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2/02/2024

Fair Work Commission – Pay Equity and Awards Team

By e-mail: awards@fwc.gov.au

Dear Sir/Ma'am,

AWCC Submission Part 2 – Making awards easier to use – part of the Modern Awards Review 2023-24

On the 17th January 2024 the Fair Work Commission's Statement directed AWCC Ltd to file a further submission with proposed variations to awards.

Accordingly, where possible, AWCC updated its original submission in accordance with the FWC's direction.

AWCCs board, volunteers and management would like to thank the FWC for its patience and understanding by taking the time to issue the statement and clarification dated 17th January 2024, thereby providing AWCC Ltd with the opportunity to continue with its contribution towards this very important review process.

As the FWC may be aware, AWCC Ltd is a new member owned not for profit association and the countries only peak body to represent the Payroll Profession and EmployTech sectors. During this process we are incorporating lessons learnt for future submission to be made by our Modern Award Joint Advisory Committee (MAJAC) which consists of payroll professionals and related industries representatives who work with modern awards on a daily basis.

Our contact for any queries is Ciaran Strachan CEO AWCC Ltd via ciaran.strachan@awcc.asn.au

Thankyou

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AWCC would like to acknowledge the following members for their contribution and hard work drafting both the original and updated (Part 2) submissions.

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Australian Workforce Compliance Council

AWCC Submission Part 2 Making awards easier to use - part of the Modern Awards Review 2023-24

The Australian Workforce Compliance Council Ltd
Australian Company Number (ACN): 663 421 805
Australian Business Number (ABN): 1166 342 1805
A public company limited by guarantee

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1. About AWCC Ltd

1.1 Background on the creation of AWCC Ltd

(a) AWCC Ltd was created following three years of research into wage-theft and other payroll related non-compliance.

(b) The Australian Workforce Compliance Council Ltd (AWCC), Australia's first and only member owned peak body association which represents payroll professionals and employment technology providers (EmployTech). AWCC Ltd was incorporated on the 27 October 2022.

1.2 The drivers to create AWCC and its relation to Wage-Theft

(a) The following drivers were identified as a result of research that originally began with an aim to develop a permanent wage-theft solution for Australia.

(i) Australia's Workplace Relations[1] System had no regulated operational workforce unlike the Department of the Treasury's Tax/BAS Agent[2] system.

(ii) Professions, Universities and Associations which claim to know and represent the National Workplace Relations system in an operational context, have insufficient knowledge, skills, education, training and/or capacity to comment on operational contributing factors pertaining to Workforce Compliance including wage-theft. Most of these institutions teach foreign methodologies impacting and somewhat watering down Workforce Compliance education in Australia. University and VET sector qualifications reviewed included: Human Resources, Industrial Relations, Accounting, Bookkeeping, Law including Tax and Employment Law Specialisations. This review included all major Accounting, Law, HR and related associations certifications and equivalent. The review also included a total of 22 Australian Universities degrees in these and related areas including both under and post graduate degrees, and some PhDs and recent academic journals pertaining to wage-theft.

(iii) During the past three years of research, a number of initiatives were identified as needed in order to address those best positioned to mitigate Workplace Relations non-compliance including wage-theft[3]. These initiatives are to be centred around payroll and payroll related digital service providers (Payroll Technology). Collectively this sector manages the countries entire payroll for its over 13.5 million workers.

(iv) Many current limitations exist that must be resolved to develop national capabilities able to mitigate and manage Workplace Relations and State/Territory related compliance risk. This risk ranges from wage-theft to income tax (Pay As You Go / Withholding), superannuation and taxation non-compliance.

(v) Limitations identified included no interest or limited understanding of the payroll function by Universities (22 were interviewed), nor was any interest expressed to

[1] https://www.dewr.gov.au/australias-national-workplace-relations-system
[2] https://www.tpb.gov.au/tax-agent-services
[3] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ExploitationofCleaners/Report

conduct research into payroll by the same Universities. Thus, no appropriate AQF 7 or higher (bachelor's or above) degree exists for payroll.

(vi) Current legislation misaligns the payroll profession to either Accounting or Bookkeeping via the Tax Agent Services Act 2009[4], placing Tax/BAS Agents with inappropriate skills, education and training at the centre of Workplace Relations activities, including award interpretation. Specifically, this Act requires all who charge a fee for payroll and superannuation services to be an accountant. Thereby locking out the payroll profession from solely working on payroll related superannuation and taxation, and placing pressure on accountants and bookkeepers to work beyond their skills and education in the areas of Fair Work Act, Regulations, awards and state base instruments. However, many accountants surveyed stated they rely on the services of a Payroll professional to advise them on all aspects of not only the Workplace Relations system, including award interpretation, but the correct calculation with corresponding payroll related instruments including payroll taxation and superannuation.

(vii) Payroll as a profession needs significant assistance to bring it up to speed with that of other regulated professions including Taxation and Business Activity Statement (BAS) Agents, and in addition to Professional Standards Scheme self-regulated professions such as Accountants who hold a certificate of practice and Lawyers regulated by their respective Law Society/Bar.

(viii) Payroll lacks any dedicated degree from AQF 7 (Bachelor) or higher (Master) AQF 8-9. Such degrees exist in other OECD countries including the UK, whose Charted Payroll Practitioners have access to advanced[5], bachelor's and master's degrees[6] in payroll.

(ix) Until the creation of AWCC Ltd, Australia had no member-based association or "voice" to represent those who operationalise Australia's Workforce and related labour legislation. The total economic representation to the Federal, State and Territory Governments is in the order of roughly 1/3rd of the nation's GDP. This was noted in the 2019 Independent Review of the Tax Practitioners Board dated 2019[7], by the peak bodies. Of particular interest in the report were the following statements in relation to payroll:

"payroll service providers and Digital service providers are what we (Peak Bodies) refer to as tax intermediaries…..and it is important any changes as part of this review are future proofed."

"payroll service providers….may have qualifications that do not necessarily fit within the structure as contained in the TASR."

"There were no submissions suggesting any changes to the current arrangements for payroll service providers."

[4] https://www.tpb.gov.au/legislation
[5] https://www.cipp.org.uk/training-and-education/study/fdpayroll.html
[6] https://www.cipp.org.uk/membership/chartered-membership/why-become-chartered-with-the-cipp.html
[7] https://treasury.gov.au/review/review-tax-practitioners-board-final-report

(b) As the above demonstrates, to date, payroll and payroll service providers including EmployTech providers have had no representation to Government (both State and Federal), and it has been left to intermediaries to fill this void for them for representational purposes. These intermediaries (known as the peak bodies) consist of associations for bookkeepers, accountants, superannuation funds and in some cases, lawyers (Law Council of Australia).

(c) The other sector which influences national policy in this space are politically affiliated groups such as Unions and Employer Groups. Both of which utilise experts that mostly consist of economists and lawyers. Each of which AWCC views as not having the appropriate level of skill and experience to understand and provide insight into operational aspects of Wage-Theft and related non-compliance.

(d) AWCC also identified other wider issues that include a lack of a Standards framework, to the use of potentially right wing influenced post graduate degree education for Human Resources and Management, resulting in Governance and capability related issues for Workforce Compliance and Corporate Governance, including ESG (Environmental, Social and Governance) C-Suite risk frameworks.

(e) At a more appropriate juncture, AWCC Ltd will put forward its full comprehensive Workforce Compliance solution (with a focus on prevention) to all nine Governments, including the Federal Government, and is Ministers for Workplace Relations and Treasury.

1.3 AWCCs purpose and strategic pillars:

(a) In response to the drivers listed above, the Australian Workforce Compliance Council (AWCC Ltd) was formed on 27 October 2022, and work began to create the first membership-based association for payroll professionals and their EmployTech providers including payroll and industrial relations technology.

(b) AWCCs Purpose is defined in its Constitution as follows:

(i) Provide a voice for the payroll practitioners and employment technology providers who operationalise Australia's labour and related legislation.

(ii) Endeavour to increase the public standing, credibility and capability of its payroll practitioners and employment technology providers.

(iii) Advocate on behalf of our members to all governments on matters of national policy in relation to the operational application of labour and related legislation.

(iv) Conduct and publish research to support our industry.

2. Executive Summary

2.1 Purpose of the Submission

(a) The purpose of this submission is to provide feedback to seven awards listed by the Fair Work Commission as part of its public consultation with the intent of making awards easier to use as requested by the Minister for Employment and Workplace Relations.

(b) This submission outlines our recommended approach to making awards easier to use and addresses the challenges identified in operationalising these awards, emphasising the need for key changes that enable greater clarity with the added benefit of increasing the likelihood of compliance with each modern award.

