pursuant to either clause 10.5 or clause 10.7. This requirement increases the regulatory burden on employers and is unduly inflexible. Critically, employers are unable to make critical changes to when a part-time employee takes a break or the duration of that break, without their written consent on each separate occasion.

259. In order to give effect to this proposal, Ai Group proposes the deletion of clause 10.3(d) of the Award. Amendments consequential to this change are also proposed, including deleting from clause 14.2 the words *‘and are subject to any agreement made under clause 10.3 regarding a part-time employee’s regular pattern of work’*, the deletion of clause 14.3, and associated renumbering of clauses.

260. Ai Group’s proposal is directed at improving flexibility and reducing the compliance burden imposed by the award, without any diminution of part-time employees’ substantive meal break entitlements or other existing protections afforded to employees under the award regarding when meal breaks are to be taken.

B. Additional Hours of Work for Part-time Employees (New Clause 10.8)

261. Currently, clause 10.3 of the FF Award requires an employer and a part-time employee to agree in writing on a regular pattern of work, at the time of engagement. Except where that agreement has been varied as contemplated by clauses 10.5 or 10.7, clause 10.9 of the award regards all time worked in excess of the number of agreed ordinary hours as overtime and requires the payment of overtime rates for such work. Time worked in excess of an agreement reached under clauses 10.5 or 10.7 is also regarded as overtime and to be paid for as such.

262. The existing requirement for an employee’s regular pattern of work to be varied in writing for any additional hours to be characterised as ordinary hours places an unworkable regulatory burden on employers. In the context of the fast food industry, such ad hoc arrangements often need to be implemented at short notice and/or during the course of a shift.

263. Ai Group proposes that the award be varied to permit an employer and part-time employee to agree that any hours worked by agreement in addition to the employee's agreed hours will be ordinary hours and paid as such; provided that an employee would be paid at overtime rates where they work in excess of:

(a) 38 ordinary hours per week or an average of 38 ordinary hours per week averaged over a 4 week period, per clause 20.3(a)(i) of the award;

(b) Five days in a week (or six days in one week if, in the following week, ordinary hours are worked on not more than four days), per clause 20.3(a)(ii); and

(c) 11 ordinary hours on any one day, per clause 20.3(a)(iii).

264. The proposal has numerous mutual benefits for employees and employers.

265. Many part-time employees wish to work additional hours, though the specific days and times during which they are available to work may vary from week to week. Similarly, employers commonly have an unexpected need for additional labour; for example, in response to fluctuating customer demands or unplanned staff absences.

266. The existing terms of the FF Award discourage employers from offering part-time employees additional hours due to the requirement to pay overtime rates for such work and / or the compliance burden associated with varying the employee's regular work pattern in writing to enable the hours to be worked at ordinary rates[154]. They also discourage employers from offering part-time roles instead of casual roles.

267. Our proposal would provide an employer with the ability to offer additional ordinary hours to part-time employees who wish to maximise the number of ordinary hours worked, unencumbered by the regulatory burden of needing to enter into a written variation of the employee's regular pattern of work on each

[154] Per clauses 10.5 and 10.7.

occasion; noting that it may not be practical or possible for those hours to be offered on an ongoing basis.

268. We envisage that the proposed change would result in part-time employees being offered the option to work hours that would otherwise not be afforded to them.

269. Importantly, the requirement for the arrangement to be by agreement ensures that employees cannot be *required* to work additional hours at ordinary rates, if they do not wish to. Where an employer directs a part-time employee to work additional hours, the employee would continue to be entitled to be paid for that time at overtime rates. Further, the requirement to inform employees, via their pay slip, of the number of hours worked at the ordinary rate, ensures that a record of the total number of hours worked is created and maintained.[155]

270. In order to give effect to this proposal, Ai Group proposes the insertion of a new clause 10.8 in the following terms:

> **10.8** An employer and part-time employee may agree in writing (including by electronic means) that where the employee agrees to perform additional hours of work outside or in excess of their regular pattern of work as agreed under clause 10.3 or as varied pursuant to clause 10.5 or 10.7, the time worked will be treated as ordinary hours and paid as such.

271. It is proposed that existing clause 10.9 also be varied such that the requirement for an employer to treat hours in addition to those agreed under clause 10.3 (or varied under clause 10.5 or 10.7) as overtime, and pay for those hours at overtime rates, is read as subject to the proposed new clause 10.8. Similarly, a new clause 20.4 would need to be introduced, stating that clauses 20.3(a)(iv), 20.3(a)(v), 20.3(a)(vi), 20.3(b) and 20.3(c) operate subject to the proposed clause 10.8.

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[155] Regulation 3.46 of the *Fair Work Regulations 2009*.

272. The proposal we have advanced here can be distinguished in various material ways from that which we previously sought during the 4 yearly review.[156] At that time, we proposed changes that would have significantly changed the manner in which part-time hours of work are agreed and structured. The proposal we now advance is more modest, as it relates only to the performance of additional hours of work.

273. Further, in its decision during the 4 yearly review, the Commission was influenced by evidence that enterprise agreements were the most common method of regulating employment in the fast food sector and that a number of the major fast food chains had flexible part-time clauses in their enterprise agreements.[157] However, the prevalence of enterprise agreement coverage in the fast food industry has changed materially since the Commission determined Ai Group's aforementioned claim.

274. Common to both claims, however, is the positive impact that they would have on business; a matter that weighs in favour of varying the award in the manner proposed[158].

C. Part-time and Casual Minimum Engagement Periods (Clauses 10.2 & 11.3)

275. Currently, clause 10.2 of the award requires an employer to roster a part-time employee for a minimum of three consecutive hours on any shift. Similarly, clause 11.3 of the award stipulates that the minimum daily engagement for a casual employee is three consecutive hours.

276. Ai Group proposes that the award be varied to permit part-time and casual employees to be rostered for a period less than 3 consecutive hours on any shift, where it is for the purpose of attending a meeting or participating in training, however the employee is not required to attend a designated workplace for this;

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[156] *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272.

[157] *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [130] - [133].

[158] *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [122] and [155].

that is, where the employee is at liberty to engage in the training or meeting from a location of their choosing, including their private residence.

277. In order to give effect to this proposal, Ai Group submits that 10.2 should be varied as follows:

> **10.2** An employer must roster a part-time employee for a minimum of 3 consecutive hours on any shift, except where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

278. In a similar vein, Ai Group submits clause 11.3 should be varied to give effect to its proposal, as follows:

> **11.3** The minimum daily engagement for a casual employee is 3 consecutive hours, except where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

279. The existing minimum engagement periods are unduly restrictive. They require an employer to roster or engage an employee for a minimum period of three hours, even if the employee is working for a short period of time, from home. They do not reflect the increasing prevalence of employees in the fast food sector participating in staff meetings and training online, from a location of their choosing. Typically, one hour or less is required to attend to such work.

280. In a decision concerning casual and part-time employment *'common issues'*, the Commission explained the rationale underpinning minimum engagement periods as follows: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of

casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[159]

281. Plainly, the disutilities associated with attending work do not arise where an employee is working from home. Therefore, the fundamental justification underlying the extant minimum engagement provisions does not apply where employees remotely attend staff meetings and attend in training. The above provisions should be revised to reflect this.

282. An ability for an employer to engage a part-time or casual employee for a period less than the minimum is particularly relevant in the context of the fast food industry, which is comprised in large part of casual and part-time employees working variable arrangements of hours, often to suit their availability. This naturally represents a challenging situation for an employer to attempt to meet with its workforce or section of its workforce at a time when all required attendees are rostered for work at the same time. The requirement to pay a part-time or casual employee for the minimum three hour period may deter employers from including employees in meetings or training opportunities.

D. Separate Periods of Ordinary Hours of Work (New Clause 13.7)

283. Clause 13.6 of the FF Award requires ordinary hours of work on any day to be continuous, except for rest and meal breaks. This precludes arrangements that involve the performance of work on more than one separate period of ordinary hours during the course of a calendar day. This arises in particular where an employee performs a period of ordinary hours that straddles two calendar days (e.g. 10pm – 6am). Clause 13.6 prohibits the employee from performing a separate period of ordinary hours on either of those calendar days (e.g. any time after 6am on the second calendar day).

[159] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

284. Such an outcome is anomalous, since ordinary hours can be worked across 24 hours of each day under the award. Moreover, many fast food businesses operate 24 hours a day, 7 days a week. In such contexts, clause 13.6 significantly undermines the flexibility otherwise afforded by the absence of a spread of hours.

285. Often, employees are available and wish to work more than one period of ordinary hours in a calendar day. For example, the fast food industry workforce has previously been found to be comprised of more than 50 percent of students (compared to around 13 percent of the workforce generally being students).[160] Students may wish to complete a period of ordinary hours, leave the workplace to attend classes or other learning activities, and then return to the workplace to perform further ordinary hours afterwards. By way of further example, the fast food industry also comprises a significant proportion of employees with caring responsibilities. The ability to perform ordinary hours of work in two separate periods would permit flexibility for employees to leave the workplace after completing the first period of work to attend to carers duties (for example, collecting children from school, driving children to after-school activities or appointments, or covering a period of caring for dependents until a spouse/partner or other carer returns from work to relive them) after which the employee may wish to return to work to complete further ordinary hours.

286. In the absence of an amendment to the award, an employee needing to attend to such studying or carer commitments can only work ordinary hours *either* before *or* after the commitment (notwithstanding they may be available to and want to, work *both* before *and* after the commitment). An employee can only be rostered for a second period of work in a day if the hours are treated and paid for as overtime. This creates additional expense for employers which at a practical level, is likely to operate as a disincentive to engage an employee for a second period of work on a particular day.

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[160] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [1273]. See *also 4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [29] – [31].

287. Ai Group proposes this issue be addressed by the insertion of a new clause 13.7 in the following terms:

> **13.7** By agreement between an employer and employee, an employee may perform ordinary hours of work during two separate periods of work on any day. Any such agreement may be ongoing or for a specified period of time.

288. Consequential amendments to clause 13.6 and Table 1 in clause 7.2 are also proposed.

289. As is evident from the above, the flexibility to permit an employee to perform their ordinary hours of work in two separate periods of work on any day, is proposed to be introduced by way of a facilitative provision. Facilitative provisions are a common feature of most modern awards, and are an existing feature of the FF Award. The effect of implementing the change in this way is that it operates as a safeguard to employees, in so far as the arrangement can only be implemented by agreement between an employer and an employee. Employees who wish to only work their ordinary hours in one continuous period on any day will continue to be entitled to do so, under clause 13.6.

290. The proposed change would:

(a) Better enable employers to arrange their employees' hours of work in a way that satisfies their operational requirements; particularly where their business operates 24 hours a day.

(b) Promote flexible, modern work practices.[161]

(c) Enable employees to perform additional periods of work, which they may otherwise not be offered. This would have a positive impact on their earnings.

(d) Improve access to work opportunities and participation in the workforce for employees with commitments outside of work making it difficult (or even,

[161] Section 134(1)(d) of the Act.

impossible) to work the number of ordinary hours they may wish to perform on any particular day.

E. Taking Meal Breaks (New Clause 14.6)

291. Clause 14.5 of the FF Award states that an employer *'cannot require'* an employee to take a rest break or meal break within the first or last hour of work; to take a rest break combined with a meal break; or to work more than five hours without taking a meal break. It is expressed as a prohibition on an employer *'requiring'* an employee to do certain things. The current wording *infers* – but does not expressly deal with whether – these things are able to be done by agreement.

292. In any event, the award should be varied to expressly permit an employer and employee to agree to implementing arrangements of the nature otherwise prohibited by clause 14.5. In particular, Ai Group proposes the insertion of a new clause 14.6, in the following terms:

> **14.6** An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):
>
> **(a)** the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;
>
> **(b)** the employee take rest breaks combined with meal breaks; and/or
>
> **(c)** the employee will work up to 6 hours without taking a meal break.

293. Consequential amendments to existing clause 14.6 and Table 1 in clause 7.2 are also proposed.

294. We note that the Commission has found it appropriate to include similar flexibilities in other modern awards. By way of illustration, relevant to the proposal that an employer and an employee be permitted to agree for the employee to work up to six hours without taking a meal break, the following types of flexibilities may be found elsewhere in modern awards:

(a) The ability for an employer and an employee to agree to extend the period an employee may be required to work without a break for a meal from five ordinary hours, by up to one additional hour.[162] Similar agreement may also be reached between an employer and the majority of employees in an enterprise or part of enterprise concerned.[163]

(b) The ability for an employer and employee to mutually agree to vary the requirement that an employee not work for longer than five hours without a minimum 30 minute unpaid meal break (without restriction on the agreement).[164]

(c) A requirement that the meal break be commenced within the 4th to 6th hours from the commencement of ordinary working hours.[165]

(d) Where daily hours to be worked are six hours or less, an employee may agree to work without a break for a meal by agreement (in place of the requirement to not work in excess of five hours without a meal break).[166]

(e) The ability for an employer and an employee to agree that an unpaid meal break is to be taken after the first hour of work and within the first 6.5 hours of work.[167]

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[162] *Cement, Lime and Quarrying Award 2020*, clause 15.1(a)(ii); *Cotton Ginning Award 2020*, clause 16.1; *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.1(b); *Seafood Processing Award 2020*, clause 14.1(a)(ii); *Telecommunications Services Award 2020*, clause 14.4(a)(i).

[163] *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.1(b); *Pharmaceutical Industry Award 2020*, clause 14.1(b); *Seafood Processing Award 2020*, clause 14.1(a)(ii); *Telecommunications Services Award 2020*, clause 14.4(a)(i); *Textile, Clothing, Footwear and Associated Industries Award 2020*, clause 18.1(c)(i).

[164] *Meat Industry Award 2020*, clause 15.1(a).

[165] *Concrete Products Award 2020*, clause 15.1(a).

[166] *Banking, Finance and Insurance Award 2020*, clause 14.1(b); *Broadcasting, Recorded Entertainment and Cinemas Award 2020*, clause 30.1; *Business Equipment Award 2020*, clause 13.2(a)(i) (with a restriction on such agreement being able to be reached for 12 hour days or shifts); *Health Professionals and Support Services Award 2020*, clause 15.1(c); *Pharmaceutical Industry Award 2020*, clause 14.1(c); *Timber Industry Award 2020*, clause 19.2; *Wine Industry Award 2020*, clause 14.2 (shiftworkers).

[167] *Restaurant Industry Award 2020*, clause 16.4(a).

295. Relevant to the proposal that an employer and an employee be permitted to agree for the employee to take rest breaks and / or meal breaks within the first and / or last hour of work, the following types of flexibilities may be found elsewhere in modern awards:

(a) A facilitative provision that enables the duration and starting time of meal breaks to be variable by agreement between the employer and the employees concerned to suit the particular work requirements and to enable efficient completion of work.[168]

(b) A requirement that the employer will allow an employee reasonable time to have regular and normal meals on each day of the employee's employment, without specifying the duration and timing of meal breaks.[169]

(c) Where employees have an entitlement to two separate paid 10 minute rest breaks on each day worked, to be taken as one break in the morning and one break in the afternoon, the ability to reach agreement to the afternoon rest break being taken immediately before finishing work.[170]

(d) Where employees have an entitlement to one paid 10 minute rest break during their ordinary hours of work required to be taken in the first half of the day or shift at a time decided by the employer, the ability for the employer and the majority of employees in any establishment or section of an establishment to agree to an alternative arrangement (amongst other things).[171]

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[168] *Airport Employees Award 2020*, clause 18.2.

[169] *Commercial Sales Award 2020*, clause 14.

[170] *Car Parking Award 2020*, clause 16.2(c); *Racing Clubs Events Award 2020*, clause 16.3(b); *Racing Industry Ground Maintenance Award 2020*, clause 14.2(c).

[171] *Meat Industry Award 2020*, clause 15.2(e).

296. Relevant to the proposal that an employer and an employee be permitted to agree for the employee to take rest breaks combined with meal breaks, the following types of flexibilities may be found elsewhere in modern awards:

(a) Where employees have an entitlement to two separate paid 10 minute rest breaks on each day worked, to be taken as one break in the morning and one break in the afternoon, the ability to reach agreement to the afternoon rest break being taken in the morning by joining it to the lunch break, [172] or taken immediately before finishing work.[173]

(b) Where employees have an entitlement to two 7.5 minute paid rest breaks on any day or shift, the ability for an employer and the majority of employees at a particular plant to instead agree to one 15 minute break per day taken at a mutually agreeable time.[174]

(c) Where employees have an entitlement to two paid 10 minute rest breaks (one in the morning and one in the afternoon), the ability for a majority of employees and the employer to agree that the morning and afternoon breaks be consolidated into one longer break[175], or one or both rest breaks may be added to the meal beak.[176]

(d) Where employees have an entitlement to a paid 10 minute tea break in each four hours worked, the ability for an employer and an employee to agree that such breaks may be taken as one 20 minute tea break.[177]

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[172] *Car Parking Award 2020*, clause 16.2(c).

[173] *Car Parking Award 2020*, clause 16.2(c); *Racing Clubs Events Award 2020*, clause 16.3(b); *Racing Industry Ground Maintenance Award 2020*, clause 14.2(c).

[174] *Concrete Products Award 2020*, clause 15.3(b).

[175] *Cotton Ginning Industry Award 2020*, clause 16.2; *Dry Cleaning and Laundry Industry Award 2020*, clause 17.2(b); *Sugar Industry Award 2020*, clause 16.4(d) and (e).