2.2 Methodology

(a) AWCC's Modern Award Joint Advisory Committee (MAJAC) conducted a comprehensive review of seven modern awards, gathering insights from its 11 members spanning six companies and seven industry participants with operational expertise in home care, aged care, social work, childcare, hospitality, fast food, and clerical services to understand the true operational impacts facing employers and employees.

(b) AWCCs (MAJAC) found the exercise of identifying issues to be improved upon in various awards to be one of the most intensive and challenging tasks undertaken. Initially, this consisted of individuals analysing each award separately and identifying two types of themes per award, these were:

(i) Specific issues in each award.

(ii) Common issues spanning all awards.

(c) Wider issues which impact awards were also identified and included in each awards recommendation, these were:

(i) Misalignment of classifications against the corresponding ANZSCO ([8]Australian and New Zealand Standard Classification of Occupations).

(ii) Unclear jurisdictional requirements.

(iii) Inconsistent definitions.

(iv) Lack of tailoring to commonly used industry language and audience literacy.

(v) Consumer Price Index referencing which impact modern award rate and allowance calculations, offering detailed insights and proposed solutions for each issue.

2.3 Findings and Conclusions

(a) The challenges and clarifications essential for the compliant implementation of the modern awards under review go beyond amendments to individual clauses. To ensure comprehension by diverse audiences with varying education levels and linguistic

[8] https://www.abs.gov.au/statistics/classifications/anzsco-australian-and-new-zealand-standard-classification-occupations/latest-release

backgrounds, it is imperative to incorporate key principles into the modern awards. This approach aims to uphold compliance with award provisions.

(b) The principles guiding our recommendations are illustrated using a singular Modern Award as a referenced example, with the acknowledgment that the same applies in many instances to the other six awards (and others outside of the 7 reviewed in this submission) with similar if not identical clauses. While specific solutions are provided where context allows, some, due to their nature, necessitate the exploration of multiple scenarios.

(c) To facilitate an effective and impactful review, we propose the establishment of a working group comprising industry representatives. This group will collaboratively outline the necessary wording and amendments to systematically address each issue within the existing award structure. Striking the right balance of information in awards is crucial, particularly in addressing the following considerations:

(vi) Simplification and Oversimplification**:** The recommendation for simplification must avoid potential conflicts and non-compliance arising from oversimplification, which may result in the loss of crucial details. Oversimplification could lead to misinterpretation, especially in complex scenarios with overlapping coverage.

(vii) Over-complication with Clarification**:** While additional clarification is proposed, providing too many examples might create confusion. It is essential to strike a balance between clarity and conciseness.

(viii) Conflict with Nuanced Legal Requirements**:** Adding guidance on communication should not conflict with existing legal requirements. It is crucial to consider and balance legal requirements that may influence award provisions, ensuring that examples and guidance do not lead to conflicts with nuanced legal interpretations at the Federal or state level or due to business type.

(d) To achieve this balance, further consultation and clarification are necessary to propose clear wording and structural changes that enable consistent compliance and effective communication of award provisions.

(e) **Summary of Systemic Modern Award Issues:** Navigating the intricacies of modern employment awards presents a multifaceted landscape fraught with challenges. From the ambiguity in business classification and award application to the misalignment of classifications with professional skill frameworks, and the unclear jurisdictional requirements within awards, employers grapple with a fundamental lack of clarity. Furthermore, inconsistencies in definitions, particularly concerning meal breaks, and the overarching failure to tailor awards to industry language and audience literacy create additional layers of complexity. These challenges not only complicate the selection and application of appropriate awards but also introduce the risk of unintentional misinterpretation and non-compliance, necessitating a thorough examination of each issue to pave the way for effective solutions.

(f) **Challenge 1: Ambiguity in Business Classification and Award Application:** Upon reviewing various awards, a prevalent issue emerges where businesses exhibit a significant degree of discretion in selecting their dominant business type to determine the applicable modern award. The decision-making process for award selection appears discretionary, with businesses aligning their dominant service or line of business to a specific award based on factors like revenue, employee work hours, and floor space. Unfortunately, there is a lack of clear guidance and consistency in determining the suitable award within a business, leading to limited context regarding the impact on employees and their roles.

The absence of compelling incentives for employers to select the correct award, especially when multiple awards could apply, contributes to this challenge. To streamline time and attendance, as well as payroll processes, employers are inclined to minimise the number of awards applied, thereby reducing the complexity associated with compliance. Illustrative examples involve companies with multiple trading entities or those operating across various industries, where selecting the correct award becomes a complex task.

(g) **Challenge 2: Misalignment of Award Classifications with ANZSCO Framework:** A second critical issue arises from the misalignment and lack of updates in the classifications provided within modern awards concerning the ANZSCO professional skill level classifications. The positions outlined in modern awards fail to align with the ANZSCO framework, creating ambiguity in definitions and their currency, ultimately falling short of meeting professional standards. While some alignment may be more proactive where professional standards exist, a comprehensive review of awards reveals a lack of effective benchmarks for individuals within the award classifications.

(h) **Challenge 3: Unclear Jurisdictional Requirements in Awards:** Adding to the complexity, certain awards remain silent on jurisdiction-based requirements, leaving employers uncertain about the implications of state-based legal provisions. While some awards acknowledge jurisdictional requirements relevant to specific clauses, this practice is neither comprehensive nor consistent across awards and clause types. National businesses and those operating across multiple states face the challenge of managing compliance with decentralised state legislation alongside modern award requirements, further underscoring the need for a consolidated point of reference via the awards.

(i) **Challenge 4: Inconsistent Definitions Across Legislation:** The fourth challenge revolves around the inconsistency of definitions, particularly in relation to meal breaks, when compared to other legislation such as liquor licensing acts. The absence of a clear definition of terms like "meal breaks" within awards, especially concerning shift hours worked, poses challenges for workers seeking to understand their rights. This lack of clarity contrasts starkly with liquor licensing legislation and regulations surrounding the retail of alcohol, where the definition of a meal is well-established and aligns between state and federal laws.

(j) **Challenge 5: Lack of Tailoring to Industry Language and Audience Literacy:** A fifth challenge stems from the one-size-fits-all approach in drafting awards, irrespective of industry, skill level, or qualification requirements. This approach poses a risk of unintentional misinterpretation and misapplication of awards and their intended conditions. Additionally, the use of subjective and discretionary language within clauses, such as the term "reasonably," introduces scope for misinterpretation and potential abuse of award clauses.

Moreover, the awards' failure to tailor language to industry audiences and consider varying literacy levels creates challenges for employers and employees, particularly those from non-English speaking backgrounds. The need for accessible language, contextual guidance, and visual aids in awards becomes crucial to avoid misapplication and non-compliance, especially when dealing with diverse demographics, including minors and individuals from different linguistic backgrounds.

(k) **Challenge 6: Consumer Price Index (CPI) Reference Impacting Modern Award Rate and Allowance Calculations:** The challenge of referencing factors affected by the Consumer Price Index (CPI), including expense allowances, becomes pronounced due to insufficient explanation on how these elements are varied in line with the CPI. The lack of specific guidance for Modern Awards, in contrast to the available information from the Australian Bureau of Statistics (ABS), hampers users' ability to accurately calculate the timing and

amount of variations. This deficiency leads to incorrect calculations being applied to rates and allowances within Modern Awards, posing a substantial impact on the correct interpretation of these crucial components. For a more detailed understanding, the internal note directs users to the ABS guidance page, yet the absence of tailored information for Modern Awards exacerbates the challenge and necessitates a focused resolution to ensure precision and compliance in rate and allowance calculations.

(l) From employer and employee experiences in the operationalisation of the modern awards reviewed, there are common themes that were evident across all 7 awards that create systemic issues:

(i) Lack of Clear Definitions: The awards lack concise and clear definitions for critical terms like "junior employee," "junior office employee," "casual employee," and "apprentice," leading to potential confusion in classification.

(ii) Complex Rate Calculation: The method for calculating rates, especially for junior employees and apprentices, is intricate and involves references to multiple tables, posing challenges for accurate payment determination.

(iii) Frequency of Variations: Frequent references to variations without providing the updated text create ambiguity. Access to the latest version of these variations is essential for accurate interpretation but is currently challenging.

(iv) Table References: The use of tables without explicit inclusion in the document makes cross-referencing difficult. The absence of the actual tables within the document further complicates understanding.

(v) Individual Flexibility Arrangements: Individual Flexibility Arrangements permit the bundling of disparate payments that have different treatments for the tax and super obligations, thus further complicating compliance.

(vi) Unclear Application of Allowances: The application of allowances, such as the fork-lift driver allowance in hospitality, lacks consistent explanation. Clarity on when and how these allowances apply is necessary to prevent misinterpretation. Additionally, the classification of allowances that are intended to compensate for an annual licence or registration fee is silent about the treatment of reduced or no pay, as the annual licence/registration fee is fixed.

(vii) Uncertain Application of Annualised Wage Arrangements: The application of annualised wage arrangements is outlined but lacks specificity, particularly regarding the outer limit of ordinary and overtime hours. This ambiguity hinders correct implementation.

(viii) Unclear Reimbursement Policies: Mention of reimbursement policies without clear guidelines on approved expenses creates uncertainty for employees, impacting their understanding of eligible expenses.

(ix) Termination Procedures: Termination procedures for agreements, such as annualised wage arrangements, are not detailed, leading to a lack of clarity on steps and responsibilities during termination and potential disputes.

(x) Record-Keeping Requirements: While there are references to record-keeping requirements, specific details on the format and content of records are not outlined, creating challenges for compliance.

(xi) Inconsistencies in Formatting: Inconsistent formatting of clauses, notes, and tables may hinder readability and referencing, making it difficult for users to locate and understand specific information.

Addressing these systemic issues requires comprehensive efforts, including simplifying definitions, standardising formatting, providing explicit details, and reducing reliance on external references for a more accessible and user-friendly modern award system.

(m) In summary, the following award review summaries outline the specific overarching issues to be considered in the revision of each specific award, along with relevant clauses and the key issues and proposed solutions for each. Detailed clause-specific proposed changes and solutions along with access to analysis is available with further consultation.

3. Hospitality Industry (General) Award [MA000009]

3.1 Summary

(a) The evaluation of the Hospitality Award has unveiled overarching themes and categories of challenges, impacting the overall clarity, communication, and practical implementation of key provisions. These themes highlight areas where improvements are crucial for the benefit of both employers and employees.

(i) Operational Complexity**:** Multiple variations in the title and commencement since 2010 have introduced operational complexity, necessitating simplification for enhanced clarity.

(i) Definition Challenges**:** The extensive list of definitions throughout the award poses a potential challenge, calling for simplification and clearer distinctions to improve user comprehension.

(ii) NES Linkage Ambiguity**:** Cross-referencing to the National Employment Standards (NES) introduces ambiguity, emphasising the need for clear communication regarding the relationship between NES and the award.

(iii) Coverage Simplification**:** The exhaustive list of covered establishments may benefit from simplification to improve understanding among stakeholders.

(iv) Flexibility Arrangements**:** Lack of specific examples or guidelines for individual flexibility arrangements calls for a more detailed and transparent process to enhance flexibility for both employers and employees.

(v) Flexible Working Requests Clarity**:** Ambiguity in handling requests for flexible working arrangements, particularly in the context of NES, underscores the need for clear and accessible information.

(vi) Employee Classification Process: The process and criteria for employee classification lack explicit guidance, necessitating the introduction of an overview or accessible links to relevant sections for clarity.

(vii) Work-Life Balance Emphasis**:** While outlining ordinary hours and rostering arrangements, there is a need for a more explicit emphasis on work-life balance, flexibility, and considerations for remote locations.

(viii) Breaks and Compliance**:** The definition of meal and rest breaks lacks emphasis on the employer's responsibility to ensure breaks are evenly spread, requiring clarification and enforcement details.

(ix) Wage Arrangements Clarity**:** Various clauses under minimum rates, including adult rates, managerial staff, casino gaming classifications, and junior rates, require clarification to ensure accurate and fair wage arrangements.

(x) Language Appropriate for Dominant Employee Demographic**:** The hospitality award deals in complex language and terminology paired with the combination of highly variable operating environments, low qualification and skill-level entry requirements. This means that the award in its complexity is being presented to an audience that is not sufficiently supported with education or tools to comprehend and apply it correctly in all relevant business contexts in its current form. There is a need to holistically revise the approach to the hospitality award and other awards that attract juniors and people of non-English speaking backgrounds who are likely to obtain

employment and build skills within the hospitality sector due to the lack of entry-level skill requirements. Legislation must have an Explanatory Memorandum to provide a plain English explanation of the legislation or enable adequate access to such support. The equivalent of an explanatory memorandum with a plain English explanation is what is lacking for Modern Awards. There is currently no such guidance to assist the audience.

(b) These identified themes collectively represent key areas for improvement within the Hospitality Award, aiming to streamline operations, enhance communication, and create a more equitable and understandable framework for all parties involved.

3.2 Issues & Proposed Solutions

(a) This comprehensive list outlines the identified issues and proposed solutions within each specified clause of the Hospitality Award, serving as a foundation for a targeted and strategic approach to highlighting and addressing these challenges.

(i) Title and Commencement (Clause 1.2):

Issue: Multiple variations since 2010 may create complexity.

Solution: Simplify or consolidate variations for clarity.

(ii) Definitions (Clause 2):

Issue: An extensive list of definitions may overwhelm users.

Solution: Simplify or group related terms; provide clearer distinctions/examples.

(iii) The National Employment Standards and this award (Clause 3):

Issue: Cross-referencing to NES creates ambiguity.

Solution: Clearly communicate the link between NES and the award.

(iv) Coverage (Clause 4):

Issue: The extensive list of covered establishments may be simplified.

Solution: Simplify the list for better comprehension.

(v) Individual Flexibility Arrangements (Clause 5):

Issue: Lack of specific examples or guidelines.

Solution: Provide specific examples and clarify the process.

(vi) Requests for Flexible Working Arrangements (Clause 6):

Issue: Cross-referencing to NES creates ambiguity.

Solution: Provide clear information within the context of the NES.

(vii) Facilitative Provisions (Clause 7):

Issue: Facilitative provisions need clearer understanding.

Solution: Simplify Table 1 for better accessibility.

(viii) Types of Employment (Clause 8):

Issue: Lack of clarity on benefits, rights, and obligations.

Solution: Simplify language; provide links to relevant sections.

(ix) Terms of Engagement (Clause 8.2):

Issue: The consequences of not informing about terms need clarification.

Solution: Clarify the consequences.

(x) Full-time Employees (Clause 9):

Issue: Lack of information on flexible work arrangements.

Solution: Explain options; provide a link to relevant clauses.

(xi) Part-time Employees (Clauses 10.1 - 10.6):

Issue: Language should be simplified; clear communication on guaranteed hours.

Solution: Simplify language; emphasise clear communication.

(xii) Casual Employees (Clause 11):

Issue: Lack of information on rights and entitlements.

Solution: Provide a brief summary; link to relevant clauses.

(xiii) Apprentices (Clause 12):

Issue: Lack of explicit information on apprentices' rights.

Solution: Elaborate on training, reimbursement, and conditions.

(xiv) Junior Employees (Clause 13):

Issue: Limited information on junior employees' rights.

Solution: Expand on pay rates, working hours, and restrictions.

(xv) Classifications (Clause 14):

Issue: No guidance on the process and criteria for classification.

Solution: Introduce an overview or link to relevant sections.

(xvi) Ordinary Hours of Work and Rostering Arrangements (Clause 15):

Issue: Lack of emphasis on work-life balance and flexibility along with definition of “remote location”.

Solution: Include a brief section; link to relevant clauses and provide definition of a remote work location with examples.

(xvii) Breaks (Clause 16):

Issue: No emphasis on the employer's responsibility for evenly spreading breaks.

Solution: Emphasise the employer's responsibility; provide details.

(xviii) Work Organisation (Clause 17):

Issue: Lack of specificity in competency determination.

Solution: Specify competency process; provide task allocation guidelines.

(xix) Minimum Rates (Clause 18):

Issue: Clarification needed for adult rates, managerial staff, casino gaming classifications, and junior rates.

Solution: Clarify conditions affecting each category.

(xx) Apprentice Rates (Clause 19):

Issue: Guidance needed on apprenticeship progression.

Solution: Keep tables updated; provide guidance.

(xxi) Supported Wage System and National Training Wage (Clauses 20 and 21):

Issue: Ensure accessibility, clarity, and timely updates.

Solution: Ensure accessibility; reflect changes appropriately.

(xxii) Higher Duties (Clause 22):

Issue: Lack of clarity in higher duties determination.

Solution: Clarify the process; provide transparency.

(xxiii) Payment of Wages (Clause 23):

Issue: Lack of clarity on pay records and payslip content.

Solution: Clearly outline the process.

(xxiv) Annualised Wage Arrangements (Clause 24):

Issue: Lack of clarity in terms and review process.

Solution: Clearly communicate terms; specify the review process.

3.3 Part 2 addition – Individual Flexible Arrangements (Clause 5)

(a) Clauses 5.1 to 5.13 Flexibility Agreements outlines the following conditions for varying award terms:

5. Individual flexibility arrangements

5.1 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.

5.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

5.3 An agreement may only be made after the individual employee has commenced employment with the employer.

5.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

5.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

5.7 An agreement must be:

(a) in writing; and

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

5.8 Except as provided in clause 5.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

5.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

5.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

5.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

5.12 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause.