[176] *Cotton Ginning Award 2020*, clause 16.2; *Sugar Industry Award 2020*, clause 16.4(e).

[177] *Health Professionals and Support Services Award 2020*, clause 15.2(b); *Nurses Award 2020*, clause 14.2(b).

297. There are many circumstances in which it is conceivable that an employee may wish to take their meal breaks at times currently subject to restrictions by clause 14.5. For example, an employee may wish to combine two breaks into one longer break, to enable them time to leave the premises. It may also suit an employee to take their break at the end of their shift, effectively allowing them to conclude work earlier for the day.

298. Addressing the issue by way of a facilitative provision that requires agreement between an employer and an employee would provide a safeguard to employees such that any employee who wishes to retain the meal break timing protections in clause 14.5 would do so.

F. Direction to Work During a Meal or Rest Breaks (New Clause 14.7)

299. Ai Group proposes a further change to the breaks provisions of the award, which would permit an employer to direct an employee to perform work during a rest break or meal break, with the employer then required to endeavour to provide the employee with an alternate break as soon as reasonably practicable thereafter. The employee would be paid for the time worked during the break at the applicable rate of pay.

300. Many modern awards contain an ability for an employer to direct an employee to work through their meal break, in a variety of circumstances. This includes, for example:

    (a) The ability for an employer to direct an employee to work during a meal break at ordinary rates for the purpose of making good breakdowns of equipment, or upon routine maintenance of equipment which can only be done while the equipment is idle.[178]

[178] *Airport Employees Award 2020*, clause 18.4; *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.4; *Manufacturing and Associated Industries and Occupations Award 2020*, clause 18.5(a).

(b) Where an employee is required by the employer to work through a meal break to perform maintenance, with the requirement for a meal break to be made available at the first reasonable opportunity after the maintenance has been performed.[179]

(c) Where for operational or emergency reasons the employee is required to remain on duty in lieu of taking their meal break, the ability to arrange to take meals during the employees hours off duty without a specific meal break and be paid for the time off at ordinary rates.[180]

301. The absence of an ability to direct an employee to work through a break creates an award-derived barrier for dealing with temporary situations in which it is not practical or feasible for an employee to take their break at the time originally contemplated. Such situations might include an unexpected surge in customers, or a temporary gap in staffing due to unplanned absences.[181] The inability to direct an employee to take their break at a later time may have broader flow-on effects within the workplace, since it may cause the workload of other employees to be intensified during that period.

302. Ai Group proposes this issue be addressed through the insertion of a new clause 14.7, in the following terms:

14.7 Notwithstanding anything in this clause, an employer may direct an employee to perform work during a rest break or meal break. Such work will be treated as ordinary hours and paid as such. The employer must endeavour to provide the employee with an alternate break as soon as reasonably practicable thereafter.

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[179] *Airport Employees Award 2020*, clause 18.5.

[180] *Corrections and Detention (Private Sector) Award 2020*, clauses 14.4 – 14.5.

[181] See for example the discussion of evidence concerning common departures from rosters arising from "no shows" (employees not attending for a rostered shift), illness and injury and unpredicted customer demand; as well as customer demand potentially fluctuating significantly for a variety of reasons, including special events (such as sporting events) and the weather, some of which are predictable and others are not, in *4 yearly review of modern awards – Fast Food Industry Award 2010* [2019] FWCFB 272 at [98].

303. Ai Group submits that the proposed change does not have the effect of causing any diminution in entitlements for employees, since employees would be paid for time worked through the break and an employer would be required to endeavour to provide an alternate break as soon as reasonably practicable.

G. Annualised wage arrangements (New Clause 17)

304. Ai Group seeks the introduction of a new clause 17, relating to annualised wage arrangements, in the terms set out below:

17. Annualised wage arrangements

17.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee classified at level 3 an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 17.1(c):

(i) clause 10 – Part-time employment;

(ii) clause 14.6 - Payment for work during unpaid meal break;

(iii) clause 15 – Minimum rates;

(iv) clause 18 – Allowances;

(v) clause 21 – Overtime;

(vi) clause 22 – Penalty rates;

(vii) clause 23.2 – Annual leave loading; and

(viii) clause 28.3 - Payment for work on public holiday or substitute day.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 17.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 17.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

17.2 Changes to part-time employees' hours of work

(a) Clause 17.2 applies to a part-time employee who is being paid an annualised wage and, in accordance with clause 10.7, the employer and employee agree to vary the employee's regular pattern of work agreed under clause 10.3 on an ongoing basis.

(b) The employer must review the matters described in clause 17.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 17.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 17.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

17.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 17.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 17.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 17.3(d).

17.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 17 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 15—Minimum wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

305. The proposed clause 17 would enable an employer to pay a full-time or part-time employee an annualised wage, in satisfaction of various monetary entitlements prescribed by the award.

306. The provision sought is largely in the same terms as *'Model Clause 1'*, as determined by a Full Bench of the Commission during the 4 yearly review of modern awards, in the context of *'common issues'* proceedings concerning annualised wage arrangements.[182]

307. Notwithstanding the above, the proposed provision differs from Model Clause 1 in the following respects:

(a) The proposed clause would apply to part-time employees, in addition to full-time employees.

[182] *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 4368 at [23].

In the aforementioned proceedings, when determining the terms of the various model clauses, the Commission said as follows about their applicability to part-time employees:

> **[50]** There were differing submissions received concerning the applicability of annualised wage arrangements to part-time employment. While some parties supported such arrangements being made applicable or made available to part-time employees, we do not consider that any workable, specific proposal to that end has been advanced. It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards. The course we propose to take is to adopt standard annualised wage provisions for full-time employees, and then interested parties may if they wish make an application with respect to a specific modern award to vary the provision to extend its operation to part-time employees.[183]

Thus, the Commission's decision that the model clauses would not apply to part-time employees did not reflect any finding that it would be inappropriate for such clauses to do so or any other such conclusion as to its merits. Rather, there was an absence of any workable proposal that could have applied universally to all of the awards that were the subject of those proceedings.

Proposed clause 17.2 relates to part-time employees. It would, in effect, require an employer to review the annualised wage paid to an employee, the award provisions that are satisfied by the annualised wage, the method by which the wage was calculated and the outer limit number of hours for the purposes of clause 17.1(b)(iv), if the employee's hours are varied by agreement on an ongoing basis. The proposed clause affords an employer the ability to change the arrangement with the employee to reflect the revised pattern of hours.

Other elements of Model Clause 1, particularly clauses 17.1(c) and 17.3, would also serve as important safeguards.

[183] *4 yearly review of modern awards – Annualised Wage Arrangements* [2019] FWCFB 1289 at [50].

(b) The proposed clause 17.1(a) makes clear that an annualised wage can satisfy the various provisions listed therein only to the extent that they provide monetary entitlements. Thus, an annualised wage cannot *'buy out'* other forms of entitlements, such as breaks.

(c) Model Clause 1 requires an employer to undertake a reconciliation process, for the purposes of ensuring that the annualised wage paid to an employee is not less than the amounts that would have been payable to the employee pursuant to the award. The clause requires that the process must be undertaken *'each 12 months from the commencement of the annualised wage arrangement'*.

If our claim is granted, some employers may pay a number of employees covered by the award an annualised wage. However, those annualised wage arrangements may be implemented on different dates. Thus, their anniversary dates would also differ. The model clause would require an employer to reconcile each employee's annualised wage precisely 12 months after the arrangement commenced.

The model clause imposes an unfair and unnecessary regulatory burden on employers in this regard. It precludes employers from implementing more efficient means of ensuring that employees receiving an annualised wage have not been disadvantaged, by undertaking the reconciliation process for a number of employees simultaneously.

The proposed clauses 17.3(b) – 17.3(c) have been drafted with these concerns in mind. As per the model clause, an employer would be required to reconcile the annualised wage paid to an employee with the amounts that would have been payable under the award. However, the process would need to be undertaken *'within'* 12 months, or as *'soon as reasonably practicable thereafter'*. This added flexibility would allow employers to better streamline the process required to be undertaken.

(d) Model Clause 1 requires that any shortfall identified as a result of the reconciliation process must be paid to the employee *‘within 14 days’*. This may not be a sufficient period of time, particularly where the process is undertaken in relation to a number of employees collectively. Thus, our proposed clause 17.3(b) proposes a longer timeframe of 28 days.

(e) Clause 17.3(d) reflects Model Clause 1. It requires an employer to keep a record of starting and finishing times and unpaid breaks. We have proposed an additional clause 17.3(e), which would require an employee to comply with any employer direction to keep records of their hours of work for the purposes of clause 17.3(d). It is appropriate that an award-derived obligation for employees to comply with such a direction is included in the award. An employee’s failure to keep such records may render it impracticable for an employer to comply with clause 17.3(d). For example, in order for an employer to keep the relevant records, it may be necessary for an employee to complete a timesheet.

308. The proposed clause 17 can be included in the award pursuant to s.139(1)(f) because it:

(a) Has regard to patterns of work in the various sectors covered by the FF Award;

(b) Provides an alternative to the separate payment of wages and other monetary entitlements; and

(c) Includes appropriate safeguards to ensure that individual employees are not disadvantaged.

309. The proposed provision is consistent with the conclusions reached by the Commission in the aforementioned proceedings as to *‘what is necessary for an annualised wage arrangement provision to form part of the fair and relevant minimum safety net of terms and conditions required by s 134(1) taking into*

account the matters identified in paragraphs (a) – (h) of the subsection'.[184] Specifically:

(a) The clause would apply to employees classified at level 3, which is the highest level under the award. Such employees are *'appointed by the employer to be in charge of a shop, food outlet or delivery outlet'*[185]. Their hours of work often follow a reasonably stable pattern. Further, they are relatively senior or experienced employees, who exercise a degree of control over their own hours of work. They work with some autonomy. They are responsible for supervising and / or managing other employees, workflow, the delivery of the employer's services and other complex operational matters.

(b) The clause would require that the arrangement is documented in writing and kept by the employer as part of their pay records. It would also require that a copy is provided to the employee.

(c) The clause would ensure that an employee does not receive less pay over the course of a year than they would have received had the terms of the award been applied to them. We refer in particular to draft clauses 17.1(b)(iii), 17.1(b)(iv), 17.1(c), 17.2(b) and 17.3, which would provide various relevant safeguards.

310. The provision sought would offer benefits for employers and employees. For example:

(a) It would provide a mechanism for remunerating employees by way of a fixed amount, alleviating the need to separately calculate various entitlements that would otherwise be payable to an employee.

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[184] *Annualised Wage Arrangements* [2018] FWCFB 154 at [129].

[185] Clause 12.4(c) of the award.

(b) Employees would receive a fixed and certain amount of remuneration each pay period, irrespective of the number of hours worked, which would provide income security and predictability of earnings for the purposes of budgeting and obtaining finance.

311. Many employers covered by the award presently remunerate employees classified at level 3 by way of a salary, pursuant to contractual arrangements, which are intended to satisfy their obligation to pay various entitlements prescribed by the award. However, as previously recognised by the Commission, *'this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty'*.[186]

312. The proposed clause would provide clarity and certainty to employers and employees, because it would expressly permit and regulate the payment of an annualised wage in lieu of separate monetary entitlements arising under the award. It would do so in a way that provides numerous safeguards and protections to employees, that would not apply where an employer and employee have merely agreed to a common law arrangement.

313. The proposed clause would facilitate the payment of a fixed amount of remuneration to an employee, and the benefits that flow from such an arrangement, without the need to navigate the *'legal difficulties'* previously explained by the Commission and absent the risks associated with any uncertainty that falls from arrangements of that nature.

H. Broken Hill Allowance (Clause 17.2)

314. Clause 17.2 of the award requires an employer of an employee at a workplace within the County of Yancowinna in New South Wales (i.e. Broken Hill) to pay an allowance of $42.58 per week. The allowance is expressed as being a single weekly amount payable to an employee, irrespective of whether they are engaged on a full-time, part-time or casual basis, or the number of hours actually worked by an employee in a particular week.

[186] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

315. On 29 January 2010, the Broken Hill allowance was inserted into the *Fast Food Award 2010* and the *General Retail Industry Award 2010* (**GRIA 2010**) in identical terms. It provided for employees in Broken Hill to be paid an allowance '*for the exigencies of working in Broken Hill of 4.28% of the standard rate.*'[187]

316. Although both award provisions started out in identical terms, the provision in the GRIA is now expressed as an hourly payment.[188] This variation to the GRIA 2010 was made pursuant to an application made during the Modern Awards Review 2012, to make clear that the allowance is to be paid on an hourly basis to casual and part-time employees, for the purposes of ensuring that they would not receive the same amount as full-time employees if they worked fewer hours.[189] Ultimately this proposed variation was agreed to by the SDA.[190] In light of this, Justice Boulton varied the GRIA 2010 to provide for the hourly payment of the Broken Hill allowance on the basis that it would resolve an ambiguity as to the manner in which the allowance was payable.[191]

317. A similar ambiguity to that identified by Justice Boulton in the context of the GRIA 2010 regarding the basis upon which the Broken Hill allowance is payable potentially also exists in this Award. Moreover, there is no apparent justification for a different approach being adopted in the FF Award relative to the GRIA. We also note that other allowances in the FF Award are payable on an hourly or per shift basis.[192]

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[187] *General Retail Industry Award 2010* [2010] FWAFB 305; PR992724; *Fast Food Industry Award 2010* [2010] FWAFB 379; PR992813.

[188] Clause 19.13 of the GRIA.

[189] NRA Application to vary a modern award, 9 February 2012, page 5. See also NRA Submissions, 13 August 2012, page 9.

[190] NRA Submissions, 22 March 2013, paragraph [57].

[191] *Modern Awards Review 2012 – General Retail Industry Award 2010* [2013] FWC 6056 at [23] - [24].

[192] See, eg, clauses 17.3, 17.5(b)(ii), 17.6 of the Award.

318. To address this, Ai Group proposes clause 17.2 be amended to express the allowance as an hourly amount for part-time and casual employees, in the following terms:

17.2 Broken Hill allowance

(a) An employer must pay an employee at a workplace within the County of Yancowinna in New South Wales (Broken Hill) an allowance of:

(i) in the case of full-time employees: **$42.58** per week; or

(ii) in the case of part-time or casual employees: **$1.12** per ordinary hour.

(b) This allowance is in addition to all other payments.

319. A consequential variation is also proposed, to ensure the change is reflected in the table in clause B.1.1 of Part B.1 of Schedule B – Summary of Monetary Allowances.

320. The effect of the proposed amendments would be that part-time and casual employees would receive a pro-rated amount of the weekly allowance calculated by reference to the number of ordinary hours worked during the week.

14. THE GRIA

A. Timing & Duration of Meal Breaks for Part-time Employees (Clause 10.5(c))

321. At the time of engaging a part-time employee, clause 10.5(c) of the GRIA requires the employer and employee to agree in writing on a regular pattern of work including *'when meal breaks may be taken'* and their duration.

322. Ai Group proposes that the award be varied to remove the requirement for the timing and duration of meal breaks to form part of the agreed pattern of work for a part-time employee. Importantly, Ai Group is *not* proposing any removal or reduction of the meal break entitlement itself as set out in clause 16.2 of the award. We are also *not* proposing to remove the meal break timing protections afforded to employees pursuant to clause 16.5 (subject to the voluntary facilitative provision being proposed, dealt with in our submission below).

323. The existing requirement to reach agreement with a part-time employee regarding the duration and timing for taking meal breaks is unduly restrictive. Plainly, an employer will not be in a position to forecast all of the operational requirements and circumstances that are relevant to when employees are afforded a break or the length of that break. Relevant considerations include the timing of other employees' breaks so as to ensure that the employers' operations can continue, staff absences, fluctuations in customer demand etc.

324. It is also relevant that the award does not require that agreement be reached with other types of employees, such as full-time employees, regarding the timing and duration of their meal breaks. The proposal we advance would ensure that a fair and equitable approach is adopted in relation to all employees.

325. Currently, in order to vary the timing of meal breaks or their duration, an employer is required to enter into a written variation with the employee, pursuant to clause 10.6. This requirement increases the regulatory burden on employers and is unduly inflexible. Importantly, employers are unable to make critical changes to when a part-time employee takes a break or the duration of that break, without their written consent on each separate occasion.

326. In order to give effect to this proposal, Ai Group proposes the deletion of clause 10.5(c) of the award.

327. Ai Group's proposal is directed at improving flexibility and reducing the compliance burden imposed by the award, without any diminution of part-time employees' substantive meal break entitlements or the existing protections afforded to employees under the Award regarding when meal breaks are to be taken.

B. Additional Hours of Work for Part-time Employees (New Clause 10.11)

328. Currently, clause 10.5 of the GRIA requires an employer and a part-time employee to agree in writing on a regular pattern of work, at the time of engagement. Except where that agreement has been varied as contemplated by clauses 10.6 or 10.11, clause 10.8 requires that for all time worked in excess of the number of agreed ordinary hours, an employee must be paid overtime rates.

329. The existing requirement for an employee's regular pattern of work to be varied in writing for any additional hours to be characterised as ordinary hours places an unworkable regulatory burden on employers. In the context of the retail industry, such ad hoc arrangements often need to be implemented at short notice and / or during the course of a shift.

330. Ai Group proposes that the award be varied to permit an employer and part-time employee to agree that any hours worked by agreement in addition to the employee's agreed hours will be ordinary hours and paid as such; provided that an employee would be paid at overtime rates where they work in excess of 38 ordinary hours per week.

331. The proposal has numerous mutual benefits for employees and employers.

332. Many part-time employees wish to work additional hours, though the specific days and times during which they are available to work may vary from week to week. Similarly, employers commonly have an unexpected need for additional labour; for example, in response to fluctuating customer demands or unplanned staff absences.

333. The existing terms of the GRIA discourage employers from offering part-time employees additional hours due to the requirement to pay overtime rates for such work and / or the compliance burden associated with varying the employee's regular work pattern in writing to enable the hours to be worked at ordinary rates[193]. They also discourage employers from offering part-time roles instead of casual roles.

334. Our proposal would provide an employer with the ability to offer additional ordinary hours to part-time employees who wish to maximise the number of ordinary hours worked, unencumbered by the regulatory burden of needing to enter into a written variation of the employee's regular pattern of work on each occasion; noting that it may not be practical or possible for those hours to be offered on an ongoing basis.

335. We envisage that the proposed change would result in part-time employees being offered the option to work hours that would otherwise not be afforded to them.

336. Importantly, the requirement for the arrangement to be by agreement ensures that employees cannot be *required* to work additional hours at ordinary rates, if they do not wish to. Where an employer directs a part-time employee to work additional hours, the employee would continue to be entitled to be paid for that time at overtime rates. Further, the requirement to inform employees, via their pay slip, of the number of hours worked at the ordinary rate, ensures that a record of the total number of hours worked is created and maintained.[194]

337. In order to give effect to this proposal, Ai Group proposes the insertion of a new clause 10.11 in the following terms:

10.11 An employer and part-time employee may agree in writing (including by electronic means) that where the employee agrees to perform additional hours of work outside or in excess of their regular pattern of work as agreed under clause 10.5 or as varied pursuant to clause 10.6 or 10.12, the time worked will be treated as ordinary hours and paid as such.

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[193] Per clauses 10.6 and 10.10.

[194] Regulation 3.46 of the *Fair Work Regulations 2009*.

338. It is proposed that existing clauses 10.8 and 21.2(b) also be varied such that they operate subject to the proposed clause 10.11.

C. Hours of Work (Clause 15)

339. Clause 15 of the GRIA regulates ordinary hours of work and rostering arrangements. It does so in a way that is complex, cumbersome and overly prescriptive. It could by no means be described as being *'easy to use'*. Its practical application is often unclear, as is the interrelationship between subclauses within it, as well as with other parts of the award.

340. The clause should be the subject of discussion before the Commission in the context of the Review; for the purposes of ascertaining whether there is scope to simplify and clarify various elements of it. We have sought not to advance specific proposals in relation to clause 15 at this stage (subject to the matter raised in section D below), with a view to first engaging in a fulsome discussion with other parties about a range of concerns that arise from it.

D. Spread of Hours (Clause 15.2(c))

341. A seemingly inadvertent but problematic change was made to clause 15.2(c) of the GRIA during the PLR Process recently undertaken by the Commission. It should be addressed through this process.

342. From 1 October 2020, the GRIA 2010 was substantially varied, to give effect to the outcome of the PLR Process.[195] Immediately prior to the relevant variations commencing operation, clause 27.2 of the GRIA 2010 was in the following terms: (emphasis added)

27.2 Ordinary hours

(a) Except as provided in clause 27.2(b), ordinary hours may be worked, within the following spread of hours:

Days	**Spread of hours**
Monday to Friday, inclusive	7.00am – 9.00pm
Saturday	7.00am – 6.00pm
Sunday	9.00am – 6.00pm

[195] PR722492.

(b) Provided that:

(i) the commencement time for ordinary hours of work for newsagencies on each day may be from 5.00 am;

(ii) the finishing time for ordinary hours for video shops may be until 12 midnight; and

(iii) in the case of retailers whose trading hours extend beyond 9.00 pm Monday to Friday or 6.00 pm on Saturday or Sunday, the finishing time for ordinary hours on all days of the week will be 11.00 pm.

(c) Hours of work on any day will be continuous, except for rest pauses and meal breaks.

343. Once the award was varied, it came to be known as the GRIA.

344. Clause 15.1 of the GRIA prescribes the spread of hours within which ordinary hours may be worked, consistent with clause 27.2(a) of the GRIA 2010. Clause 15.2 of the GRIA corresponds in broad terms with clause 27.2(b) of the GRIA 2010, save for one notable variation. It provides some exceptions to the spread of hours, in the following terms: (emphasis added)

15.2 However, ordinary hours may be worked:

(a) from 5:00 am in a newsagency; or

(b) until midnight in a video shop; or

(c) until 11.00 pm if the trading hours of the establishment extend beyond 9.00 pm on a Monday to Friday or 6.00 pm on a Saturday or Sunday.

345. As can be seen from the above:

(a) Clause 27.2(b)(iii) of the GRIA 2010 provided that employees of *'retailers'* whose trading hours extended beyond the parameters described by that clause could work ordinary hours up to 11pm on any day of the week.

(b) Clause 15.2(c) of the GRIA now provides that ordinary hours may be worked until 11pm by only those employees at an *'establishment'* where the trading hours extend beyond the relevant parameters.

346. The application of clause 15.2(c) of the GRIA turns on a consideration of the trading hours of a particular *'establishment'*. This raises the question as to what constitutes an *'establishment'*. By contrast, clause 27.2(b)(iii) of the GRIA 2010 clearly and unambiguously applied to employees of employers whose trading hours, at any establishment or location, extended beyond the hours there specified.[196]

347. The changed manner in which clause 27.2(b)(iii) of the GRIA 2010 is expressed in the GRIA has given rise to uncertainty as to whether it has resulted in a substantive alteration to the application of the award's terms and, by extension, employee entitlements. That is, there is some concern in industry that the reference to *'establishment'* now requires a consideration of the trading hours of a specific place of work or premises, rather than of the operations of the organisation as a whole. If this is so, it would represent a major substantive change to the operation of the instrument. Without endorsing the veracity of such an interpretation, we observe that the new wording is far from simple and easy to understand. It is also arguably ambiguous or uncertain as contemplated by s.160 of the Act.

348. We consider that the change was made inadvertently on the following bases:

(a) The first *'exposure draft'* of the GRIA was published by the Commission on 5 July 2017. Clause 15.2(c) of that draft was in the same terms as the clause now found in the GRIA. Relevantly, it contained the impugned reference to an *'establishment'*.

(b) The same exposure draft said as follows at its commencement, making clear that it was not intended to substantively alter any terms and conditions: (emphasis added)

[196] Consistent with *Application by Mrs Penelope Alice Vickers* [2016] FWC 6350 at [225].

> This plain language exposure draft has been prepared by staff of the Fair Work Commission based on the ***General Retail Industry Award 2010*** as at 5 July 2017. This exposure draft does not seek to amend any entitlements under the ***General Retail Industry Award 2010***. It has been prepared to address some of the structural issues identified in modern awards and to apply plain language drafting principles and techniques to award-specific provisions.

(c) At no stage did any interested party participating in the proceedings seek the change described earlier in this correspondence. It appears that the terminology used in clause 15.2(c) was adopted by the draftsperson with the intention of making the clause simpler and easier to understand, without seeking to change the meaning of clause 27.2(b)(iii).

(d) At no stage did any interested party participating in the proceedings identify that the change made was substantive in nature or submit that it should not be made for any reason.

349. Thus, the GRIA 2010 was ultimately varied to include clause 15.2(c) as found in the first exposure draft. At no stage did the Commission indicate that it intended to alter the application of the provision. Indeed, it stated the very opposite intent when publishing the exposure draft.

350. For completeness, we note that no party had made any application, or claim during the 4 yearly review in any context outside the PLR Process, to vary clause 27.2(b)(iii) of the GRIA 2010. The change is therefore not the result of any such matter.

351. On the basis of the matters set out above, the Commission should amend clause 15.2(c) of the GRIA as set out below, to reverse the inadvertent and substantive change made to the GRIA 2010:

> until 11.00 pm if the trading hours of the ~~establishment~~ retailer extend beyond 9.00 pm on a Monday to Friday or 6.00 pm on a Saturday or Sunday.

352. The variation should be made pursuant to s.160(2)(a) of the Act on the basis that it would correct an error, in the relevant sense[197]. The variation should be made retrospectively[198], with effect from 1 October 2020 (i.e. from the date on which the award was varied).

E. Remote Work (New Clause 15.6)

353. Clause 15 relates to the ordinary hours of work. Specifically, clause 15.3 requires that ordinary hours must be *'continuous'*, except for rest breaks and meal breaks. Further, clause 15.1 requires that ordinary hours must be performed within the prescribed spread of hours.

354. In recent years, it has become increasingly common for employees to work from home or from some other location that is not an employer's designated workplace. This includes employees covered by the GRIA who are not required to perform all of their duties at the employer's workplace, such as employees engaged in clerical work, employees facilitating online or telephone sales, employees engaged in various support functions and those performing certain managerial functions.

355. Many employees working from home wish to take breaks (other than meal breaks and rest breaks) during ordinary hours to attend to personal matters. This can include transporting children to and / or from school or early education facilities, attending personal appointments (e.g. doctors' appointments), running errands, engaging in physical activity etc. Often, these employees work autonomously and exercise at least some control over how and when they undertake their work.

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[197] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

[198] Section 165(2) of the Act.

356. Some employees may seek to *'make up'* the time spent off work outside the spread of hours. This arises most commonly in the context of parents of young children, who wish to spend time with their children when they would otherwise be required to work; and to subsequently *'make up'* this time at night, after their children have gone to bed.

357. Many employers are amenable to accommodating arrangements of the nature described above (and do in fact do so); however, applied strictly, clauses 15.1 and 15.3 prevent their implementation. To that end, the award does not provide a *'relevant'* safety net, that is consistent with contemporary community expectations and employee desires to work flexibly. It renders unlawful arrangements that would be of obvious benefit to many employees.

358. In addition, in respect of part-time and casual employees, clauses 10.9 and 11.2 prescribe minimum engagement periods of three hours. These provisions also potentially preclude the types of arrangements contemplated above, or they may discourage employers from agreeing to flexible working arrangements of this nature.

359. The key rationale underpinning minimum engagement periods was described as follows by a Full Bench during the 4 yearly review of modern awards: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. <u>However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like.</u> An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[199]

[199] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

360. The principle that employees should be sufficiently compensated *‘for each attendance at the workplace to justify the expense and inconvenience associated with that attendance’* is plainly not relevant where an employee is working from home or another location of their choosing. Moreover, our proposal is directed towards ensuring that employees can take time off work and make up that time flexibly, in ways that suit them.

361. Accordingly, a new clause 15.6 should be inserted in the following terms, which makes clear that clause 15.1 (the spread of hours), clause 15.3 (the requirement to perform ordinary hours of work continuously) and the aforementioned minimum engagement periods will not apply where an employer and employee agree and the employee is working remotely:

> **15.6** If an employee is working from a location other than a workplace designated by the employer, the employer and employee may agree that clauses 15.1, 15.3, 10.9 and 11.2 (as applicable) will not apply when the employee is so working.

F. Taking Meal Breaks (New Clause 16.6)

362. Clause 16.5 of the award states that an employer *‘cannot require’* an employee to take a rest break or meal break within the first or last hour of work; to take a rest break combined with a meal break; or to work more than five hours without taking a meal break. It is expressed as a prohibition on an employer *‘requiring’* an employee to do certain things. The current wording *infers* – but does not expressly deal with whether – these things are able to be done by agreement.

363. In any event, the award should be varied to expressly permit an employer and employee to agree to implementing arrangements of the nature otherwise prohibited by clause 16.5. In particular, Ai Group proposes the insertion of a new clause 16.6, in the following terms:

> **16.6** An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):
>
> **(a)** the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;

(b) the employee take rest breaks combined with meal breaks; and/or

(c) the employee will work up to 6 hours without taking a meal break.

364. Consequential amendments to existing clause 16.5 and Table 1 in clause 7.2 are also proposed.

365. We note that the Commission has found it appropriate to include similar flexibilities in other modern awards. By way of illustration, relevant to the proposal that an employer and an employee be permitted to agree for the employee to work up to six hours without taking a meal break, the following types of flexibilities may be found elsewhere in modern awards:

(a) The ability for an employer and an employee to agree to extend the period an employee may be required to work without a break for a meal from five ordinary hours, by up to one additional hour.[200] Similar agreement may also be reached between an employer and the majority of employees in an enterprise or part of enterprise concerned.[201]

(b) The ability for an employer and employee to mutually agree to vary the requirement that an employee not work for longer than five hours without a minimum 30 minute unpaid meal break (without restriction on the agreement).[202]

(c) A requirement that the meal break be commenced within the fourth to sixth hours from the commencement of ordinary working hours.[203]

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[200] *Cement, Lime and Quarrying Award 2020*, clause 15.1(a)(ii); *Cotton Ginning Award 2020*, clause 16.1; *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.1(b); *Seafood Processing Award 2020*, clause 14.1(a)(ii); *Telecommunications Services Award 2020*, clause 14.4(a)(i).

[201] *Food, Beverage and Tobacco Manufacturing Award 2020*, clause 13.1(b); *Pharmaceutical Industry Award 2020*, clause 14.1(b); *Seafood Processing Award 2020*, clause 14.1(a)(ii); *Telecommunications Services Award 2020*, clause 14.4(a)(i); *Textile, Clothing, Footwear and Associated Industries Award 2020*, clause 18.1(c)(i).

[202] *Meat Industry Award 2020*, clause 15.1(a).

[203] *Concrete Products Award 2020*, clause 15.1(a).

(d) Where daily hours to be worked are six hours or less, an employee may agree to work without a break for a meal by agreement (in place of the requirement to not work in excess of five hours without a meal break).[204]

(e) The ability for an employer and an employee to agree that an unpaid meal break is to be taken after the first hour of work and within the first 6.5 hours of work.[205]

366. Relevant to the proposal that an employer and an employee be permitted to agree for the employee to take rest breaks and / or meal breaks within the first and / or last hour of work, the following types of flexibilities may be found elsewhere in modern awards:

(a) A facilitative provision that enables the duration and starting time of meal breaks to be variable by agreement between the employer and the employees concerned to suit the particular work requirements and to enable efficient completion of work.[206]

(b) A requirement that the employer will allow an employee reasonable time to have regular and normal meals on each day of the employee's employment, without specifying the duration and timing of meal breaks.[207]

(c) Where employees have an entitlement to two separate paid 10 minute rest breaks on each day worked, to be taken as one break in the morning and one break in the afternoon, the ability to reach agreement to the afternoon rest break being taken immediately before finishing work.[208]

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[204] *Banking, Finance and Insurance Award 2020*, clause 14.1(b); *Broadcasting, Recorded Entertainment and Cinemas Award 2020*, clause 30.1; *Business Equipment Award 2020*, clause 13.2(a)(i) – with a restriction on such agreement being able to be reached for 12 hour days or shifts); *Health Professionals and Support Services Award 2020*, clause 15.1(c); *Pharmaceutical Industry Award 2020*, clause 14.1(c); *Timber Industry Award 2020*, clause 19.2; *Wine Industry Award 2020*, clause 14.2 (shiftworkers).

[205] *Restaurant Industry Award 2020*, clause 16.4(a).

[206] *Airport Employees Award 2020*, clause 18.2.

[207] *Commercial Sales Award 2020*, clause 14.

[208] *Car Parking Award 2020*, clause 16.2(c); *Racing Clubs Events Award 2020*, clause 16.3(b); *Racing Industry Ground Maintenance Award 2020*, clause 14.2(c).

(d) Where employees have an entitlement to one paid 10 minute rest break during their ordinary hours of work required to be taken in the first half of the day or shift at a time decided by the employer, the ability for the employer and the majority of employees in any establishment or section of an establishment to agree to an alternative arrangement (amongst other things).[209]

367. Relevant to the proposal that an employer and an employee be permitted to agree for the employee to take rest breaks combined with meal breaks, the following types of flexibilities may be found elsewhere in modern awards:

(a) Where employees have an entitlement to two separate paid 10 minute rest breaks on each day worked, to be taken as one break in the morning and one break in the afternoon, the ability to reach agreement to the afternoon rest break being taken in the morning by joining it to the lunch break, [210] or taken immediately before finishing work.[211]

(b) Where employees have an entitlement to two 7.5 minute paid rest breaks on any day or shift, the ability for an employer and the majority of employees at a particular plant to instead agree to one 15 minute break per day taken at a mutually agreeable time.[212]

(c) Where employees have an entitlement to two paid 10 minute rest breaks (one in the morning and one in the afternoon), the ability for a majority of employees and the employer to agree that the morning and afternoon breaks be consolidated into one longer break[213], or one or both rest breaks may be added to the meal beak.[214]

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[209] *Meat Industry Award 2020*, clause 15.2(e).

[210] *Car Parking Award 2020*, clause 16.2(c).

[211] *Car Parking Award 2020*, clause 16.2(c); *Racing Clubs Events Award 2020*, clause 16.3(b); *Racing Industry Ground Maintenance Award 2020*, clause 14.2(c).

[212] *Concrete Products Award 2020*, clause 15.3(b).

[213] *Cotton Ginning Award 2020*, clause 16.2; *Dry Cleaning and Laundry Industry Award 2020*, clause 17.2(b); *Sugar Industry Award 2020*, clause 16.4(d) and (e).

[214] *Cotton Ginning Award 2020*, clause 16.2; *Sugar Industry Award 2020*, clause 16.4(e).