5.13 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

(b) The language in the clauses needs improvement to ensure it's understandable to a wider audience given the broad application of the award across multiple sectors. There is an absence of clear guidance around flexibility arrangements with respect to what should be a consideration for the assessment of whether the employee is better off overall with the individual flexibility arrangement in place. A broad cross section of Payroll practitioners have noted over the course of the last 3 years of 7 Enterprise Agreements that pass the “better off overall” test, but still have breached other instruments including the taxation act.

(c) The language should be simplified for better readability along. Additionally, the award should provide additional guidance on assessing whether an employee is "better off overall" under the agreement.

(d) According to the not-for-profit Multicultural Youth South Australia (2022, p. 2 & p.3)[9], young refugees in South Australia face significant challenges in understanding Australian employment systems and are vulnerable to exploitation in the workplace. Furthermore, several sources frequently intermix reports which contain together “exploitation, migrant workers and underpayments,” [10][11][12] further supporting the needs for clearer language easily understood by those workers whose first language is not English or of a high literacy level.

[9] https://www.homeaffairs.gov.au/reports-and-pubs/files/migration-system-aust-future-submissions/m-r/Multicultural_Youth_South_Australia_MYSA.pdf
[10] https://www.abf.gov.au/newsroom-subsite/Pages/Employers-named-and-shamed-for-exploiting-migrant-workers-.aspx
[11] https://www.fairwork.gov.au/newsroom/media-releases/2023-media-releases/august-2023/20230815-polytrade-penalty-media-release
[12] https://www.migrantjustice.org/migrant-workers-access-to-justice-in-australia

(e) AWCC proposed the following changes for the Commissions consideration.

5.1 Despite anything else in this award, both the ~~an~~ employer and an individual employee ~~can~~ may agree to ~~vary the application of the~~ adjust certain 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 w~~When work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

5.2 ~~An~~ The agreement must be ~~one that is~~ genuinely made by the employer and the individual employee without ~~coercion or duress~~ pressure or threat.

5.3 ~~An~~ Such agreements ~~may~~ can only be made after the ~~individual~~ employee has commenced employment with the employer.

5.4 ~~An~~ If the employer ~~who wishes~~ wants to ~~initiate~~ propose ~~the making of~~ an agreement, they must:

(a) ~~give~~ Present ~~the employee~~ a written proposal to the employee; and

(b) ~~if the employer is aware that the employee has, or should reasonably be aware that the employee may have,~~ If the employee has limited understanding of written English, take reasonable steps ~~(including providing a translation in an appropriate language)~~ to ensure that the employee understands the proposal (including providing a translation in an appropriate language).

5.5 ~~An~~ The agreement must ~~result in~~ ensure that the employee is ~~being~~ better off overall compared to the standard terms of the award when the agreement is ~~at the time the agreement is made than if the agreement had not been~~ made.

5.6 ~~An~~ The agreement must include ~~do all of the following~~:

(a) ~~state the n~~Names of the employer and the employee; and

(b) ~~identify~~ T~~t~~he specific award term, or award terms, ~~the application of which is to be varied~~ being adjusted; and

(c) ~~set out how the application of the award term, or each award term, is varied~~ How the specific award terms and/or their application is being adjusted; and

(d) ~~set out h~~How the agreement results in the employee being better off overall at the time ~~the agreement is made~~ than if the agreement had not been made; and

(e) The ~~state the~~ date when the agreement ~~is to~~ starts.

(f) The employer is to ensure a conversation to determine if an employee is “better off overall” under the agreement, including expected hours of work and span of hours, overtime hours, reasonable expectation of overtime hours and conditions both before and after the agreement. The employer and employee should assess if the changes improve the employee's situation overall, taking into account factors such as financial benefits, work-life balance, and job security.

(g) The classification is to be agreed upon, specifically part time, full time or casual. For part time, hours are to be both written and agreed upon in the agreement. With casual, anticipated or expected hours to work acknowledging the nature of casual employment.

(h) The determination for the financial component including salaries is also to comply with other legal instruments outside of this award including taxation and superannuation act.

(i) If there is any uncertainty from the employer and/or employee, the employer should seek advice or clarification to ensure fairness and compliance.

5.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, ~~by~~ the employee's parent or guardian must also sign.

5.8 Except ~~as provided~~ for (b) in clause 5.7~~(b)~~, ~~an~~the agreement ~~must~~ does not ~~require the~~ need approval or consent of ~~a person other than the employer and the employee~~ anyone else.

5.9 The employer must keep the agreement ~~as a time and wages record~~ and provide ~~give~~ a copy to the employee.

5.~~10~~ ~~The employer and the employee~~ Both parties must genuinely agree to any changes, without ~~duress or coercion~~ feeling forced or threatened ~~to any variation of an award provided for by an agreement~~.

5.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

5.12 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause.

5.13 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

3.4 Part 2 addition – Cashing out of annual leave (Clause 30.10)

(a) Clause 30.10 refers to cashing out of annual leave, outlining the following conditions for the award terms:

30.10 Cashing out of annual leave

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 30.10(c).

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 30.10(c).

(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.

(d) An agreement under clause 30.10(c) must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made.

(e) An agreement under clause 30.10(c) 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.

(f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 30.10(c) as an employee record.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 30.10(c).

NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 30.10.

NOTE 3: An example of the type of agreement required by clause 30.10(c) is set out at Schedule H—Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule H—Agreement to Cash Out Annual Leave.

1. The current clause 30.10 within the award permits the cashing out of annual leave, yet it lacks explicit guidance on the frequency and conditions governing this practice. This deficiency could potentially lead to misunderstandings between employers and employees regarding the process and limitations of cashing out annual leave.
2. Furthermore, there is inconsistency in the interpretation of Time Off In Lieu (TOIL) as a cashable leave type given the definition provided for in clause 28.5(k) as outlined in the following:

28.5 Time off instead of payment for overtime

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 28.5.

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked; and

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime; and

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked; and

(iv) that any payment mentioned in clause 28.5(c)(iii) must be made in the next pay period following the request.

NOTE: An example of the type of agreement required by clause 28.5 is set out at Schedule F—Agreement for Time Off Instead of Payment for Overtime. There is no requirement to use the form of agreement set out at Schedule F—Agreement for Time Off Instead of Payment for Overtime. An agreement under clause 28.5 can be made by an exchange of emails between the employee and employer, or by other electronic means.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 28.5 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time to be paid for overtime covered by an agreement under clause 28.5 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in clause 28.5(e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause 28.5 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 28.5 will apply, including the requirement for separate written agreements under clause 28.5(b), in relation to overtime that has been worked.

[Note varied by PR763203 ppc 01Aug23]

NOTE: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65A(3) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 28.5 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

NOTE: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 28.5.

(b) The award clause fails to clarify whether employees are entitled to receive payment for accrued time off for overtime cashed out at the overtime rate as differentiated from annual leave, instead defaulting to payment at ordinary hours unless specifically agreed upon, as stipulated in section 28.5.

(c) To address the issues related to the consistency of payment of time off for overtime (TOIL) accrued, it is proposed that leave classified as TOIL be handled in accordance with the agreed overtime rate applicable at the time the TOIL was accrued as per clause 28. This ensures clarity and consistency in the treatment of TOIL as a cashable leave type, aligning with the understanding that TOIL represents compensation for overtime work. By specifying that TOIL must be compensated at the agreed overtime rate, employers and employees can accurately assess the value of TOIL accruals and avoid potential disputes over payment rates resulting from incorrectly applying the annual leave cash-out clause which is silent on the reference to overtime rates that are required to be applied to accrued time off for overtime worked.

(d) The following amendments are proposed to Clause 30.10

30.10 Cashing out of annual leave

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 30.10(c).

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 30.10(c).

(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.

(d) An agreement under clause 30.10(c) must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made, ensuring clarity on the timeline for the transaction.

(e) An agreement under clause 30.10(c) 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.

(f) The payment for cashed-out leave must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 30.10(c) as an employee record.

(j) Guidance:

(i) **Frequency and Conditions:** Cashing out of annual leave should only occur through a formal written agreement between the employer and the employee. Each instance of cashing out must be documented separately.

(ii) **Agreement Details:** The agreement must specify the amount of leave being cashed out and the corresponding payment, along with the date of payment. This ensures transparency and clarity for both parties.

(iii) **Minimum Payment:** The payment for cashed-out leave should be at least equivalent to what the employee would have received if they had taken the leave instead.

(iv) **Minimum Accrued Leave:** Employees must retain a minimum accrued entitlement to paid annual leave, ensuring they have at least 4 weeks of leave remaining after cashing out.

(v) **Maximum Amount:** There is a cap on the amount of annual leave that can be cashed out in a 12-month period, set at 2 weeks.

(vi) **Record-Keeping:** Employers are responsible for maintaining records of all agreements regarding cashing out of annual leave.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 30.10(c).

NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 30.10.

NOTE 3: An example of the type of agreement required by clause 30.10(c) is set out at Schedule H—Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule H—Agreement to Cash Out Annual Leave.

NOTE 4: As outlined in 28.5(k), upon termination of employment, time off for overtime worked by the employee to which clause 28 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

4.Fast Food Industry Award 2020 [MA000003]

4.1 Summary

(a) The assessment of the Restaurant Industry Award 2020 has revealed several prominent themes and categories of concerns that warrant careful attention and refinement. The identified issues can be broadly categorised into the following key areas:

(i) References and Incorporation: The award's references to the Miscellaneous Award and the incorporation of external terms have led to confusion, highlighting the need for a streamlined approach.

(ii) Definitions and Clarity**:** Ambiguous definitions, especially regarding terms like "reasonable overtime" and "appropriate level of training," require precision for consistent interpretation.

(iii) Working Hours and Breaks**:** Issues related to working hours, breaks, and penalty rates, including the clarity of overtime and meal break calculations, need careful examination.

(iv) Payment and Allowances**:** Concerns about penalty rates, meal allowances, and the treatment of tips call for explicit guidelines and uniformity in the award.

(v) Coverage and Classification**:** Ambiguities in coverage, classification criteria, and the exclusion list necessitate clear and concise definitions for better understanding.

(vi) Flexibility and Dispute Resolution**:** Provisions related to individual flexibility arrangements and dispute resolution require simplification and clearer guidelines for effective implementation.

(vii) Apprenticeships and Training**:** Clarity on apprenticeship laws, training provisions, and classifications must be enhanced to foster consistency and compliance.

(viii) General Language and Presentation**:** Ambiguities in language, the presentation of tables, and the lack of specificity regarding variations to the award need refinement for overall clarity.

(b) This review summary offers a high-level overview of the multifaceted issues within the Fast Food Award. Addressing these concerns through amendments and clarifications will contribute to a more transparent, fair, and effective regulatory framework for the fast-food industry, benefiting both employers and employees.

4.2 Issues & Proposed Solutions

(a) The review of the Restaurant Industry Award 2020 has revealed several prominent themes and categories of concerns that warrant careful attention and refinement. The identified issues can be broadly categorised into the following key areas:

(i) Full-time Employees (Clause 9):

Issue: Definition of 4 weeks lacks clarity.

Solution: Specify the averaging period (rolling or calendar month) and provide an example roster for better comprehension.

(ii) Fast Food Employee Level 1 (Clause 12.4(a)(ii)):

Issue: Ambiguity in measuring competence uniformly.

Solution: Define "competence" consistently across related awards, ensuring clarity and uniformity.

(iii) Part-time Employees (Clause 10.1):

Issues:

(a) Clarity needed on the maximum and minimum weekly hours.
(b) Lack of clarity on the meaning of "reasonably predictable hours."
Solution:
(a) Clearly define the maximum and minimum weekly hours.
(b) Define "reasonably predictable hours" for better understanding.

(iv) Breaks (Clause 14.1):

Issue: Lack of guidance on tracking paid breaks.

Proposed: Provide guidance on acceptable proof from employers for tracking paid breaks.

(v) National Training Wage (Clause 15.4):

Issue: Unnecessary clause about the reference to Miscellaneous Award 2020.

Solution: Remove the clause for clarity.

(vi) Meal Allowance (Clause 17.4):

Issues:

(a) Lack of clarity on what constitutes a provided meal.
(b) No guidance if overtime with conditions is cancelled.
Proposed Solution:
(a) Clearly define what constitutes a provided meal.
(b) Provide guidance on cancelled overtime with originally specified conditions.

(vii) Traveling Time Reimbursement (Clause 17.6):

Issue: Clause is confusing and needs simplification.

Solution: Rewrite the clause for better clarity.

(viii) Excluded Payments (Clause 18.2(b)):

Issue: Lack of clarity on "other similar payments."

Solution: Provide clarity on what constitutes "other similar payments."

(ix) Reasonable Overtime (Clause 20.1):

Issues:

- (a) Lack of definition for "reasonable."
- (b) No clear definition of "unreasonable."

Proposed Solution:

- (a) Define "reasonable" considering various factors.
- (b) Clearly define what is considered "unreasonable."

(x) Payment of Overtime for Full-time Employees (Clause 20.2):

Issue: Lack of clarification for non-shift workers.

Solution: Add a reference to shift workers for better understanding.

(xi) Time Off Instead of Payment for Overtime (Clause 20.7):

Issue: Random note about change in working arrangements.

Solution: Remove the random note for clarity.

(xii) Consultation about Major Workplace Change (Clause 28):

Issue: Lack of clarity on the notice period for major changes.

Solution: Specify the time frame for notice of major changes.

(xiii) Title and Commencement (Clause 1):

Issue: Lack of reference to major variations.

Solution: Include a summary or reference to major variations for better understanding.

(xiv) Definitions (Clause 2):

Issue: Definitions could be more concise.

Solution: Group related terms for better clarity.

(xv) The National Employment Standards and This Award (Clause 3):

Issue: Some terms referred to without explanation.

Solution: Clarify terms without explanation for better understanding.

(xvi) Coverage (Clause 4):

Issue: Definition of the fast food industry could be simplified.

Solution: Simplify the definition for better clarity.

(xvii) Individual Flexibility Arrangements (Clause 5):

Issue: Language could be simplified.

Solution: Simplify language for better understanding.

(xviii) Requests for Flexible Working Arrangements (Clause 6):

Issue: Note about disputes and references not prominently displayed.

Solution: Highlight the note about disputes and references for easy reference.

(xix) Facilitative Provisions (Clause 7):

Issue: Explanation of facilitative provisions could be more explicit.

Solution: Provide a clearer explanation of what facilitative provisions entail.

(xx) Full-time Employees (Clause 9.1):

Issue: Brief explanation of ordinary hours and rostering terms needed.

Solution: Include a brief explanation of ordinary hours and rostering terms for better clarity.

(xxi) Part-time Employees (Clause 10.5 and 10.7):

Issue: Language in clauses regarding variations could be simplified.

Solution: Simplify language in clauses regarding variations for better understanding.

(xxii) Classification Definitions (Clause 12.4):

Issues:

(a) Level 1 is clear but may benefit from conciseness.
(b) Level 2 is clear but could be more succinct.

(c) Level 3 is clear but could be more succinct.
Proposed Solution:
(a) Maintain clarity while making Level 1 more concise.
(b) Maintain clarity while making Level 2 more succinct.
(c) Maintain clarity while making Level 3 more succinct.

5.Restaurant Industry Award [MA000119]

5.1 Summary

(a) The review of the Restaurant Industry Award 2020 has revealed several prominent themes and categories of concerns that warrant careful attention and refinement. The identified issues can be broadly categorised into the following key areas:

(i) References and Incorporation**:** The award's references to the Miscellaneous Award and the incorporation of external terms have led to confusion, highlighting the need for a streamlined approach.

(ii) Definitions and Clarity**:** Ambiguous definitions, especially regarding terms like "reasonable overtime" and "appropriate level of training," require precision for consistent interpretation.

(iii) Working Hours and Breaks**:** Issues related to working hours, breaks, and penalty rates, including the clarity of overtime and meal break calculations, need careful examination.

(iv) Payment and Allowances**:** Concerns about penalty rates, meal allowances, and the treatment of tips call for explicit guidelines and uniformity in the award.

(v) Coverage and Classification**:** Ambiguities in coverage, classification criteria, and the exclusion list necessitate clear and concise definitions for better understanding.

(vi) Flexibility and Dispute Resolution**:** Provisions related to individual flexibility arrangements and dispute resolution require simplification and clearer guidelines for effective implementation.

(vii) Apprenticeships and Training**:** Clarity on apprenticeship laws, training provisions, and classifications must be enhanced to foster consistency and compliance.

(viii) General Language and Presentation**:** Ambiguities in language, the presentation of tables, and the lack of specificity regarding variations to the award need refinement for overall clarity.

5.2 Part 2 updated - Issues & Proposed Solutions

(a) In the review of the Restaurant Industry Award 2020, critical clauses and issues have been identified, necessitating a meticulous examination and proposed solutions for enhanced clarity, fairness, and compliance. From references to other awards and the definition of key terms to nuanced provisions affecting working hours, penalty rates, and the treatment of tips, each aspect demands careful consideration and refinement. This detailed analysis aims to provide a clear overview of the identified issues within the award, accompanied by proposed solutions to address these concerns. It is essential to ensure that the Restaurant Industry Award 2020 reflects precise language, eliminates ambiguity, and aligns with industry standards to create a fair and comprehensible framework for both employers and employees in the restaurant sector.