(d) Where employees have an entitlement to a paid 10 minute tea break in each four hours worked, the ability for an employer and an employee to agree that such breaks may be taken as one 20 minute tea break.[215]

368. There are many circumstances in which it is conceivable that an employee may wish to take their meal breaks at times currently subject to restrictions by clause 16.5. For example, an employee may wish to combine multiple breaks into one longer break, to enable them time to leave the premises during their break. It may also suit an employee to take their break at the end of their shift, effectively allowing them to conclude work earlier for the day.

369. Addressing the issue by way of a facilitative provision that requires agreement between an employer and an employee would provide a safeguard to employees such that any employee who wishes to retain the meal break timing protections in clause 16.5 would do so.

G. Annualised Wage Arrangements (New clause 19)

370. Ai Group seeks the introduction of a new clause 19, relating to annualised wage arrangements, in the terms set out below:

19. Annualised wage arrangements

19.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee classified as Retail Employee Level 4 – Retail Employee Level 8 an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 19.1(c):

(i) clause 10 – Part-time employees;

(ii) clause 15.9(h) – Notification of rosters;

(iii) clause 15.9(i) – Notification of rosters;

(iv) clause 16.2 – Breaks;

(v) clause 16.6 – Breaks between periods of work;

[215] *Health Professionals and Support Services Award 2020*, clause 15.2(b); *Nurses Award 2020*, clause 14.2(b).

(vi) clause 17.1—Minimum rates;

(vii) clause 17.5 – Higher duties;

(viii) clause 19 – Allowances;

(ix) clause 21.2 – Overtime;

(x) clause 21.3 – Time off in lieu of payment for overtime;

(xi) clause 22—Penalty rates;

(xii) clause 24.5 – What is shiftwork;

(xiii) clause 25—Rates of pay for shiftwork;

(xiv) clause 26— Rest breaks and meal breaks;

(xv) clause 28.3—Additional payment for annual leave; and

(xvi) clause 33.3 – Payment for work on public holiday or substitute day.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 19.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 19.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

19.2 Changes to part-time employees' hours of work

(a) Clause 19.2 applies to a part-time employee who is being paid an annualised wage and, in accordance with clause 10.6 or 10.11, the employee's regular pattern of work is changed on an ongoing basis.

(b) The employer must review the matters described in clause 19.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 19.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 19.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

19.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 19.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 19.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 19.3(d).

19.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 19 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 17—Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

371. The proposed clause 19 would enable an employer to pay a full-time or part-time employee an annualised wage, in satisfaction of various monetary entitlements prescribed by the award.

372. The provision sought is largely in the same terms as *'Model Clause 1'*, as determined by a Full Bench of the Commission during the 4 yearly review of modern awards, in the context of *'common issues'* proceedings concerning annualised wage arrangements.[216]

373. Notwithstanding the above, the proposed provision differs from Model Clause 1 in the following respects:

(a) The proposed clause would apply to part-time employees, in addition to full-time employees.

In the aforementioned proceedings, when determining the terms of the various model clauses, the Commission said as follows about their applicability to part-time employees:

> **[50]** There were differing submissions received concerning the applicability of annualised wage arrangements to part-time employment. While some parties supported such arrangements being made applicable or made available to part-time employees, we do not consider that any workable, specific proposal to that end has been advanced. It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards. The course we propose to take is to adopt standard annualised wage provisions for full-time employees, and then interested parties may if they wish make an application with respect to a specific modern award to vary the provision to extend its operation to part-time employees.[217]

[216] *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 4368 at [23].

[217] *4 yearly review of modern awards – Annualised Wage Arrangements* [2019] FWCFB 1289 at [50].

Thus, the Commission's decision that the model clauses would not apply to part-time employees did not reflect any finding that it would be inappropriate for such clauses to do so or any other such conclusion as to its merits. Rather, there was an absence of any workable proposal that could have applied universally to all of the awards that were the subject of those proceedings.

Proposed clause 19.2 relates to part-time employees. It would, in effect, require an employer to review the annualised wage paid to an employee, the award provisions that are satisfied by the annualised wage, the method by which the wage was calculated and the outer limit number of hours for the purposes of clause 19.1(b)(iv), if the employee's hours are varied on an ongoing basis. The proposed clause affords an employer the ability to change the arrangement with the employee to reflect the revised pattern of hours.

Other elements of Model Clause 1, particularly clauses 19.1(c) and 19.3, would also serve as important safeguards.

(b) The proposed clause 19.1(a) makes clear that an annualised wage can satisfy the various provisions listed therein only to the extent that they provide monetary entitlements. Thus, an annualised wage cannot *'buy out'* other forms of entitlements, such as breaks.

(c) Model Clause 1 requires an employer to undertake a reconciliation process, for the purposes of ensuring that the annualised wage paid to an employee is not less than the amounts that would have been payable to the employee pursuant to the award. The clause requires that the process must be undertaken *'each 12 months from the commencement of the annualised wage arrangement'*.

If our claim is granted, some employers may pay a number of employees covered by the award an annualised wage. However, those annualised wage arrangements may be implemented on different dates. Thus, their anniversary dates would also differ. The model clause would require an

employer to reconcile each employee's annualised wage precisely 12 months after the arrangement commenced.

The model clause imposes an unfair and unnecessary regulatory burden on employers in this regard. It precludes employers from implementing more efficient means of ensuring that employees receiving an annualised wage have not been disadvantaged, by undertaking the reconciliation process for a number of employees simultaneously.

The proposed clauses 19.3(b) – 19.3(c) have been drafted with these concerns in mind. As per the model clause, an employer would be required to reconcile the annualised wage paid to an employee with the amounts that would have been payable under the award. However, the process would need to be undertaken *'within'* 12 months, or as *'soon as reasonably practicable thereafter'*. This added flexibility would allow employers to better streamline the process required to be undertaken.

(d) Model Clause 1 requires that any shortfall identified as a result of the reconciliation process must be paid to the employee *'within 14 days'*. This may not be a sufficient period of time, particularly where the process is undertaken in relation to a number of employees collectively. Thus, our proposed clause 19.3(b) proposes a longer timeframe of 28 days.

(e) Clause 19.3(d) reflects Model Clause 1. It requires an employer to keep a record of starting and finishing times and unpaid breaks. We have proposed an additional clause 19.3(e), which would require an employee to comply with any employer direction to keep records of their hours of work for the purposes of clause 19.3(d). It is appropriate that an award-derived obligation for employees to comply with such a direction is included in the award. An employee's failure to keep such records may render it impracticable for an employer to comply with clause 19.3(d). For example, in order for an employer to keep the relevant records, it may be necessary for an employee to complete a timesheet.

374. The proposed clause 19 can be included in the Award pursuant to s.139(1)(f) because it:

(a) Has regard to patterns of work in the various sectors covered by the GRIA;

(b) Provides an alternative to the separate payment of wages and other monetary entitlements; and

(c) Includes appropriate safeguards to ensure that individual employees are not disadvantaged.

375. The proposed provision is consistent with the conclusions reached by the Commission in the aforementioned proceedings as to *'what is necessary for an annualised wage arrangement provision to form part of the fair and relevant minimum safety net of terms and conditions required by s 134(1) taking into account the matters identified in paragraphs (a) – (h) of the subsection'*.[218] Specifically:

(a) The clause would apply to employees classified at level 4 and above. The performance of managerial responsibilities is contemplated from level 4. Such employees are relatively senior or experienced, and exercise a degree of control over their own hours of work. Some employees have considerable autonomy. They are responsible for supervising and / or managing other employees, workflow, the delivery of the employer's services and other complex operational matters.

(b) The clause would require that the arrangement is documented in writing and kept by the employer as part of their pay records. It would also require that a copy is provided to the employee.

(c) The clause would ensure that an employee does not receive less pay over the course of a year than they would have received had the terms of the award been applied to them. We refer in particular to draft clauses

[218] *Annualised Wage Arrangements* [2018] FWCFB 154 at [129].

19.1(b)(iii), 19.1(b)(iv), 19.1(c), 19.2(b) and 19.3, which would provide various relevant safeguards.

376. The provision sought would offer benefits for employers and employees. For example:

(a) It would provide a mechanism for remunerating employees by way of a fixed amount, alleviating the need to separately calculate various entitlements that would otherwise be payable to an employee.

(b) Employees would receive a fixed and certain amount of remuneration each pay period, irrespective of the number of hours worked, which would provide income security and predictability of earnings for the purposes of budgeting and obtaining finance.

377. Many employers covered by the award presently remunerate employees classified at level 4 and above by way of a salary, pursuant to contractual arrangements, which are intended to satisfy their obligation to pay various entitlements prescribed by the award. However, as previously recognised by the Commission, *'this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty'*.[219]

378. The proposed clause would provide clarity and certainty to employers and employees, because it would expressly permit and regulate the payment of an annualised wage in lieu of separate monetary entitlements arising under the award. It would do so in a way that provides numerous safeguards and protections to employees, that would not apply where an employer and employee have merely agreed to a common law arrangement.

[219] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

379. The proposed clause would facilitate the payment of a fixed amount of remuneration to an employee, and the benefits that flow from such an arrangement, without the need to navigate the *'legal difficulties'* previously explained by the Commission and absent the risks associated with any uncertainty that falls from arrangements of that nature.

H. Exemption Rates (New Clause 20)

380. As has previously been acknowledged by the Commission, it *'can include exemption rate clauses in modern awards provided that:*

- *it is satisfied that they are necessary to achieve the modern awards objective in s.134 of the Act;*
- *they are about matters set out in s.139 of the Act*
- *they are not terms that must not be included in a modern award, and*
- *they do not have the effect that employees earning above a certain rate stop being covered by the award altogether (unless the Commission is satisfied that those employees would instead be covered by another modern award (other than the Miscellaneous Award) that is appropriate for them).'*[220]

381. The Commission has also acknowledged that an *'exemption rate clause could reduce award complexity and the regulatory burden on business and may encourage collective bargaining'*.[221]

382. Ai Group proposes that an exemption rate be introduced in the GRIA, in the following terms:

20. Exemptions

20.1 This clause applies to:

(a) Full-time employees classified as Retail Employee Level 4 – Retail Employee Level 8 who are a paid a salary that is at least 25% more than the applicable minimum wage for their classification level, as prescribed by clause 17.1, multiplied by 313/6.

[220] *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 at [91].

[221] *Re Restaurant & Catering Industrial* [2021] FWCFB 4149 at [92].

(b) Part-time employees classified as Retail Employee Level 4 – Retail Employee Level 8 who are a paid a salary that is at least 25% more than the applicable minimum wage for their classification level, as prescribed by clause 17.1, multiplied by 313/6 and calculated on a pro-rata basis.

20.2 The following provisions of the award do not apply the employees, where applicable:

(a) Clause 10 – Part-time employees;

(b) Clause 16 – Breaks;

(c) Clause 14 – Rostering arrangements (employees other than shiftworkers)

(d) Clause 16 – Breaks

(e) Clause 18 – Payment of wages

(f) Clause 19 – Allowances

(g) Clause 21 – Overtime

(h) Clause 22 – Penalty rates

(i) Clause 24 – What is shiftwork

(j) Clause 25 – Rate of pay for shiftwork

(k) Clause 26 – Rest breaks and meal breaks

(l) Clause 27 – Rostering restrictions

(m) Clause 28.3 – Additional payment for annual leave

(n) Clause 33.3 – Payment for work on a public holiday or substitute day

383. The proposed exemption rate provision would not only allow, but also encourage, employers and employees to strike a *'bargain'* that would result in an employee receiving a salary that exceeds the base rates prescribed by the award. The operation of the proposed clause 20.1 would ensure that employees must be paid at least 25% more than the minimum annual wage that would be payable under the award. Accordingly, in respect of full-time employees, the following exemption rates would apply:

Classification	Minimum annual wage (i.e. minimum weekly rate x (313/6))	Exemption rate
Level 4	$51,906	$64,883
Level 5	$54,039	$67,549
Level 6	$54,822	$68,528
Level 7	$57,571	$71,964
Level 8	$59,908	$74,885

384. The proposed provision would make the GRIA easier to use in a significant and meaningful way. It would:

(a) Provide a pathway for remunerating employees by way of a salary that is well above the base rates prescribed by the award.

(b) Provide a pathway for remunerating employees by way of a salary that does not rely on common law offset arrangements. Many employers covered by the GRIA presently remunerate employees by way of a salary, pursuant to contractual arrangements, which are intended to satisfy their obligation to pay various entitlements prescribed by the award. However, as previously recognised by the Commission, *'this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty'*.[222]

(c) Provide a mechanism for remunerating employees by way of a fixed amount, alleviating the need to separately calculate various entitlements that would otherwise be payable to an employee.

(d) Result in employees generally receiving a fixed and certain amount of remuneration each pay period, irrespective of the number of hours worked, which would provide income security and predictability of earnings for the purposes of budgeting and obtaining finance.

(e) Alleviate the need for employers and employees to create, maintain and verify records as to the employees' hours of work. The requirements to do so under the *Fair Work Regulations 2009* result in considerable additional costs and compound the regulatory burden facing employers. Further,

[222] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

many employees do not wish to produce records of the hours worked and resist their employers' directions to do so. Employees often perceive that such requirements impede upon their independence and autonomy or misapprehend that the records are intended for some other purpose (e.g. for the employer to monitor and assess their working hours). Senior employees particularly resent being asked to use a *'bundy clock'* of any form.

(f) Permit employees' hours of work to be arranged in more flexible ways, because the strictures of the award would not apply. This is particularly relevant given the increased prevalence of remote working arrangements, as discussed earlier.

I. First Aid Allowance (Clause 19.10)

385. Clause 19.10 of the award prescribes a first aid allowance in the following terms:

> **19.10 First aid allowance**
>
> **(a)** Clause 19.10 applies to an employee who:
>
> **(i)** has a current first aid qualification from St John Ambulance Australia or a similar body; and
>
> **(ii)** is appointed by the employer to perform first aid duty.
>
> **(b)** The employer must pay the employee an allowance of **$12.94** per week.

386. Some employees are appointed to perform first aid duties from time to time. That is, they are required to perform first aid duties during some periods of work, but not others. This arises where employers endeavour to share or distribute first aid duties amongst the workforce.

387. Clause 19.10 should be varied to make clear that the prescribed allowance is payable only when the employee is so appointed. This would put beyond doubt that in the context of an employee who is not permanently engaged to perform first aid duties, they will not be entitled to the allowance when they are not appointed to this role.

388. Accordingly, we suggest that clause 19.10(a) is replaced with the following:

> Clause 19.10 applies to an employee who has a current first aid qualification from St John Ambulance or a similar body, whilst they are appointed by the employer to perform first aid duty.

15. THE SCHCDS AWARD

A. Definition of *'Home Care Sector'* & *'Social and Community Services Sector'* (Clause 2)

389. In a submission dated 28 February 2023 in proceedings concerning union claims to increase minimum wages payable to employees engaged in the aged care sector under a number of awards[223], including the SCHCDS Award, the ASU said as follows at [9]:

> c. All employees providing supports to people with a disability should be classified as social and community services employees. This fact is recognised in NDIS funding arrangements, which price disability support work according to the minimum wages and conditions for social and community services employees. Most so-called home care workers in the NDIS system are misclassified.

390. In a subsequent submission dated 15 September 2023, the ASU said as follows about this issue at [4]:

> We can now confirm that the ASU will make an application to vary the SCHDS Award to clarify the coverage of disability support workers in the SCHDS Award. It would not be appropriate to pursue this variation through the Aged Care Work Value Case given that none of the submissions or evidence thus far have dealt with disability services.

391. We contest the assertion that employees providing disability services must all be engaged in the *'social and community services sector'* and that any employee classified as being engaged in the *'home care sector'* is misclassified. The *'home care sector'* can and does include the provision of disability services.

392. Given that the ASU has foreshadowed filing a separate application about this issue, it may be appropriate that it is dealt with in that context, rather than the Review. The conferencing process to be conducted by the Commission as part of the Review may however provide a useful opportunity for ventilation of the ASU's concerns in order to ascertain whether any level of consensus about a potential variation to improve clarity can be reached between the parties.

[223] AM2020/99, AM2021/63 and AM2021/65.

B. Annualised Wage Arrangements (New clause 18)

393. Ai Group seeks the introduction of a new clause 18, relating to annualised wage arrangements, in the terms set out below:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time Social and Community Services Employees classified at level 4 or higher, Crisis Accommodation Employees classified at level 2 or higher, Family Day Care Employees classified at level 3 or higher and Home Care Employees classified at level 4 or higher an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 18.1(c):

(i) Clause 10.5 – Minimum payments;

(ii) Clauses 15 – 17 – Minimum wages;

(iii) Clause 20 – Allowances;

(iv) Clause 25.5(f) – Client cancellation;

(v) Clause 25.6 – Broken Shifts;

(vi) Clause 25.7 – Sleepovers;

(vii) Clause 25.8 – 24 hour care;

(viii) Clause 25.9 – Excursions;

(ix) Clause 25.10 – Remote work;

(x) Clause 26 – Saturday and Sunday work;

(xi) Clause 27 – Breaks;

(xii) Clause 28 – Overtime and penalty rates;

(xiii) Clause 29 – Shiftwork;

(xiv) Clause 30 – Higher duties;

(xv) Clause 31.3 – Annual leave loading; and

(xvi) Clause 34.2 – Payment for working on a public holiday.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause18.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

18.2 Changes to part-time employees' hours of work

(a) Clause 18.2 applies to a part-time employee who is being paid an annualised wage and their employer, if in accordance with clause 10.3(e) or clause 10.3(g), the employer and employee agree to vary the employee's hours of work agreed under clause 10.3(c) on an ongoing basis.