(i) Reference to Miscellaneous Award (Clause 2)

Issue: Incorporation of terms from the Miscellaneous Award 2020.

Solution: Include referenced terms directly in the Restaurant Industry Award 2020 for clarity.

(ii) Where the wording is "agreement by majority of employees" (Clause 6)

Issue: Lack of clarity on what constitutes a majority.

Solution: Define the threshold for a majority to ensure clear understanding.

Current wording

> **7. Facilitative provisions**
>
> **7.1** This award contains facilitative provisions which allow agreement between an employer and an individual employee, or the majority of employees, on how specific award provisions are to apply at the workplace.

Proposed wording

> Add into the definitions list:
>
> Definition of Majority: Majority of employees is classed as more than half.
>
> For example: when more than half of the employees for an employer agree to a change then the change is therefore agreed too.

(iii) What is the definition of "reasonable overtime" (Clause 18.3**)**

Issue: Lack of definition for "reasonable overtime."

Solution: Provide a clear definition of "reasonable overtime" to avoid ambiguity.

(b) Please note, payroll professionals agreed that this issue was contentious and were reluctant to put forward any suggested definitions of reasonable overtime. They all agreed any new wording should be driven by external legal precedent. However, the MAJAC wish to convey to the FWC that this is a significant issue which payroll are regularly asked their opinion on by both employers and employees. All safety guidance, including Safe Works Australia's Guide for Managing the risk of fatigue in the workplace[13] does not specify any minimum or maximum hours to be worked and instead, points back to the FWC and modern awards for some information. Further, there is fatigue medical guidance and research which does indicate that being awake for 17 hours[14] is equivalent to a blood alcohol reading of .05 and as such, we do recommend the FWC consider this as a determining factor for reasonable overtime, ie, the clause below could be added:

> Reasonable overtime is not to exceed minimum safety thresholds as outlined within Safework Australia's guide to determining fatigue.
>
> Guidance: additional overtime resulting in the employee being awake for a prolonged period (16 hours or more) would be considered unreasonable overtime due to the employer failing to provide a safe working environment by way of failing to manage workplace fatigue risk.

[13] https://www.safeworkaustralia.gov.au/system/files/documents/1702/managing-the-risk-of-fatigue.docx https://www.safework.sa.gov.au/workers/health-and-wellbeing/fatigue

[14] https://www.safework.sa.gov.au/workers/health-and-wellbeing/fatigue

(iv) Appropriate level of training (Definitions)

Issue: Lack of clarity on the definition of "appropriate level of training."

Solution: Clearly define and specify who determines the appropriate level of training.

appropriate level of training, in relation to an employee, means that the employee:

(a) has completed an appropriate training program that meets the training and assessment requirements of a qualification or one or more appropriate units of competency forming part of a training package; or

(b) has been assessed by a qualified skills assessor as having skills at least equivalent to those attained in an appropriate training program; or

(c) other than a Food and beverage attendant grade 2 as defined in Schedule A—Classification Structure and Definitions, as at 31 December 2009, had been doing the work of a particular classification for a period of at least 3 months.

Proposed wording

(a) Completion of an Appropriate Training Program:

The person must successfully finish a relevant training program. This program should adhere to the training and assessment standards specified for a particular qualification or the necessary units of competency within a training package.

(b) Assessment by a Qualified Skills Assessor:

Alternatively, if the person hasn't undergone a formal training program, they can still qualify by being assessed by a skilled professional. This assessment should confirm that the individual possesses skills at least equivalent to those acquired through a suitable training program.

In simple terms, eligibility can be achieved either by completing a recognized training program or by undergoing a skills assessment by a qualified assessor, ensuring that the individual meets the required standards.

(v) Full-time Employees: When does a 4-week period start and end? (Clause 15)

Issue: Ambiguity regarding the start and end of a 4-week period for full-time employees.

Solution: Clarify the time frame for a 4-week period for full-time employees.

Current wording

9. Full-time employees

An employee who is engaged to work an average of 38 ordinary hours per week over a period of no more than 4 weeks is a full-time employee.

Proposed wording

An employee who is engaged to work an average of 38 ordinary hours per week over a period of no more than 4 weeks as defined in this award is a full-time employee.

A four week period is defined as being restricted to four consecutive weeks with no unpaid breaks of work except weekends and public holidays (unless rostered on weekends and taking RDOs during the week).

(vi) Clause 13.3 & 13.4: Working hours for employees under 18 years (Clause 13.3 & 13.4)

Issue: Lack of clarity on working hours for employees under 18 years, especially 19/20-year-olds.

Solution: Clearly specify the working hours for employees under 18, addressing any age-related distinctions.

Current wording

13.3 An employer must not require an employee under 18 years of age to work more than 10 hours in a shift.

Proposed wording

In accordance with clause 13.3 an employee aged 18 and under cannot work more than 10 hrs in a shift. An employee aged 19 yrs of age can work more than 10 hrs but is still classed as a junior and will be paid 85% of the minimum weekly rate.

Current wording

13.4	Where the law permits, junior employees may work in a bar or other place where liquor is sold or dispensed.

Proposed wording

13.4 Where the law permits, junior employees under the age of 18 may work in a bar or other place where liquor is sold or dispensed, but dependant on the state may or may not serve or sell alcohol.

(vii) Meal Break Penalty: Clarification of 50% extra pay (Clause 16.5 & 16.5)

Issue: Ambiguity regarding whether the 50% extra pay is a penalty or overtime.

Solution: Clearly state whether the 50% extra pay is a penalty or overtime and explain the implications.

Current wording

16.5 Employer to pay higher rate if break not allowed at rostered time

If the employer does not allow the employee to take an unpaid meal break at the rostered time (or at the time agreed under clause 16.4), then the employer must pay the employee **50%** of the employee's ordinary hourly rate extra:

(a) from when the meal break was due to be taken;

(b) until either the employee is allowed to take the break or the shift ends.

Proposed wording

If the employer does not allow the employee to take an unpaid meal break at the rostered time (or at the time agreed under clause 16.4)

a) From when the meal break was due to be taken.
b) Until either the employee is allowed to take the break or the shift end

the employer needs to pay a penalty of 50% on top of their ordinary rate of pay. E.G 50% penalty on top of base rate

(viii) Additional Rest Break After Overtime: Clarity on 20-minute paid break (Clause 16.8(b))

Issue: Lack of clarity on whether the additional 20-minute paid rest break is at the overtime rate and when it should be taken.

Solution: Clearly specify the rate and timing of the additional 20-minute paid rest break after overtime.

Current wording

16.8 Additional rest break after overtime

An employer must give an employee an additional 20 minute paid rest break if the employer requires the employee to work more than 2 hours' overtime after completion of the employee's rostered hours.

NOTE: For the purposes of clause 16.8 the overtime worked does not compound on the break entitlements under clause 16.2.

EXAMPLE: An employee who works a 7 hour shift, followed by 3 hours of overtime will be entitled to breaks as follows:

(a) for the 7 hour shift, an unpaid meal break of at least 30 minutes under clause 16.2; and

(b) for the 3 hours of overtime, an additional 20 minute paid rest break under clause 16.8.

Proposed wording

(b) for the 3 hours of overtime, an additional 20 minute paid rest break under clause 16.8 at overtime rates, to be taken during the overtime period.

(ix) Annualised Wage: Clarification to avoid employee disadvantage (Clause 20.2)

Issue: Lack of clarity on annualised wage not disadvantaging employees.

Solution: Rename as "BOOT" and provide a clear explanation to avoid employee disadvantage.

Current wording

20.2 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 or the agreement terminates 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, within any 12 month period upon the termination of employment of the employee or termination of the agreement, 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 agreement for the purpose of undertaking the comparison required by clause 20.2(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.

Proposed wording (addition of fourth paragraph)

d) Regular Review: To comply with the BOOT (Better Off Overall Testing) , employers may be required to regularly review and adjust the annualised wage arrangements to ensure ongoing compliance with minimum standards.

*add BOOT (Better Off Overall Testing) to the definitions.

(x) Meal Allowance Definition: Equivalent to a meal at home (Clause 21.2(a))

Issue: Lack of clarity on what constitutes a meal for the purpose of meal allowance.

Solution: Specify that the meal should be equivalent to what the employee would have at home.

Current wording

21.2 Meal allowance

[21.2(a) varied by PR719089, PR729562, PR740968, PR762399 ppc 01Jul23]

(a) An employer must supply an employee with a meal, or pay an employee a meal allowance of **$15.30,** if the employee is required to work overtime for more than 2 hours without being notified of that requirement on or before the previous day.

Proposed wording

a) An employer must supply an employee with a meal, equivalent of a meal that the employee would have at home, or pay an employee a meal allowance of $15.30, if the employee is required to work overtime for more than 2 hours without being notified of that requirement on or before the previous day.

(xi) Split Shift Allowance: Clarification on the gap between shifts (Clause 21.3)

Issue: Lack of clarity on the gap between shifts that qualifies as a split shift.

Solution: Define the specific gap between shifts that constitutes a split shift.

Current wording

21.3 Split shift allowance

(a) Clause 21.3(b) applies to any full-time or part-time employee who has a broken working day.

[21.3(b) varied by PR718937, PR729382, PR740805, PR762228 ppc 01Jul23]

(b) The employer must pay the employee an allowance of **$4.98** for each separate work period of 2 hours or more.

Proposed wording

21.3 Split shift allowance

(a) Clause 21.3(b) applies to any full-time or part-time employee who has a broken working day.

(b)The employer must pay the employee an allowance of $4.98 for each separate work period of 2 hours or more.

(c) Definition of a split shift is any more than 1 hour between shifts that isn't considered an unpaid meal break.

(xii) Penalty Rates Table: Clarification of Penalty Rates (Clause 24.2)

Issue: Complex presentation with a percentage and dollar amount.

Solution: Align with other awards by using only a penalty percentage, providing clarity.

Current wording In table 8 Penalty rates, there is a percentage as well as a dollar amount.

Table 8—Penalty rates

Column 1 Time of ordinary hours worked	Column 2 Full-time and part-time employees	Column 3 Casual employees – Introductory to Level 2	Column 4 Casual employees – Level 3 to Level 6
	% of minimum hourly rate	% of minimum hourly rate (inclusive of casual loading)	% of minimum hourly rate (inclusive of casual loading)
Monday to Friday – 6.00 am to 10.00 pm	100%	125%	125%
Monday to Friday – 10.00 pm to midnight	100% plus $2.62 per hour or part of an hour	125% plus $2.62 per hour or part of an hour	125% plus $2.62 per hour or part of an hour
Monday to Friday – midnight to 6.00 am	100% plus $3.93 per hour or part of an hour	125% plus $3.93 per hour or part of an hour	125% plus $3.93 per hour or part of an hour
Saturday	125%	150%	150%
Sunday	150%	150%	175%
Public holiday	225%	250%	250%

Proposed wording/modification to table 8

Remove the dollar amount and only show the percentage including the $ amount, this will lessen the number of variations needed when rates are calculated, reduce errors and reduce risk for underpayments as it will eliminate a significant source of confusion.

(xiii) Provisions Related to Tips and Service Charges (Various Clauses)

Issue: Lack of guidance on handling tips and service charges, especially regarding reporting requirements.

Solution: Introduce a clause providing guidance on tip handling, reporting, and distribution.

Current wording

There is currently no clause to address tips or service charges, yet AWCC Ltd has anecdotal evidence that these are on the rise, and some POS (Point of Sales) systems are now automatically including tipping on billing, some of which do so that a customer must ensure he/she de-selects the tipping "option" prior to payment.

Other factors for the Fair Work Commission to consider:
A 2015 study by the University of Wollongong titled "*Who owns tips? Hospitality and the distribution of customer gratuities*."[15] Indicates that there is common law precedent for the employer to claim tips.

AWCC has confirmed that that the study appears to be correct and verified with the Australian Taxation Office (ATO) that any tips claimed by either the employer or employee are to be declared as a gratuity[16] and record keeping along with reporting obligations to the ATO apply.

The United Kingdom recently passed a bill to protect tipping and make it an employee only entitlement (Employment (Allocation of Tips) Act 2023[17]), and developed a code of practice for fair distribution.

Therefore, AWCC Ltd submits the following wording to considered for including within the Restaurant award.

Tips and service charges

a) Employers must ensure all tips and service charges comply with the Australian Taxation Office record keeping and reporting requirements as a gratuity.
b) Employees who keep tips and/or service charges are to comply with the Austrlaian Taxation Officer record keeping and reporting requirements as a gratuity.
c) The employer must declare in writing to the employee as part of the employees onboarding process, the policy on tipping including who claims the tip, or its manner of distribution between staff (if a share scheme exists). For example:

1. The employer shall keep all tips collected by employees.
2. The employee shall keep all tips they collect.
3. All tips are collected by the employer and distributed as per the respective Enterprise Agreement or company policy

[15] https://ro.uow.edu.au/lhapapers/2140/#:~:text=The%20common%20law%20position%20is,employees%20arising%20from%20their%20employment.
[16] https://www.ato.gov.au/law/view/document?docid=GII/GSTIITH9/NAT/ATO/00001
[17] https://www.legislation.gov.uk/ukpga/2023/13/enacted

(xiv) Public Holiday Remuneration Disparity (Clause 24.4(d) and 30.3)

Issue: Financial disparity for employees working on public holidays.

Solution: Address the financial disparity issue for employees working on public holidays.

(xv) Junior Apprentice Rates Table Clarity (Clause 18.3(ii))

Issue: Lack of clarity in the Junior Apprentice Rates Table, specifically Column 4.

Solution: Clearly indicate that Column 4 is for part-time employees in the Junior Apprentice Rates Table.

Current wording

Table 5—Junior apprentice—cooking trade minimum rates

Column 1 Year of apprenticeship	Column 2 % of the standard rate	Column 3 Minimum weekly rate (full-time employee)	Column 4 Minimum hourly rate
		$	$
1st year	55	547.25	14.40
2nd year	65	646.75	17.02
3rd year	80	796.00	20.95
4th year	95	945.25	24.88

Proposed wording

Add (Part time employee) under the heading of column 4 as per column 3.

(xvi) Proficiency Payments: Definition of Proficiency (Clause 18.4)

Issue: Lack of definition for "proficiency" payments.

Solution: Provide a clear definition of "proficiency" in the context of payments.

Current wording

18.4 Proficiency payments—cooking trade

(a) Application

Proficiency pay as set out in clause 18.4(b) will apply to apprentices who have successfully completed their schooling in a given year.

Proposed wording

Proficiency refers to a high degree of skill or expertise in a particular field or activity. It indicates a person's ability to perform a task, use a skill, or demonstrate knowledge at an advanced and competent level. Proficiency implies a level of mastery that goes beyond basic competence, suggesting a deep understanding and capability in a specific area.

(xvii) Recognition of QSR (Quick Service Restaurant) in Classifications (Various Clauses)

Issue: Lack of recognition for QSR in classifications.

Solution: Explicitly recognise QSR as a designation in the classifications.

Current wording
There is currently no definition in the restaurant award for QSR restaurant award.

Proposed wording – add the following definition to the definition table.

QSR (Quick Service Restaurants) in the restaurant award refers to Restaurants that also have take away options and delivery partners. These restaurants are called Hybrid.

(xviii) Reasonable Requirements for Training and Online Delivery (Various Clauses)

Issue: Staff being forced to do training online in their own time.

Solution: Establish reasonable requirements for training, especially when delivered online.

(xix) Award Variations Clarity (Part 1—Application and Operation of this Award)

Issue: Ambiguity in the language regarding award variations since January 1, 2010.

Solution: Provide specific details on the nature and extent of variations made since 1 January 2010 for clarity.

(xx) Clarification of Adult Apprentice Definition (Definitions)

Issue: Lack of clarity in the definition of "adult apprentice."

Solution: Clarify the types of apprenticeships covered by specifying relevant industries or qualifications for better understanding.

(xxi) Clarification of Casual Employee Definition (Definitions)

Issue: Reference to section 15A of the Act may create uncertainty.

Solution: Include a specific reference or provide the relevant content from section 15A to avoid potential discrepancies.

Current wording

> **casual employee** has the meaning given by section 15A of the Act.

Proposed wording – Add wording directly from the act.

> **15A Meaning of *casual employee.***
>
> (1) A person is a ***casual employee*** of an employer if:
>
> (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
>
> (b) the person accepts the offer on that basis; and
>
> (c) the person is an employee as a result of that acceptance.
>
> (2) For the purposes of subsection (1), in determining whether, at the time the offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:
>
> (a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
>
> (b) whether the person will work as required according to the needs of the employer;
>
> (c) whether the employment is described as casual employment;
>
> (d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.
>
> Note: Under Division 4A of Part 2-2, a casual employee who has worked for an employer for at least 12 months and has, during at least the last 6 months of that time, worked a regular pattern of hours on an ongoing basis may be entitled to be offered, or request, conversion to full-time employment or part-time employment.
>
> (3) To avoid doubt, a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
>
> (4) To avoid doubt, the question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.
>
> (5) A person who commences employment as a result of acceptance of an offer of employment in accordance with subsection (1) remains a ***casual employee*** of the employer until:
>
> (a) the employee's employment is converted to full-time or part-time employment under Division 4A of Part 2-2; or
>
> (b) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

(xxii) Liquor Service Employee Definition Clarity (Definitions)

Issue: Lack of clarity on whether it includes employees involved in the sale or service of liquor within a restaurant.