(b) The employer must review the matters described in clause 18.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 18.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing of any changes to the matters described in clause 18.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

18.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 18.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 18.3(d).

18.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 15 – 17—Minimum wages and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

394. The proposed clause 18 would enable an employer to pay a full-time or part-time employee an annualised wage, in satisfaction of various monetary entitlements prescribed by the award.

395. The provision sought is largely in the same terms as *'Model Clause 1'*, as determined by a Full Bench of the Commission during the 4 yearly review of modern awards, in the context of *'common issues'* proceedings concerning annualised wage arrangements.[224]

[224] *4 yearly review of modern awards - Annualised Wage Arrangements* [2019] FWCFB 4368 at [23].

396. Notwithstanding the above, the proposed provision differs from Model Clause 1 in the following respects:

(a) The proposed clause would apply to part-time employees, in addition to full-time employees.

In the aforementioned proceedings, when determining the terms of the various model clauses, the Commission said as follows about their applicability to part-time employees:

> **[50]** There were differing submissions received concerning the applicability of annualised wage arrangements to part-time employment. While some parties supported such arrangements being made applicable or made available to part-time employees, we do not consider that any workable, specific proposal to that end has been advanced. It is not possible to formulate any standard provision which might apply to part-time employees because of the wide divergence in part-time employment provisions as between different modern awards. The course we propose to take is to adopt standard annualised wage provisions for full-time employees, and then interested parties may if they wish make an application with respect to a specific modern award to vary the provision to extend its operation to part-time employees.[225]

Thus, the Commission's decision that the model clauses would not apply to part-time employees did not reflect any finding that it would be inappropriate for such clauses to do so or any other such conclusion as to its merits. Rather, there was an absence of any workable proposal that could have applied universally to all of the awards that were the subject of those proceedings.

Proposed clause 18.2 relates to part-time employees. It would, in effect, require an employer to review the annualised wage paid to an employee, the award provisions that are satisfied by the annualised wage, the method by which the wage was calculated and the outer limit number of hours for the purposes of clause 18.1(b)(iv), if the employee's hours are varied by agreement on an ongoing basis. The proposed clause affords an employer the ability to change the arrangement with the employee to reflect the revised pattern of hours.

[225] *4 yearly review of modern awards – Annualised Wage Arrangements* [2019] FWCFB 1289 at [50].

Other elements of Model Clause 1, particularly clauses 18.1(c) and 18.3, would also serve as important safeguards.

(b) The proposed clause 18.1(a) makes clear that an annualised wage can satisfy the various provisions listed therein only to the extent that provide monetary entitlements. Thus, an annualised wage cannot *'buy out'* other forms of entitlements, such as breaks.

(c) Model Clause 1 requires an employer to undertake a reconciliation process, for the purposes of ensuring that the annualised wage paid to an employee is not less than the amounts that would have been payable to the employee pursuant to the award. The clause requires that the process must be undertaken *'each 12 months from the commencement of the annualised wage arrangement'*.

If our claim is granted, some employers may pay a number of employees covered by the award an annualised wage. However, those annualised wage arrangements may be implemented on different dates. Thus, their anniversary dates would also differ. The model clause would require an employer to reconcile each employee's annualised wage precisely 12 months after the arrangement commenced.

The model clause imposes an unfair and unnecessary regulatory burden on employers in this regard. It precludes employers from implementing more efficient means of ensuring that employees receiving an annualised wage have not been disadvantaged, by undertaking the reconciliation process for a number of employees simultaneously.

The proposed clauses 18.3(b) – 18.3(c) have been drafted with these concerns in mind. As per the model clause, an employer would be required to reconcile the annualised wage paid to an employee with the amounts that would have been payable under the award. However, the process would need to be undertaken *'within'* 12 months, or as *'soon as reasonably practicable thereafter'*. This added flexibility would allow employers to better streamline the process required to be undertaken.

(d) Model Clause 1 requires that any shortfall identified as a result of the reconciliation process must be paid to the employee *'within 14 days'*. This may not be a sufficient period of time, particularly where the process is undertaken in relation to a number of employees collectively. Thus, our proposed clause 18.3(b) proposes a longer timeframe of 28 days.

(e) Clause 18.3(d) reflects Model Clause 1. It requires an employer to keep a record of starting and finishing times and unpaid breaks. We have proposed an additional clause 18.3(e), which would require an employee to comply with any employer direction to keep records of their hours of work for the purposes of clause 18.3(d). It is appropriate that an award-derived obligation for employees to comply with such a direction is included in the award. An employee's failure to keep such records may render it impracticable for an employer to comply with clause 18.3(d). For example, in order for an employer to keep the relevant records, it may be necessary for an employee to complete a timesheet.

397. The proposed clause 19 can be included in the award pursuant to s.139(1)(f) because it:

(a) Has regard to patterns of work in the various sectors covered by the SCHCDS Award;

(b) Provides an alternative to the separate payment of wages and other monetary entitlements; and

(c) Includes appropriate safeguards to ensure that individual employees are not disadvantaged.

398. The proposed provision is consistent with the conclusions reached by the Commission in the aforementioned proceedings as to *'what is necessary for an annualised wage arrangement provision to form part of the fair and relevant minimum safety net of terms and conditions required by s 134(1) taking into*

account the matters identified in paragraphs (a) – (h) of the subsection'.[226] Specifically:

(a) The clause would apply to only select categories of workers. It would generally not apply to those involved in the provision of day-to-day direct care. By and large, the employees classified at the levels identified in clause 18.1(a) would perform work in an office or other similar environment. Their hours of work follow a reasonably stable pattern. Further, many are relatively senior or experienced employees, who exercise a degree of control over their own hours of work. They work with some autonomy. They are responsible for supervising and / or managing other employees, workflow, the delivery of the employer's services and other complex operational matters.

(b) The clause would require that the arrangement is documented in writing and kept by the employer as part of their pay records. It would also require that a copy is provided to the employee.

(c) The clause would ensure that an employee does not receive less pay over the course of a year than they would have received had the terms of the award been applied to them. We refer in particular to draft clauses 18.1(b)(iii), 18.1(b)(iv), 18.1(c), 18.2(b) and 18.3, which would provide various relevant safeguards.

399. The provision sought would offer benefits for employers and employees. For example:

(a) It would provide a mechanism for remunerating employees by way of a fixed amount, alleviating the need to separately calculate various entitlements that would otherwise be payable to an employee.

[226] *Annualised Wage Arrangements* [2018] FWCFB 154 at [129].

(b) Employees would receive a fixed and certain amount of remuneration each pay period, irrespective of the number of hours worked, which would provide income security and predictability of earnings for the purposes of budgeting and obtaining finance.

400. Many employers covered by the award presently remunerate employees classified at the relevant levels by way of a salary, pursuant to contractual arrangements, which are intended to satisfy their obligation to pay various entitlements prescribed by the award. However, as previously recognised by the Commission, *'this means of paying an annualised wage to an employee to whom a modern award applies is not entirely free from legal difficulty'*.[227]

401. The proposed clause would provide clarity and certainty to employers and employees, because it would expressly permit and regulate the payment of an annualised wage in lieu of separate monetary entitlements arising under the award. It would do so in a way that provides numerous safeguards and protections to employees, that would not apply where an employer and employee have merely agreed to a common law arrangement.

402. The proposed clause would facilitate the payment of a fixed amount of remuneration to an employee, and the benefits that flow from such an arrangement, without the need to navigate the *'legal difficulties'* previously explained by the Commission and absent the risks associated with any uncertainty that falls from arrangements of that nature.

C. Work performed before and after a sleepover (Clause 25.7 & others)

403. Clause 25.7 of the SCHCDS Award provides for the performance of a *'sleepover'*, as defined by clause 25.7(a). Sleepover arrangements are commonly implemented by employers covered by the award, including those who provide disability support services and undertake youth work.

[227] *Annualised Wage Arrangements* [2018] FWCFB 154 at [102].

404. Clause 25.7(f) of the award contemplates the performance of work before *'and / or'* after a sleepover.

405. The award is ambiguous and / or uncertain as to whether an employee's ordinary hours of work can be arranged such that they include the performance of ordinary hours of work both immediately before a sleepover, and during a separate shift of ordinary hours immediately after that sleepover, without such an arrangement automatically resulting in the work before and after being regarded as one continuous shift. The award is arguably capable of being read both ways (the Fair Work Ombudsman appears to currently read the award differently to Ai Group). That ambiguity or uncertainty is exacerbated by clauses 25.4 and 29.4 of the award.

406. Ai Group has filed an application to vary the SCHCDS Award in respect of this issue (AM2023/28). It is listed for conference before Deputy President Wright on 31 January 2024.

D. Tea breaks (Clause 27.2)

407. Clause 27.2 provides for paid tea breaks, in the following terms:

> **27.2 Tea breaks**
>
> **(a)** Every employee will be entitled to a paid 10 minute tea break in each four hours worked at a time to be agreed between the employer and employee.
>
> **(b)** Tea breaks will count as time worked.

408. In addition, an employee *'who works in excess of five hours will be entitled to an unpaid meal break'* of 30 – 60 minutes, '*to be taken at a mutually agreed time after commencing work'*.[228]

409. It may not be operationally feasible to allow an employee to take a tea break within each four hour period worked. This can arise where, for example, the employee is required to provide intensive support to a client with complex needs, where the employee is attending to a particular activity or appointment with a

[228] Clause 27.1(a) of the SCHCDS Awrad.

client that cannot be interrupted or where, due to unexpected staff absences or other unforeseen circumstances, it is not practicable for the employee to take the tea break within the designated four hour period.

410. It is important to note that some employees covered by the award are often working alone, in the private residence of their client's home. Clients exercise a substantial degree of choice and control over when they wish to receive services. An employee's working hours and patterns are therefore largely driven by client demands. These issues create various challenges for the taking of rest breaks within the prescriptive timeframes stipulated by the award.

411. Ai Group proposes that a new clause 27.2(c) be inserted, in the following terms:

> **(c)** Notwithstanding anything in this clause, a tea break may be taken in conjunction with another tea break or a meal break to which the employee is entitled, at a time that is agreed between the employer and employee.

412. The proposed provision would provide for greater flexibility as to when a tea break is to be taken. It would also result in an employee receiving a longer and potentially more meaningful break.

G. Transitional provisions (Clause 10.5A & Schedule A)

413. Schedule A of the award contains transitional provisions containing arrangements relevant to how the award was to apply to employers to whom a different minimum wage instrument and/or award-based transitional instrument applied immediately prior to 1 January 2010.

414. All of the operative provisions have ceased to apply. For this reason, Ai Group proposes Schedule A be deleted in its entirety.

415. We note that the Commission has previously determined it is appropriate for such transitional provisions to be deleted in full where the Schedule contains only transitional provisions that are no longer relevant.[229]

[229] See for example *4 yearly review of modern awards – Award stage – Group 4 awards* [2018] FWCFB 6852 at [129].

416. Consequential amendments and proposed to renumber remaining Schedules B to I (inclusive) as Schedules A to H, respectively.

417. Similarly, clause 10.5A has now ceased to apply and can therefore also be deleted.

16. THE CS AWARD

A. Notice of Roster Changes for Part-time Employees (Clauses 10.4 & 21.7)

418. Clause 10.4 of the award requires an employer and an employee to agree on a regular pattern of work in writing at the time of engagement. The agreement is required to include (amongst other things) the days of the week on which the employee will work and the employee's actual start and finish times (clause 10.4(c)). The award currently permits changes in the days to be worked, or start and/or finish times, by agreement. Where agreement cannot be reached, an employer may change an employee's days of work with 7 days' advance notice (clause 10.4(d)(ii)). An employer is exempt from the requirement to provide the full 7 days' notice where the roster change is made as a result of an emergency outside of the employer's control (clause 10.4(d)((iii)). *'Emergency'* is confined to a situation or event that poses an imminent or severe risk to the persons at an education and care service premises (for example, a fire at the premises), or a situation that requires the education and care service premises to be locked-down (for example, an emergency government direction) (clause 10.4(d)(v)).

419. Evidently, the circumstances in which an employer is permitted to change a part-time employee's usual days of work with less than 7 days' notice are extremely limited.

420. The circumstances in which an employer should be permitted to vary a part-time employee's roster with less than 7 days' notice ought to be considered in the context of the regulatory framework applying to employers covered by the CS Award. Relevantly, the National Quality Framework, being Australia's system for regulating early learning and school age care, was introduced in 2012. It comprises various components, including (amongst other things) minimum educator-to-child ratio requirements for children's education and care services.[230] In the context of the requirement of service providers to maintain minimum child-to-educator ratios under the National Quality Framework, a circumstance in which an employee who has been rostered to work directly with

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[230] See National Quality Framework | ACECQA

children for the purpose of providing them with education and care (and therefore forms part of the educator cohort required to be physically present with the children in order to maintain compliance with an employer's minimum child-to-educator ratios) is unexpectedly absent from the workplace should be regarded as an urgent situation in respect of which an employer is exempt from the 7-day roster change requirement.

421. In circumstances where, due to the unexpected nature of the absence, an employer has not had an opportunity to provide advance notice of the roster change but is compelled for compliance purposes to roster a replacement employee, Ai Group submits that the requirement to pay the replacement employee at overtime times, or incur the additional expense associated with engaging a casual employee, operates in an unduly penalising manner for employers. It is not fair that employers are unable to make roster changes in these circumstances, without paying the replacement employee a premium.

422. To address this, Ai Group proposes clause 10.4(d)(iii) be deleted and replaced with a new clause in the following terms:

> **(iii)** The employer is not required to provide the full 7 days' notice of change of the days an employee is to work where the employer makes the change as a result of:
>
> **(A)** an emergency outside of the employer's control; or
>
> **(B)** another employee's unexpected absence from work.

423. Ai Group also proposes a related amendment to clause 21.7(b)(ii), such that the current clause is to be deleted and replaced with a new clause in the following terms:

> **(ii)** The employer is also not required to provide the full 7 days' notice where the employer makes the change as a result of:
>
> **(A)** an emergency outside of the employer's control; or
>
> **(B)** another employee's unexpected absence.

424. Consequential amendments to the award are proposed to update cross-references contained in clauses 10.4(d)(iv), 10.4(d)(v), 21.7(b)(iii), 21.7(b)(iv) and 21.7(b)(v).

425. Since the change simply results in a part-time employee working ordinary hours on a day different to that usually rostered/agreed, there is no erosion of the monetary entitlements an employee is entitled to receive for those ordinary hours.

B. Roster Changes due to Client Cancellations (New Clause)

426. In the context of the National Quality Framework described above, employer rostering practices within the industry are heavily influenced by the need to roster an appropriate number of suitably qualified and skilled employees to ensure the minimum child-to-educator ratios will be met based on the number of children booked to attend a service on any particular day (or particular times on a given day).

427. It follows that in circumstances where children unexpectedly do not attend for a booked service (particularly where there may be multiple cancellations in one day, for example where an illness that prevents attendance has spread to a number of children in a particular service or area of a service), employers would benefit from having increased flexibility with respect to how staff who are no longer required for a shift (or part of a shift) due to client cancellations, may be productively utilised. It is noted that similar rostering flexibility is found in the SCHCDS Award.

428. The development of any such proposal would need to carefully consider the needs and circumstances of the diverse parts of the industry covered by the CS Award. The issue may impact employers differently depending on which part of the industry they operate in. Therefore, Ai Group proposes that the concerns we have raised are the subject of discussion before the Commission, in order to understand the various parties' views, prior to any specific proposal being advanced.

C. Part-time and Casual Minimum Engagement Periods (Clauses 10.4(e) & 10.5(c))

429. Currently, clause 10.4(e) of the award requires an employer to roster a part-time employee for a minimum of two consecutive hours on any shift. Similarly, clause 10.5(c) of the award stipulates that a casual employee is to be paid a minimum of two hours pay for each engagement.

430. Ai Group proposes that the award be varied to permit part-time and casual employees to be rostered (and paid) for a period less than two consecutive hours on any shift, where it is for the purpose of attending a meeting or participating in training, however the employee is not required to attend a designated workplace for this. That is, where the employee is at liberty to engage in the training or meeting from a location of their choosing, including their private residence.

431. In order to give effect to this proposal, Ai Group proposes clause 10.4(e) be varied as follows:

> **(e)** An employer is required to roster a part-time employee for a minimum of two consecutive hours on any shift, except where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

432. Ai Group proposes an identical change to the award in respect of casual employees, to be given effect by varying clause 10.5(c) in the following terms:

> **(c)** A casual employee will be paid a minimum of two hours pay for each engagement, except where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

433. The existing minimum engagement periods are unduly restrictive. They require an employer to roster or engage an employee for a minimum period of two hours, even if the employee is working for a short period of time, from home. They do not reflect the increasing prevalence of the availability of options for staff to participate in staff meetings and training online, from a location of their choosing. Typically, one hour or less is required to attend to such work.

434. In *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, the Commission explained the rationale underpinning minimum engagement periods as follows: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[231]

435. Plainly, the disutilities associated with attending work do not arise where an employee is working from home. Therefore, the fundamental justification underlying the extant minimum engagement provisions does not apply where employees remotely attend staff meetings or attend training. The above provisions should be revised to reflect this.

436. An ability for an employer to engage a part-time or casual employee for a period less than the minimum is particularly relevant in the context of the children's services and early childhood education industry, which is comprised in large part of casual and part-time employees. Further, it is generally not possible for an employer to divert employees who form part of minimum child-to-educator ratios away from their usual duties during service operating hours to participate in training or meetings, and still maintain compliance with this requirement. This naturally represents a challenging situation for an employer to attempt to meet with its workforce or section of its workforce at a time when all required attendees are rostered for work and available to do so, at the same time. The requirement to pay a part-time or casual employee for the minimum two hour period may deter employers from including employees in meetings or training opportunities.

[231] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

D. Electronic Rostering (Clause 21.7(a))

437. Currently clause 21.7(a) of the award requires an employee to post a legible roster at a place readily accessible to employees indicating their rostered hours of work. It is not clear that this obligation can be satisfied by an employer making a roster available to employees by electronic means. The provision is therefore ambiguous and uncertain.

438. In addition, it has become increasingly common for employers and employees to utilise electronic means of communication, including email, text messages and smart phone applications. In this context, to the extent that the award does not permit a roster to be made accessible to employees by electronic means, it does not reflect contemporary work practices. It would also be internally inconsistent within the award itself, noting clauses 10.4(d) and 21.7(b)(i) expressly permit agreements between an employer and an employee to be made by electronic means of communication.

439. To address this, Ai Group proposes clause 21.7(a) be deleted and replaced with the following:

> (a) An employer must ensure that the work roster is available to all employees, either exhibited on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

E. Meal Breaks – Out of School Hours Care (New Clause 22.2)

440. Clause 22.1 of the award requires an employee to be provided with an uninterrupted unpaid meal break of at least 30 minutes after no more than five hours work (unless the employee agrees to forego the break on a shift no longer than six hours).

441. Clause 22.1(c) modifies the meal break entitlement, to a paid break of not less than 20 minutes or more than 30 minutes (counted as time worked) where an employee is required to remain on the employer's premises.

442. The current provisions are not appropriate in the context of the types of activities employees may be engaged in as part of an out-of-school hours care program providing childcare and recreation during school vacation periods. Such programs commonly involve excursions away from the employer's premises, for example to a movie cinema or local swimming pool or other recreational facility. Excursions may consume the major portion of the period of care during that day. In such situations, it is often impractical for an employee to take an uninterrupted meal break having regard to the location at which the break may necessarily need to be taken and the requirement for an employer to maintain minimum child-to-educator ratios at all times during the excursion. Insofar as the award fails to accommodate situations such as these, it does not reflect contemporary work practices within the out-of-school hours care sector.

443. To address this, Ai Group proposes the insertion of new clause 22.2 in the following terms:

22.2 Meal breaks (out-of-school hours care during school vacations)

(a) Clause 22.2 applies to employees whilst engaged in providing out-of-school hours care during school vacation periods, away from the employer's premises.

(b) An employee will not be required to work in excess of five hours without an unpaid meal break of not less than 30 minutes and not more than one hour. Provided that employees who are engaged for not more than six hours continuously per shift may elect to forego a meal break.

(c) A meal break must be uninterrupted. Where there is an interruption to the meal break and this is occasioned by the employer, overtime will be paid until an uninterrupted break is taken. The minimum overtime payment will be as for 15 minutes with any time in excess of 15 minutes being paid in minimum blocks of 15 minutes.

(d) Where an employee is required by the employer to have a meal while actively supervising children as part of the normal work routine or program, this will be treated as time worked and paid as such. In addition, clauses 22.2(b) and (c) do not apply.

444. Related amendments are proposed to the heading to clause 22.1, and clause 22.1(a), together with associated renumbering of clauses.

445. Importantly, Ai Group does not propose any removal or reduction of the period of the break to which an employee is entitled. Our proposal that an employee be paid at ordinary rates in circumstances where they do not have all of the usual liberties associated with an unpaid meal break is consistent with existing clause 22.1(c) of the award and accordingly, is evidently already permitted in some existing circumstances within the industry.

446. Further, the proposal is consistent with how unpaid meal breaks are dealt with in the SCHCDS Award in circumstances where an employee is required by the employer to have a meal with a client or clients as part of the normal work routine or client program.[232]

F. Rest Periods – Out of School Hours Care (Clause 22.2)

447. By extension, and for the same reasons outlined in respect of meal breaks, the requirement in the extant clause 22.2 of the award for employees to receive one (or in some circumstances, two) *uninterrupted* paid rest breaks during their shift is not practical in the context of employees involved in supervising excursions during school vacation periods.

448. To address this, Ai Group proposes that the existing clause 22.2(c) of the award be varied as follows:

> **(c)** All rest periods must be uninterrupted, except for employees engaged in providing out of school hours care during school vacation periods away from the employer's premises, who may be required to take a paid break while actively supervising children as part of the normal work routine or program.

449. Importantly, Ai Group does not propose the removal of the paid meal break. An employee, whilst continuing to actively supervise children, may still (for example) consume food or a drink or be seated by way of rest during the period.

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[232] Clause 27.1(c) of the CS Award.

G. Transitional Provisions (Schedule A)

450. Schedule A of the award contains transitional provisions containing arrangements relevant to how the award was to apply to employers to whom a different minimum wage instrument and/or award-based transitional instrument applied immediately prior to 1 January 2010.

451. Schedule A contains 9 clauses (A.1 to A.9, inclusive). Operative provisions are contained in A.2, A.3 and A.5 to A.9 (inclusive). Clauses A.2, A.3 and to A.5 to A.8 (inclusive) are all expressed as having ceased to operate from the beginning of the first full pay period after 1 July 2014.[233] Clause A.9 ceased to operate on 31 December 2014.[234]

452. For this reason, Ai Group proposes Schedule A be deleted in its entirety.

453. We note that the Commission has previously determined it is appropriate for such transitional provisions to be deleted in full where the Schedule contains only transitional provisions that are no longer relevant.[235]

454. Consequential amendments and proposed to renumber remaining Schedules B to H (inclusive) as Schedules A to G, respectively.

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[233] CS Award, Schedule A, Clauses A.2.7, A.3.9, A.5.5, A.6.5, A.7.4 and A.8.6.

[234] CS Award, Schedule A, Clause A.9.1(b).

[235] See for example *4 yearly review of modern awards – Award stage – Group 4 awards* [2018] FWCFB 6852 at [129].

MA000002 [insert print number]

DRAFT DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24
(AM2023/21)

CLERKS – PRIVATE SECTOR AWARD 2020
[MA000002]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 – Clerks – Private Sector Award 2020

A. Further to the decision issued by the Fair Work Commission on [insert date],[1] the *Clerks – Private Sector Award 2020*[2] is varied by:

Chapters 5 & 12A

1. Inserting the following rows into the table in clause 7.2 titled "Table 1 – Facilitative provisions":

10.5	Minimum engagement / payment for part-time employees	An individual employee
11.4	Minimum payment for casual employees	An individual employee

2. Deleting clause 10.5 and replacing it with the following:

10.5 An employer must engage a part-time employee for a minimum of 3 hours' work on each occasion or provide a minimum payment of 3 hours. This obligation applies even where the employee is required to work for fewer than 3 consecutive hours, provided the employee is ready, willing and able to

[1] [citation].

[2] MA000002.

perform such work. Notwithstanding this clause, an employer and employee may agree to reduce the minimum periods prescribed by it.

3. Deleting clause 11.4 and replacing it with the following:

11.4 An employer must pay a casual employee for a minimum of 3 hours' work on each engagement even if they are rostered to work for fewer than 3 consecutive hours. Provided that an employer and a casual employee may agree to reduce the minimum payment period prescribed by this clause.

Chapter 7

4. Deleting clause 17.2 and replacing it with the following:

17.2 Pay period

(a) The employer may determine the pay period of employees as being either weekly or fortnightly.

(b) The employer and an individual employee, or the majority of employees, may agree to monthly or four-weekly pay periods.

Chapter 8

5. Deleting clause 5.1(e) and replacing it with the following:

(e) annual leave loading; or

(f) pay periods.

Chapter 9

6. Deleting clause 32.3 and replacing it with the following:

32.3 Annual leave loading

(a) During a period of accrued annual leave an employee will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in clause 16 —Minimum rates.

(b) In clause 32.3:

(i) a **relevant weekend penalty amount** is an applicable penalty rate prescribed by clause 24 – Penalty rates (employees other than shiftworkers) for working on weekends, less the minimum hourly rate; and

(ii) a **relevant shift penalty amount** is an applicable penalty rate prescribed by clause 31 – Penalty rates for shiftwork for working shiftwork, less the minimum hourly rate.

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(c) For an employee who would have worked on day work only had they not been on leave, the loading is the greater of:

(i) **17.5%** of the minimum hourly rate for the employee's ordinary hours of work in the period; or

(ii) The relevant weekend penalty amounts payable to the employee for all ordinary hours they would have worked on a weekend if they were not on leave during the period.

(d) For an employee who would have worked on shiftwork had they not been on leave, the loading is the greater of:

(i) **17.5%** of the minimum hourly rate for the employee's ordinary hours of work in the period; or

(ii) The relevant shift penalty amounts payable to the employee for all ordinary hours they would have worked in the period if they were not on leave.

(e) Notwithstanding clauses 32.3(c) and 32.3(d), where the number of hours that would attract the relevant weekend or shift penalty amounts specified in clauses 32.3(c)(ii) or 32.2(d)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period.

Chapter 11

7. Inserting the words "(including by electronic means)" into clause 5.4(a) after the words "written proposal".

8. Inserting the words "(including by electronic means)" into clause 5.7(a) after the words "in writing".

9. Inserting the words ", or confirmed using electronic means," into clause 5.7(b) after the word "signed".

10. Inserting the words "(including by electronic means)" into clause 5.11(a) after the words "written agreement".

11. Inserting the words "(including by electronic means)" into clause 5.11(b) after the words "written notice".

12. Inserting the words "(including by electronic means)" into the note following clause 5.11, after the words "written notice".

13. Inserting the words "(including by electronic means)" into the chapeau of clause 10.2 after the words "in writing".

14. Inserting the words “(including by electronic means)” into clause 10.3 after the words “in writing”.

15. Inserting the words “(including by electronic means)” into clause 12.3 after the words “in writing”.

16. Inserting the words “(including by electronic means)” into clause 20.3(a) after the words “in writing”.

17. Inserting the words “(including by electronic means)” into clause 20.3(b) after the words “written notice”.

18. Inserting the words “(including by electronic means)” into clause 32.4(a) after the words “in writing”.

19. Inserting the words “, or confirmed using electronic means,” into clause 32.4(b)(ii) after the word “signed”.

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20. Inserting the words “(including by electronic means)” into clause 32.5(b) after the words “written notice”.

21. Inserting the words “(including by electronic means)” into clause 32.5(c) after the words “written notice”.

22. Inserting the words “(including by electronic means)” into clause 32.5(e)(i) after the words “in writing”.

23. Inserting the words “(including by electronic means)” into clause 32.5(g) after the words “in writing”.

24. Inserting the words “(including by electronic means)” into clause 32.7(a) after the words “in writing”.

25. Inserting the words “(including by electronic means)” into clause 32.8(a) after the words “written notice”.

26. Inserting the words “(including by electronic means)” into clause 32.9(c) after the words “in writing”.

27. Inserting the words “, or confirmed using electronic means,” into clause 32.9(e) after the word “signed”.

28. Inserting the words “(including by electronic means)” into the chapeau of clause 38.2 after the words “in writing”.

Chapter 12B

29. Inserting a new clause 13.9 as follows:

13.9 If an employee is working from a location other than a workplace designated by the employer, the employer and employee may agree that clauses 10.5, 11.4, 13.3 and 13.6(a) (as applicable) will not apply when the employee is so working.

Chapter 12C

30. Deleting clause 13.3 and replacing it with the following:

13.3 Ordinary hours may be worked between 7.00am and 7.00pm on Monday to Sunday.

31. Deleting “Friday and 7:00 am and 12:30pm Saturday” in clause 13.4 and replacing it with “Sunday”.

32. Deleting clause 24.3(a).

33. Renumbering clauses 24.3(b) and (c) as 24.3(a) and (b) respectively.

Chapter 12D

34. Renumbering clause 15.4 as 15.5.

35. Inserting a new clause 15.4 as follows:

15.4 Notwithstanding clause 15.3, an employer and an employee who works up to six hours may agree that the employee will forfeit the meal break. Such agreement may be reached in relation to one or more specific periods of work, or on an ongoing basis.

Chapter 12E

36. Deleting clause 18 and replacing it with the following:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award:

(i) Clause 10.6 – Part-time employees; and

(ii) clause 13.8 (Make-up time); and

(iii) clause 16 — Minimum rates; and

(iv) clause 19 — Allowances; and

(v) clause 21 — Overtime (employees other than shiftworkers); and

(vi) clause 22 — Rest period after working overtime (employees other than shiftworkers); and

(vii) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers); and

(viii) clause 24 — Penalty rates (employees other than shiftworkers); and

(ix) clause 26 — Ordinary hours of work and rostering for shiftwork; and

(x) clause 28 — Overtime for shiftwork; and

(xi) clause 29 — Time off instead of payment for overtime for shiftwork; and

(xii) clause 30 — Rest period after working overtime for shiftwork; and

(xiii) clause 31 — Penalty rates for shiftwork; and

(xiv) clause 32.3 — Annual leave loading.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).

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(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

18.2 Changes to part-time employees' hours of work

(a) Clause 18.2 applies to a part-time employee who is being paid an annualised wage and their employer, if in accordance with clause 10.3 or clause 10.4, the employee's hours of work agreed under clause 10.2 are varied on an ongoing basis.

(b) The employer must review the matters described in clause 18.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 18.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 18.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

18.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 18.3(b) must also be undertaken:

(i) Every 12 months, or as soon as reasonably practicable thereafter;

(ii) Upon the termination of the employee's employment

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 18.3(d).

18.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Chapter 12F

37. Inserting the following table into clause 16.1:

Table 3A Minimum annual wage

Level 5	$59,908.20
Call centre technical associate	$65,625.67

38. Renumbering clauses 19 to 42 as clauses 20 to 43 respectively.

39. Inserting a new clause 19 as follows:

19. Exemptions

19.1 This clause applies to:

(a) Full-time employees who are paid a salary that exceeds the minimum annual wage prescribed by clause 16.1 for level 5 by at least 15%; and

(b) Part-time employees who are paid a salary that exceeds the minimum annual wage prescribed by clause 16.1 for level 5 by at least 15%, calculated on a pro-rata basis;

provided that in respect of employees classified as Call Centre Technical Associate, this clause applies to full-time employees who are paid a salary that exceeds the minimum annual wage prescribed at clause 16.1 for that classification level by at least 15% and to part-time employees on a pro-rata basis.

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19.2 The following provisions of the award do not apply to the employees, where applicable:

(a) Clause 10 – Part-time employees;

(b) Clause 13 – Ordinary hours of work (employees other than shiftworkers)

(c) Clause 14 – Rostering arrangements (employees other than shiftworkers)

(d) Clause 15 – Breaks

(e) Clause 17 – Payment of wages

(f) Clause 19 – Allowances

(g) Clause 21 – Overtime (employees other than shiftworkers)

(h) Clause 22 – Rest period after working overtime (employees other than shiftworkers)

(i) Clause 23 – Time off instead of payment for overtime (employees other than shiftworkers)

(j) Clause 24 – Penalty rates (employees other than shiftworkers)

(k) Clause 26 – Ordinary hours of work and rostering for shiftwork

(l) Clause 27 – Breaks for shiftwork

(m) Clause 28 – Overtime for shiftwork

(n) Clause 29 – Time off instead of payment for overtime for shiftwork

(o) Clause 30 – Rest period after working overtime for shiftwork

(p) Clause 31 – Penalty rates for shiftwork

(q) Clause 32.3 – Annual leave loading

(r) Clause 37.2 – Public holidays

Chapter 12G

40. Deleting clause 21.5 and replacing it with the following:

21.5 Return to duty

(a) An employer must pay an employee at the overtime rate specified in clause 21.4 where an employee is required to perform work after the usual finishing hour of work for that day.

(b) The employer must pay an employee a minimum payment of 3 hours under a requirement in clause 21.5(a), except where the work is performed at a location that is not a designated workplace.

(c) Clause 21.5 does not apply where the work is continuous (subject to a meal break of not more than one hour) with the start or finish of ordinary working time.

41. Updating the cross references accordingly.

B. This determination comes into operation on [date].

<u>PRESIDENT</u>

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MA000003 [insert print number]

DRAFT DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24
(AM2023/21)

FAST FOOD INDUSTRY AWARD 2020
[MA000003]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 - Fast Food Industry Award 2020

A. Further to the decision issued by the Fair Work Commission on [insert date],[1] the *Fast Food Industry Award 2020*[2] is varied by:

Chapters 5 & 13

1. Deleting Table 1 – Facilitative Provisions in clause 7.2 and replacing it with:

Clause	Provision
10.2	Minimum engagement for part-time employees
10.8	Flexible part-time employment
11.3	Minimum daily engagement for casual employees
13.7	Performance of ordinary work hours across more than one period in a day
14.5	Arrangements for taking meal and rest breaks
21.7	Time off instead of payment for overtime
23.3	Annual leave in advance

[1] [citation].

[2] MA000003.

Clause	Provision
23.4	Cashing out of annual leave
24.2(c)	Personal/carer's leave and compassionate leave—casual employees
28.2	Substitution of public holidays by agreement

Chapters 5 & 13C

2. Deleting clause 10.2 and replacing it with:

10.2 An employer must roster a part-time employee for a minimum of 3 consecutive hours on any shift, provided that:

(a) An employer and a part-time employee may agree to reduce the minimum period prescribed by this clause; and

(b) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

3. Deleting clause 10.3(e) and replacing it with the following:

(e) that subject to clause 10.2, the daily engagement is a minimum of 3 consecutive hours.

4. Deleting clause 11.3 and replacing it with the following:

11.3 The minimum daily engagement for a casual employee is 3 consecutive hours, provided that:

(a) an employer and a casual employee can agree to reduce the minimum daily engagement prescribed by this clause; and

(b) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

Chapter 6

5. Renumbering clause 16.3 as 16.4.

6. Inserting a new clause 16.3 as follows:

16.3 Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

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Chapter 7

7. Renumbering clause 16.2 as 16.3.

8. Inserting a new clause 16.2 as follows:

16.2 Notwithstanding clause 16.1, by agreement between the employer and the majority of affected employees, wages may be paid 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.

Chapter 8

9. Deleting clause 5.1(e) and replacing it with the following:

(e) annual leave loading; or

(f) pay cycles.

Chapter 9

10. Inserting a new clause 22.2(d) as follows:

(d) Notwithstanding clause 22.2(c), where the number of hours that would attract the relevant weekend penalty amounts specified in clause 22.2(c)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period.

Chapter 10

11. Renumbering clause 15.1 as 15.1(a).

12. Inserting a new clause 15.1(b) as follows:

(b) An employer is taken to satisfy its obligation to pay a full-time employee for a 38 ordinary hour week where the employer pays an amount that is equivalent to the minimum weekly rate prescribed by clause 15.1(a) or the minimum hourly rate multiplied by 38.

Chapter 11

13. Inserting the words "(including by electronic means)" into clause 5.4(a) after the words "written proposal".

14. Inserting the words "(including by electronic means)" into clause 5.7(a) after the words "in writing".

15. Inserting the words ", or confirmed using electronic means," into clause 5.7(b) after the word "signed".

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16. Inserting the words "(including by electronic means)" into clause 5.11(a) after the words "written agreement".

17. Inserting the words "(including by electronic means)" into clause 5.11(b) after the words "written notice".

18. Inserting the words "(including by electronic means)" into the chapeau of clause 10.3 after the words "agree in writing".

19. Inserting the words "(including by electronic means)" into clause 12.3 after the words "in writing".

20. Inserting the words "(including by electronic means)" into clause 19.3(a) after the words "in writing".

21. Inserting the words "(including by electronic means)" into clause 19.3(b) after the words "written notice".

22. Inserting the words "(including by electronic means)" into clause 22.3(a) after the words "agree in writing".

23. Inserting the words ", or confirmed using electronic means," into clause 22.3(b)(ii) after the word "signed".

24. Inserting the words "(including by electronic means)" into clause 22.4(c) after the words "agree in writing".

25. Inserting the words ", or confirmed using electronic means," into clause 22.4(e) after the word "signed".

26. Inserting the words "(including by electronic means)" into clause 22.6(a) after the words "in writing".

27. Inserting the words "(including by electronic means)" into clause 22.7(a) after the words "written notice".

28. Inserting the words "(including by electronic means)" into clause 28.2 after the words "give in writing".

Chapter 13A

29. Deleting clause 10.3(d).

30. Renumbering clauses 10.3(e) and 10.3(f) as 10.3(d) and 10.3(e).

31. Deleting the words "and are subject to any agreement made under clause 10.3 regarding a part-time employee's regular pattern of work" from clause 14.2.

32. Deleting clause 14.3.

33. Renumbering current clause 14.4 and 14.5 as 14.3 and 14.4.

Chapter 13B

34. Renumbering clause 10.8 and 10.9 as 10.9 and 10.10.

35. Inserting a new clause 10.8 as follows:

10.8 An employer and part-time employee may agree in writing (including by electronic means) that where the employee agrees to perform additional hours of work outside or in excess of their regular pattern of work as agreed under clause 10.3 or as varied pursuant to clause 10.5 or 10.7, the time worked will be treated as ordinary hours and paid as such.

36. Deleting clause 10.10 (as renumbered) and replacing it with the following:

10.10 Subject to clause 10.8, all time worked in excess of the number of ordinary hours agreed under clause 10.3 or varied under clause 10.5 or 10.7, is overtime and must be paid at the overtime rate in accordance with clause 20—Overtime.

37. Renumbering clauses 20.4 to 20.7 as 20.5 to 20.8.

38. Inserting a new clause 20.4:

20.4 The following clauses operate subject to clause 10.8:

(a) clause 20.3(a)(iv)

(b) clause 20.3(a)(v)

(c) clause 20.3(a)(vi)

(d) clause 20.3(b) and

(e) clause 20.3(c).

Chapter 13D

39. Deleting clause 13.6 and replacing it with the following:

13.6 Unless otherwise agreed pursuant to clause 13.7, ordinary hours of work on any day are continuous, except for rest breaks and meal breaks, as specified in clause 14—Breaks.

40. By renumbering clause 13.7 as clause 13.8.

41. Inserting a new clause 13.7 as follows:

13.7 By agreement between an employer and employee, an employee may perform ordinary hours of work during two separate periods of work on any day. Any such agreement may be ongoing or for a specified period of time.

Chapter 13E

42. Inserting the words “Subject to any agreement under clause 14.6” at the start of clause 14.5.

43. Inserting a new clause 14.6 as follows:

14.6 An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):

(a) the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;

(b) the employee take rest breaks combined with meal breaks; and/or

(c) the employee will work up to 6 hours without taking a meal break.

Chapter 13F

44. Inserting a new clause 14.7 as follows:

14.7 Notwithstanding anything in this clause, an employer may direct an employee to perform work during a rest break or meal break. Such work will be treated as ordinary hours and paid as such. The employer must endeavour to provide the employee with an alternate break as soon as reasonably practicable thereafter.

Chapter 13G

DRAFT

45. Inserting a new clause 17 as follows:

17. Annualised wage arrangements

17.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee classified as Fast Food Employee Level 3 an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 17.1(c):

(i) clauses 10 – Part-time employment;

(ii) clause 14.6 - Payment for work during unpaid meal break;

(iii) clause 15 – Minimum rates;

(iv) clause 18 – Allowances;

(v) clause 21 – Overtime;

(vi) clause 22 – Penalty rates;

(vii) clause 23.2 – Annual leave loading; and

(viii) clause 28.3 - Payment for work on public holiday or substitute day.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 17.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 17.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

17.2 Changes to part-time employees' hours of work

(a) Clause 17.2 applies to a part-time employee who is being paid an annualised wage and, in accordance with clause 10.7, the employer and employee agree to vary the employee's regular pattern of work agreed under clause 10.3 on an ongoing basis.

(b) The employer must review the matters described in clause 17.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 17.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 17.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

17.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 17.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

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(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 17.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 17.3(d).

17.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 17 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 15—Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

46. Renumbering existing clauses 17 to 32 as clauses 18 to 33.

Chapter 13H

47. Deleting clause 17.2 and replacing it with the following:

17.2 Broken Hill allowance

(a) An employer must pay an employee at a workplace within the County of Yancowinna in New South Wales (Broken Hill) an allowance of:

(i) in the case of full-time employees: **$42.58** per week; or

(ii) in the case of part-time or casual employees: **$1.12** per hour.

(b) This allowance is in addition to all other payments.

48. In the table in clause B.1.1 of Part B.1 of *Schedule B – Summary of Monetary Allowances*, deleting the first row of the table and replacing it with the following:

Broken Hill allowance – full-time employees	17.2(a)(i)	162.64	42.58	per week
Broken Hill allowance – part-time and casual employees	17.2(a)(ii)	4.28	1.12	per hour

49. Updating the cross-references accordingly.

B. This determination comes into operation on [date].

PRESIDENT

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MA000004 [insert print number]

DRAFT DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24
(AM2023/21)

GENERAL RETAIL INDUSTRY AWARD 2020
[MA000004]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 – General Retail Industry Award 2020

A. Further to the decision issued by the Fair Work Commission on [insert date],[1] the *General Retail Industry Award 2020*[2] is varied by:

Chapters 5 & 14

1. Deleting Table 1 in clause 7.2 and replacing it with the following:

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
10.9	Minimum engagement of a part-time employee	an individual employee
11.3	Minimum engagement of a casual employee	an individual employee
15.7(g)(v)	Length of work cycle	an individual employee
15.7(j)	Rosters—number of days in work cycle	an individual employee
15.7(k)	Rosters—length of shift	an individual employee
15.7(l)	Substitution of rostered days off	the majority of employees
15.7(m)	Banking of rostered days off	an individual employee

[1] [citation].

[2] MA000004.

Clause	Provision	Agreement between an employer and:
15.8(d)	Rosters—minimum consecutive days off	an individual employee
15.9(b)	Employees regularly working Sundays	an individual employee
16.6	Breaks during work periods	an individual employee
16.7(d)	Breaks between work periods	an individual employee or a group of employees
21.11(b)	Recall allowance	an individual employee
23.3	Time off instead of payment for overtime	an individual employee
24.2	Additional provisions for work on public holidays	an individual employee
27.3(d)	Substitution of public holiday shift – shiftwork	an individual employee
30.8	Annual leave in advance	an individual employee
30.9	Cashing out of annual leave	an individual employee
35.2	Substitution of public holidays by agreement	an individual employee

Chapter 5

2. Deleting clause 10.9 and replacing it with the following:

10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours; provided that an employer and an employee may agree to reduce the minimum period prescribed by this clause.

3. Deleting clause 11.2 and replacing it with the following:

11.2 The minimum daily engagement of a casual employee is 3 hours, or 1.5 hours in the circumstances set out in clause 11.3. Provided that an employer and an employee may agree to reduce the minimum periods prescribed by this clause.

Chapter 6

4. Renumbering clause 18.4 as 18.5.

5. Inserting a new clause 18.4 as follows:

18.4 Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

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Chapter 7

6. Renumbering clause 18.2 as 18.3.

7. Inserting a new clause 18.2 as follows:

18.2 Notwithstanding clause 18.1, by agreement between the employer and the majority of affected employees, wages may be paid 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.

Chapter 8

8. Deleting clause 5.1(e) and replacing it with the following:

(e) annual leave loading; or

(f) pay cycles.

Chapter 9

9. Deleting clause 28.3 and replacing it with the following:

28.3 Annual leave loading

(a) During a period of accrued annual leave an employee will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in clause 17 —Minimum rates.

(b) In clause 28.3:

(i) a **relevant penalty amount** is an applicable penalty rate prescribed by clause 22 – Penalty rates, less the minimum hourly rate.

(ii) a **relevant shift penalty amount** is an applicable penalty rate prescribed by clause 25 – Rates of pay for shiftwork, less the minimum hourly rate.

(c) For an employee other than a shiftworker the loading is the greater of:

(i) **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

(ii) The relevant penalty amounts payable to the employee for all ordinary hours they would have worked if they were not on leave during the period.

(d) For a shiftworker the loading is the greater of:

(i) **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

(ii) The relevant shift penalty amounts payable to the employee for all ordinary hours they would have worked if they were not on leave during the period.

(e) Notwithstanding clauses 28.3(c) and 28.3(d), where the number of hours that would attract the relevant penalty or shift penalty amounts specified in clauses 28.3(c)(ii) or 28.3(d)(ii) is not known or identifiable, the employee must be paid 17.5% of the employee's minimum hourly rate for all ordinary hours of work in the period.

Chapter 11

10. Inserting the words "(including by electronic means)" into clause 5.4(a) after the words "written proposal".

11. Inserting the words "(including by electronic means)" into clause 5.7(a) after the words "in writing".

12. Inserting the words ", or confirmed using electronic means," into clause 5.7(b) after the word "signed".

13. Inserting the words "(including by electronic means)" into clause 5.11(a) after the words "by written agreement".

14. Inserting the words "(including by electronic means)" into clause 5.11(b) after the words "written notice".

15. Inserting the words "(including by electronic means)" into the note below clause 5.11 after the words "written notice".

16. Inserting the words "(including by electronic means)" into clause 8.3(a) after the words "written consent".

17. Inserting the words "(including by electronic means)" into clause 8.3(c)(ii) after the words "agreed in writing with the employer".

18. Inserting the words "(including by electronic means)" into clause 10.10(a) after the words "written notice of the change".

19. Inserting the words "(including by electronic means)" into clause 10.11(a) after the words "may request in writing".

20. Inserting the words "(including by electronic means)" into clause 10.11(c) after the words "in writing".

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21. Inserting the words "(including by electronic means)" into clause 12.7(g) after the words "in writing".

22. Inserting the words "(including by electronic means)" into clause 14.3 after the words "notify employees in writing".

23. Inserting the words "(including by electronic means)" into clause 15.7(d)(ii) after the word "written request of the employee".

24. Inserting the words "(including by electronic means)" into clause 15.8(b) after the words "written request of the employee".

25. Inserting the words "(including by electronic means)" into clause 15.9(e) after the words "written notice".

26. Inserting the words "(including by electronic means)" into clause 18.3(b) after the words "in writing".

27. Inserting the words "(including by electronic means)" into clause 18.3(c) after the words "written notice".

28. Inserting the words "(including by electronic means)" into clause 20.3(a) after the words "in writing".

29. Inserting the words "(including by electronic means)" into clause 20.3(b) after the words "written notice".

30. Inserting the words "(including by electronic means)" into clause 21.3(a) after the words "in writing".

31. Inserting the words "(including by electronic means)" into clause 28.4(b) after the words "written notice".

32. Inserting the words "(including by electronic means)" into clause 28.4(c) after the words "written notice".

33. Inserting the words "(including by electronic means)" into clause 28.4(e)(i) after the words "in writing".

34. Inserting the words "(including by electronic means)" into clause 28.4(g) after the words "in writing".

35. Inserting the words "(including by electronic means)" into clause 28.6(a) after the words "in writing".

36. Inserting the words "(including by electronic means)" into clause 28.7(a) after the words "written notice".

37. Inserting the words "(including by electronic means)" into clause 28.8(a) after the words "in writing".

38. Inserting the words ", or confirmed using electronic means," into clause 28.8(b) after the word "signed".

39. Inserting the words "(including by electronic means)" into clause 28.9(c) after the words "in writing".

40. Inserting the words ", or confirmed using electronic means," into clause 28.9(e) after the word "signed".

41. Inserting the words "(including by electronic means)" into clause 34.2 after the words "in writing".

Chapter 14A

42. Deleting clause 10.5(c).

Chapter 14B

43. Deleting clause 10.8 and replacing it with the following:

10.8 For any time worked in excess of their guaranteed hours agreed under clause 10.5 or as varied under clause 10.6 or clause 10.12, the part-time employee must be paid at the overtime rate specified in Table 10—Overtime rates. This clause operates subject to clause 10.11.

44. Renumbering clause 10.11 as 10.12.

45. Inserting a new clause 10.11 as follows:

10.11 An employer and part-time employee may agree in writing (including by electronic means) that where the employee agrees to perform additional hours of work outside or in excess of their regular pattern of work as agreed under clause 10.5 or as varied pursuant to clause 10.6 or 10.12, the time worked will be treated as ordinary hours and paid as such.

46. Inserting the words "Subject to clause 10.11," at the start of clause 21.2(b).

Chapter 14D

47. Deleting clause 15.2(c) and replacing it with the following:

(c) until 11.00 pm if the trading hours of the retailer extend beyond 9.00 pm on a Monday to Friday or 6.00 pm on a Saturday or Sunday.

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Chapter 14E

48. Renumbering clauses 15.6 to 15.9 as 15.7 to 15.10.

49. Inserting a new clause 15.6 as follows:

15.6 If an employee is working from a location other than a workplace designed by the employer, the employer and employee may agree that clauses 15.1, 15.3, 10.9 and 11.2 (as applicable) will not apply when the employee is so working.

Chapter 14F

50. Adding the words "Subject to clause 16.6," at the commencement of clause 16.5.

51. Renumbering clause 16.6 as 16.7.

52. Inserting a new clause 16.6 as follows:

16.6 An employer and employee may agree, on an ongoing basis or for a specified period of time, to one or more of the following arrangements, where the employee is entitled to the relevant break(s):

(a) the employee will take rest breaks and / or meal breaks within the first and / or last hour of work;

(b) the employee take rest breaks combined with meal breaks; and/or

(c) the employee will work up to 6 hours without taking a meal break.

Chapter 14G

53. Renumbering clauses 19 to 38 as 20 to 39.

54. Inserting a new clause 19 as follows:

19. Annualised wage arrangements

19.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time employee classified as Retail Employee Level 4 – Retail Employee Level 8 an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 19.1(c):

(i) clause 10 – Part-time employees;

(ii) clause 15.9(h) – Notification of rosters;

(iii) clause 15.9(i) – Notification of rosters;

(iv) clause 16.2 – Breaks;

(v) clause 16.6 – Breaks between periods of work;

(vi) clause 17.1—Minimum rates;

(vii) clause 17.5 – Higher duties;

(viii) clause 19—Allowances;
(ix) clause 21.2—Overtime;

(x) clause 21.3 – Time off in lieu of payment for overtime;

(xi) clause 22—Penalty rates;

(xii) clause 24.5 – What is shiftwork;

(xiii) clause 25—Rates of pay for shiftwork;

(xiv) clause 26— Rest breaks and meal breaks;

(xv) clause 28.3—Additional payment for annual leave; and

(xvi) clause 33.3 – Payment for work on public holiday or substitute day.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 19.1(c).

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(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 19.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

19.2 Changes to part-time employees' hours of work

(a) Clause 19.2 applies to a part-time employee who is being paid an annualised wage and, in accordance with clause 10.6 or 10.11, the employee's regular pattern of work is changed on an ongoing basis.

(b) The employer must review the matters described in clause 19.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 19.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 19.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

19.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 19.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 19.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 19.3(d).

19.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 19 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 17—Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Chapter 14H

55. Renumbering clauses 20 to 38 as 21 to 39.

56. Inserting a new clause 20 as follows:

20. Exemptions

20.1 This clause applies to:

(a) Full-time employees classified as Retail Employee Level 4 – Retail Employee Level 8 who are a paid a salary that is at least 25% more than the applicable minimum wage for their classification level, as prescribed by clause 17.1, multiplied by 313/6.

(b) Part-time employees classified as Retail Employee Level 4 – Retail Employee Level 8 who are a paid a salary that is at least 25% more than the applicable minimum wage for their classification level, as prescribed by clause 17.1, multiplied by 313/6 and calculated on a pro-rata basis.

20.2 The following provisions of the award do not apply the employees, where applicable:

(a) Clause 10 – Part-time employees;

(b) Clause 16 – Breaks;

(c) Clause 14 – Rostering arrangements (employees other than shiftworkers)

(d) Clause 16 – Breaks

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(e) Clause 18 – Payment of wages

(f) Clause 19 – Allowances

(g) Clause 21 – Overtime

(h) Clause 22 – Penalty rates

(i) Clause 24 – What is shiftwork

(j) Clause 25 – Rate of pay for shiftwork

(k) Clause 26 – Rest breaks and meal breaks

(l) Clause 27 – Rostering restrictions

(m) Clause 28.3 – Additional payment for annual leave

(n) Clause 33.3 – Payment for work on a public holiday or substitute day

Chapter 14I

57. Deleting current clause 19.10(a) and replacing it with the following:

(a) Clause 19.10 applies to an employee who has a current first aid qualification from St John Ambulance or a similar body, whilst they are appointed by the employer to perform first aid duty.

58. Updating the cross-references accordingly.

B. This determination comes into operation on [date].

PRESIDENT

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<PRXXXXXXX>

MA000100 [insert print number]

DRAFT DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24
(AM2023/21)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010
[MA000100]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 – Social, Community, Home Care and Disability Services Industry Award 2010

A. Further to the decision issued by the Fair Work Commission on [insert date],[1] the *Social, Community, Home Care and Disability Services Industry Award 2010*[2] is varied by:

Chapter 5

1. Deleting clause 10.5 and replacing it with the following:

10.5 Minimum payments for part-time and casual employees

(a) Part-time and casual employees will be paid for the following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(i) social and community services employees (except when undertaking disability services work) – 3 hours;

(ii) all other employees – 2 hours.

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[1] [citation].

[2] MA000100.

(b) Notwithstanding clause 10.5(a), an employer and employee may agree to reduce the minimum periods prescribed by it.

Chapter 6

2. Renumbering clause 24.2 as 24.3.

3. Inserting a new clause 24.2 as follows:

24.3 Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

Chapter 7

4. Renumbering clause 24.2 as 24.3.

5. Inserting a new clause 24.2 as follows:

24.2 Notwithstanding clause 24.1, by agreement between the employer and the majority of affected employees, wages may be paid 4 weekly or monthly. Agreement in this respect may also be reached between the employer and an individual employee.

Chapter 8

6. Deleting clause 7.1(e) and replacing it with the following:

(e) annual leave loading; or

(f) pay cycles.

Chapter 9

7. Deleting current clause 31.3 and replacing it with the following:

31.3 Annual leave loading

(a) In addition to their ordinary pay, an employee, other than a shiftworker, will be paid an annual leave loading of 17.5% of their ordinary rate of pay.

(b) Shiftworkers, in addition to their ordinary pay, will be paid the higher of:

(i) an annual leave loading of 17.5% of their ordinary rate of pay; or

(ii) the relevant weekend penalty amounts and relevant shift penalty amounts the employee would have received had they not been on leave during the relevant period.

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(c) In clause 31.3:

(i) a **relevant weekend penalty amount** is an applicable penalty rate prescribed by clause 26 – Saturday and Sunday work, for working on weekends, less the ordinary rate of pay.

(ii) a **relevant shift penalty amount** is an applicable penalty rate prescribed by clause 29 – Shiftwork, for shiftwork, less the ordinary rate of pay.

(d) Notwithstanding clause 31.3(b), where the number of hours that would attract the relevant penalty amounts specified in clause 31.3(b)(ii) is not known or identifiable, the employee must be paid a loading of 17.5% of the employee's ordinary rate of pay for all ordinary hours of work in the period.

Chapter 10

8. Inserting a new clause 15.9 as follows:

15.9 This clause applies to the equal remuneration rates for applicable Social and Community Services employees and Crisis Accommodation employees set out above. An employer is taken to satisfy its obligation to pay a full-time employee for a 38 ordinary hour week where the employer pays an amount that is equivalent to the current weekly wage or the current hourly wage multiplied by 38.

Chapter 11

9. Inserting the words "(including by electronic means)" into clause 7.7(a) after the words "in writing".

10. Inserting the words ", or confirmed using electronic means" into clause 7.7(b) after the word "signed".

11. Inserting the words "(including by electronic means)" into clause 7.11(a) after the words "by written agreement".

12. Inserting the words "(including by electronic means)" into clause 7.11(b) after the words "written notice".

13. Inserting the words "(including by electronic means)" into the note below clause 7.11 after the words "giving written notice".

14. Inserting the words "(including by electronic means)" into clause 8.2 after the words "give in writing".

15. Inserting the words "(including by electronic means)" into clause 10.3(c) after the words "in writing".

16. Inserting the words "(including by electronic means)" into clause 10.3(e) after the words "in writing".

17. Inserting the words "(including by electronic means)" into clause 10.3(g)(i) after the words "in writing".

18. Inserting the words "(including by electronic means)" into clause 10.3(g)(ii) after the words "in writing".

19. Inserting the words "(including by electronic means)" into clause 13.2 after the words "in writing".

20. Inserting the words "(including by electronic means)" into clause 23.3(a) after the words "in writing".

21. Inserting the words "(including by electronic means)" into clause 23.3(b) after the words "written notice".

22. Inserting the words "(including by electronic means)" into clause 28.2(a) after the words "in writing".

23. Inserting the words "(including by electronic means)" into clause 28.2(i) after the words "separate written agreements".

24. Inserting the words "(including by electronic means)" into clause 29.1 after the words "in writing".

25. Inserting the words "(including by electronic means)" into clause 31.4(a) after the words "in writing".

26. Inserting the words ", or confirmed using electronic means," into clause 31.4(b)(ii) after the word "signed".

27. Inserting the words "(including by electronic means)" into clause 31.5(c) after the words "in writing".

28. Inserting the words ", or confirmed using electronic means," into clause 31.5(e) after the word "signed".

29. Inserting the words "(including by electronic means)" into clause 31.7(a) after the words "in writing".

30. Inserting the words "(including by electronic means)" into clause 31.8(a) after the words "written notice".

Chapter 15B

31. Renumbering clauses 18 – 36 as 19 – 37.

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32. Inserting a new clause 18 as follows:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full-time or part-time Social and Community Services Employees classified at level 4 or higher, Crisis Accommodation Employees classified at level 2 or higher, Family Day Care Employees classified at level 3 or higher and Home Care Employees classified at level 4 or higher an annualised wage in satisfaction of any or all of the following provisions of the award, to the extent that they provide a monetary entitlement to the employee, subject to clause 18.1(c):

(i) Clauses 15 – 17 – Minimum wages;

(ii) Clause 20 – Allowances;

(iii) Clause 25.5(f) – Client cancellation;

(iv) Clause 25.6 – Broken Shifts;

(v) Clause 25.7 – Sleepovers;

(vi) Clause 25.8 – 24 hour care;

(vii) Clause 25.9 – Excursions;

(viii) Clause 25.10 – Remote work;

(ix) Clause 26 – Saturday and Sunday work;

(x) Clause 27 – Breaks;

(xi) Clause 28 – Overtime and penalty rates;

(xii) Clause 29 – Shiftwork;

(xiii) Clause 30 – Higher duties;

(xiv) Clause 31.3 – Annual leave loading; and

(xv) Clause 34.2 – Payment for working on a public holiday.

(b) Where an annualised wage is paid, the employer must advise the employee in writing (including by electronic means), and keep a record of:

(i) the annualised wage that is payable;

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage;

(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and

(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).

(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv), such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.

18.2 Changes to part-time employees' hours of work

(a) Clause 18.2 applies to a part-time employee who is being paid an annualised wage and their employer, if in accordance with clause 10.3(e) or clause 10.3(g), the employer and employee agree to vary the employee's hours of work agreed under clause 10.3(c) on an ongoing basis.

(b) The employer must review the matters described in clause 18.1(b) before the change to the employee's hours take effect, or as soon as reasonably practicable thereafter.

(c) After reviewing the matters described in clause 18.1(b), the employer may make changes to them to reflect the employee's revised pattern of work.

(d) The employer must advise the employee in writing (including by electronic means) of any changes to the matters described in clause 18.1(b) and their date of operation, before they take effect, or as soon as reasonably practicable thereafter.

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18.3 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) The employer must, within 12 months from the commencement of the annualised wage arrangement, or as soon as reasonably practicable thereafter, calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 28 days.

(c) The reconciliation process described by clause 18.3(b) must also be undertaken:

(i) Every 12 months after the initial reconciliation process, or as soon as reasonably practicable thereafter; and

(ii) Upon the termination of the employee's employment.

(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.3(b). This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.

(e) An employee must follow any reasonable requirement of their employer to keep a record of their hours of work for the purposes of clause 18.3(d).

18.4 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES, the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clauses 15 – 17—Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Chapter 15D

33. Inserting a new clause 27.2(c) as follows:

(c) Notwithstanding anything in this clause, a tea break may be taken in conjunction with another tea break or a meal break to which the employee is entitled, at a time that is agreed between the employer and employee.

Chapter 15G

34. Deleting clause 10.5A.

35. Deleting Schedule A in its entirety.

36. Renumbering existing Schedule B to Schedule I as Schedule A to Schedule H.

37. By updating the cross-references accordingly.

B. This determination comes into operation on [date].

PRESIDENT

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MA000120 [insert print number]

DRAFT DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24
(AM2023/21)

CHILDREN'S SERVICES AWARD 2010
[MA000120]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 – Children's Services Award 2010

A. Further to the decision issued on [insert date],[1] it is ordered that the *Children's Services Award 2010*[2] be varied by:

Chapters 5 & 16C

1. Deleting clause 10.4(e) and replacing it with the following:

(e) An employer is required to roster a part-time employee for a minimum of two consecutive hours on any shift, provided that:

(i) An employer and a part-time employee can agree to reduce the minimum period prescribed by this clause; and,

(ii) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

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[1] [citation].

[2] MA000120.

2. Deleting clause 10.5(c) and replacing it with the following:

(c) A casual employee will be paid a minimum of two hours pay for each engagement, provided that:

(i) An employer and a casual employee can agree to reduce the minimum period prescribed by this clause; and

(ii) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

Chapter 6

3. Renumbering clause 19.3 to 19.4.

4. Inserting a new clause 19.3 as follows:

19.4 Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

Chapter 7

5. Inserting "4-weekly" after "fortnightly" in chapeau of clause 19.2.

Chapter 8

6. Deleting clause 7.1(e) and replacing it with:

(e) annual leave loading; or

(f) pay periods.

Chapter 10

7. Deleting the words "The total minimum weekly rate of wages payable to persons employed pursuant to this award will be as set out in the following table." from clause 14.1 and replacing them with "The minimum hourly and weekly rates payable to employees in each classification level under this award are set out in the following table."

8. Renumbering clauses 14.2 to 14.8 as 14.3 to 14.9.

9. Inserting a new clause 14.2 as follows:

14.2 An employer is taken to satisfy its obligation to pay a full-time employee for a 38 ordinary hour week where the employer pays an amount that is equivalent to

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the minimum weekly rate prescribed by clause 14.1 or the minimum hourly rate multiplied by 38.

Chapter 11

10. Inserting the words "(including by electronic means)" into clause 7.4(a) after the words "written proposal".

11. Inserting the words "(including by electronic means)" into clause 7.7(a) after the words "in writing".

12. Inserting the words ", or confirmed using electronic means," into clause 7.7(b) after the word "signed".

13. Inserting the words "(including by electronic means)" into clause 7.11(a) after the words "written agreement".

14. Inserting the words "(including by electronic means)" into clause 7.11(b) after the words "written notice".

15. Inserting the words "(including by electronic means)" into the note following clause 7.11 after the words "written notice".

16. Inserting the words "(including by electronic means)" into clause 8.2 after the words "in writing".

17. Inserting the words "(including by electronic means)" into clause 10.4(c) after the words "in writing".

18. Inserting the words "(including by electronic means)" into clause 14.2(b)(i) after the words "in writing".

19. Inserting the words "(including by electronic means)" into clause 14.6(d) after the words "in writing".

20. Inserting the words "(including by electronic means)" into clause 20.3(a) after the words "in writing".

21. Inserting the words "(including by electronic means)" into clause 24.4(c) after the words "written notice".

22. Inserting the words "(including by electronic means)" into clause 24.4(d) after the words "written notice".

23. Inserting the words "(including by electronic means)" into clause 24.4(f)(i) after the words "in writing".

24. Inserting the words "(including by electronic means)" into clause 24.4(h) after the words "in writing".

25. Inserting the words "(including by electronic means)" into clause 24.6(a) after the words "in writing".

26. Inserting the words "(including by electronic means)" into clause 24.7(a) after the words "written notice".

27. Inserting the words "(including by electronic means)" into clause 24.8(a) after the words "in writing".

28. Inserting the words ", or confirmed using electronic means," into clause 24.8(b)(ii) after the word "signed".

29. Inserting the words "(including by electronic means)" into clause 24.9(c) after the words "in writing".

30. Inserting the words ", or confirmed using electronic means," into clause 24.9(e) after the word "signed".

Chapter 16A

31. Deleting clause 10.4(d)(iii) and replacing it with:

    (iii) The employer is not required to provide the full 7 days' notice of change of the days an employee is to work where the employer makes the change as a result of:

    (A) an emergency outside of the employer's control; or

    (B) another employee's unexpected absence from work.

32. Deleting the cross-reference in clause 10.4(d)(iv) to clause 10.4(d)(iii) and replacing it with a cross-reference to clause 10.4(d)(iii)(A).

33. Deleting the cross-reference in clause 10.4(d)(v) to clause 10.4(d)(iii) and replacing it with a cross-reference to clause 10.4(d)(iii)(A).

34. Deleting clause 21.7(b)(ii) and replacing it with the following:

    (ii) The employer is also not required to provide the full 7 days' notice where the employer makes the change as a result of:

    (A) an emergency outside of the employer's control; or

    (B) another employee's unexpected absence.

35. Deleting the cross-reference in clause 21.7(b)(iii) to clause 21.7(b)(ii) and replacing it with a cross-reference to clause 21.7(b)(ii)(A).

36. Deleting the cross-reference in clause 21.7(b)(iv) to clause 21.7(b)(ii) and replacing it with a cross-reference to clause 21.7(b)(ii)(A).

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Chapter 16D

37. Deleting clause 21.7(a) and replacing it with the following:

(a) An employer must ensure that the work roster is available to all employees, either exhibited on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

Chapter 16E

38. Inserting the words "**(excluding out-of-school hours care)**" at the end of the heading of clause 22.1.

39. Renumbering clauses 22.1(a) to 22.1(c) as 22.1(b) to 22.1(d).

40. Inserting a new clause 22.1(a) as follows:

(a) Clause 22.1 does not apply to employees whilst engaged in providing out-of-school hours care.

41. Renumbering clauses 22.2 to 22.3 as 22.3 to 22.4.

42. Inserting a new clause 22.2 as follows:

22.2 Meal breaks (out-of-school hours care during school vacations)

(a) Clause 22.2 applies to employees whilst engaged in providing out-of-school hours care during school vacation periods, away from the employer's premises.

(b) An employee will not be required to work in excess of five hours without an unpaid meal break of not less than 30 minutes and not more than one hour. Provided that employees who are engaged for not more than six hours continuously per shift may elect to forego a meal break.

(c) A meal break must be uninterrupted. Where there is an interruption to the meal break and this is occasioned by the employer, overtime will be paid until an uninterrupted break is taken. The minimum overtime payment will be as for 15 minutes with any time in excess of 15 minutes being paid in minimum blocks of 15 minutes.

(d) Where an employee is required by the employer to have a meal while actively supervising children as part of the normal work routine or program, this will be treated as time worked and paid as such. In addition, clauses 22.2(b) and (c) do not apply.

Chapter 16F

43. Deleting existing clause 22.3(c) and replacing it with the following:

(c) All rest periods must be uninterrupted, except for employees engaged in providing out of school hours care during school vacation periods, away from the employer's premises, who may be required to take a paid break while actively supervising children as part of the normal work routine or program.

Chapter 16G

44. Deleting Schedule A in its entirety.

45. Renumbering Schedule B to Schedule H as Schedule A to Schedule G.

46. Updating cross-references accordingly.

B. This determination comes into operation on [date].

<u>PRESIDENT</u>

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