Solution: Clearly define the scope of duties for a "liquor service employee" to avoid misinterpretation.

Current wording

> **liquor service employee** means a person employed to sell or dispense liquor in bars, bottle departments or shops and includes a cellar employee.

Proposed wording

> The definition of a Liquor Service Employees means a person employed to sell or dispense liquor in bars, bottle departments or sops and includes a cellar employee. This includes restaurants with a bar within the premises.

(xxiii) Accessible Electronic Means Definition (Clause 3.3)

Issue: Lack of guidance on what constitutes "accessible electronic means."

Solution: Define what qualifies as "accessible electronic means" to ensure compliance and understanding.

Current wording

> **3. The National Employment Standards and this award**
>
> **3.1** The National Employment Standards (NES) and this award contain the minimum conditions of employment for employees covered by this award.
>
> **3.2** Where this award refers to a condition of employment provided for in the NES, the NES definition applies.
>
> **3.3** The employer must ensure that copies of this award and of the NES are available to all employees to whom they apply, either on a notice board conveniently located at or near the workplace or through accessible electronic means.

Proposed wording

> 3.3 Accessible electronic means is defined as a digital or an online method and resources that are designed and implemented to be easily understood, navigated, and used by individuals, including those with disabilities.
>
> 3.4 Accessible electronic means may include features like screen readers for the visually impaired, captions for videos to assist those with hearing impairments, keyboard shortcuts for individuals with motor disabilities, and other inclusive design practices.

(xxiv) Coverage Description Clarity (Clause 4.1)

Issue: Lack of clarity on whether it covers all employees within the restaurant industry or only those with specified classifications.

Solution: Clearly specify the scope of coverage to avoid confusion.

Current wording

4. Coverage

[Varied by PR743467]

4.1 This industry award covers, to the exclusion of any other modern award:

(a) employers in the restaurant industry throughout Australia; and

(b) employees (with a classification defined in Schedule A—Classification Structure and Definitions) of employers mentioned in clause 4.1(a).

Proposed wording/definition

4.1 This industry award covers:

a) Employer Coverage: The industry award applies to employers in the restaurant industry throughout Australia. This includes various establishments such as restaurants, reception centres, nightclubs, cafes, or roadhouses.
b) Employee Coverage: Covers employees of the employers mentioned in 4.1(a). Employees covered are those with classifications defined in Schedule A—Classification Structure and Definitions. This implies that specific roles or positions within the restaurant industry are identified and categorized in Schedule A.

Note: Clause 4.1 establishes the scope of the industry award, stating that it exclusively covers employers in the restaurant industry and their employees with defined classifications.

(xxv) Simplification of Restaurant Industry Definition (Clause 4.2)

Issue: Complex definition of the "restaurant industry."

Solution: Simplify and reorganise the definition for enhanced clarity and readability.

Current wording

4.2 In this award **restaurant industry** means restaurants, reception centres, night clubs, cafés or roadhouses and includes catering by a restaurant business and a tea room operated in, or in connection with, a restaurant business but does not include a restaurant operated in, or in connection with, premises owned or operated by an employer covered by any of the following awards:

(a) *Hospitality Industry (General) Award 2020*; or

[4.2(b) varied by PR743467 ppc 11Jul22]

(b) *Registered and Licensed Clubs Award 2020*; or

(c) *Fast Food Industry Award 2010.*

Proposed wording/definition

Under this specific award, the term "restaurant industry" is defined as restaurants, reception centres, nightclubs, cafés, or roadhouses. This definition also includes catering services provided by a restaurant and a tearoom associated with or operated in connection with a restaurant.
It's important to understand that this definition excludes restaurants operated in premises owned or operated by an employer covered by specific awards.
These specific awards include:

(a) Hospitality Industry (General) Award 2020;
(b) Registered and Licensed Clubs Award 2020;
(c) Fast Food Industry Award 2010.

Note: The award's definition of the restaurant industry includes various establishments and related services, but it explicitly excludes restaurants operated in connection with businesses covered by the above listed awards.

(xxvi) Exclusion List Clarification (Clause 4.2)

Issue: Complex exclusion list may require additional clarification.

Solution: Provide more detailed explanations or examples to clarify the exclusions.

(xxvii) On-Hire Employees Classification Definition (Clause 4.3) (a)

Issue: Lack of specificity regarding the types of classifications covered for on-hire employees.

Solution: Clearly define the classifications of on-hire employees covered by the award.

Current wording

4.3 This industry award also covers:

(a) on-hire employees working in the restaurant industry (with a classification defined in Schedule A—Classification Structure and Definitions) and the on-hire employers of those employees; and

(b) apprentices or trainees employed by a group training employer and hosted by an employer covered by this award to work in the restaurant industry (with a classification defined in Schedule A—Classification Structure and Definitions) and the group training employers of those apprentices or trainees.

Definition

on-hire means the on-hire of an employee by their employer to a client, where the employee works under the general guidance and instruction of the client or a representative of the client.

Proposed wording

On-hire: The term "on-hire" describes a situation where an employer lends or hires out an employee to work for a client. In this arrangement, the employee follows the general guidance and instructions provided by the client or a person representing the client. While on duty, the employee is under the overall direction and supervision of the client.

(xxviii) Apprentices or Trainees Coverage Specifics (Clause 4.3) (b)

Issue: Lack of specificity about the types of apprenticeships or traineeships covered.

Solution: Provide details on the specific types of apprenticeships or traineeships covered.

Current wording

4.3 This industry award also covers:

(a) on-hire employees working in the restaurant industry (with a classification defined in Schedule A—Classification Structure and Definitions) and the on-hire employers of those employees; and

(b) apprentices or trainees employed by a group training employer and hosted by an employer covered by this award to work in the restaurant industry (with a classification defined in Schedule A—Classification Structure and Definitions) and the group training employers of those apprentices or trainees.

Proposed wording (addition of C)

(c) Apprentices or traineeships covered in this award include but are not limited to:

1. Chef Apprenticeship
2. Front of House Traineeship
3. Baker Apprenticeships
4. Barista Traineeship

(xxix) Better Off Overall Criteria Definition (Clause 5.5)

Issue: Subjective nature of the "better off overall" criteria.

Solution: Define criteria or benchmarks to objectively assess whether an employee is better off overall.

Current wording

5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

Proposed wording

5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

5.6 An agreement is to individually address each of the following criteria and ensure the corresponding agreement clause provides a benefit to the employee which is equal to, or greater than the modern awards clause at the time of the agreement, and for all changes made to the award there after to the corresponding modern award during the life of the agreement.

a) Wage rates,
b) Penalty Rates and Loadings,
c) Work Hours and Rosters,
d) Leave entitlements,
e) Individual Flexibility Arrangements (IFA),
e) Other Conditions not specified above,
f) Consultation and approval.

Accompanying Guidance

1. **Wage Rates:**
   Compare the proposed wage rates in the agreement to the rates in the Restaurant award. The employee should not be worse off in terms of base pay.

2. **Penalty Rates and Loadings:**
   Consider any penalty rates, overtime rates, and other loadings in the agreement compared to those in the Restaurant award. The employee should not be disadvantaged in terms of these additional payments.

3. **Work Hours and Rosters**:
   Assess the work hours and roster arrangements under the agreement. The employee should not be worse off in terms of working hours, breaks, or any other relevant conditions compared to the Restaurant award.

4. **Leave Entitlements:**
   Examine the leave entitlements provided in the agreement (such as annual leave, personal leave, and public holiday provisions) and compare them to the Restaurant award provisions. The employee should not lose out on leave entitlements.

5. **Other Conditions:**
   Consider any other conditions or entitlements in the agreement, such as allowances, superannuation contributions, and any other benefits. The employee should not be worse off overall when compared to the Restaurant award.

6. **Individual Flexibility Arrangements (IFA):**
   If individual flexibility arrangements (IFAs) are included in the agreement, assess whether these arrangements provide genuine benefits to the employee without causing overall detriment.

7. **Consultation and Approval:**
   Ensure that the enterprise agreement has been developed through a proper process of consultation with employees, and that it has been approved by a valid majority, as listed in the definition, vote in favour of the agreement.

(xxx) Simplified Termination Process (Clause 5.11)

Issue: Complex termination process that may be difficult to enforce.

Solution: Simplify the termination process and provide clear steps for both parties.

Current wording

5.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

Proposed wording

5.11 An agreement can be terminated in the following ways:

(a) Through written agreement between the employer and the employee at any time.

(b) By either the employer or the employee providing 13 weeks' written notice to the other party. However, this notice period is reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013.

Note: If an employer and employee enter into an arrangement that claims to be an individual flexibility arrangement under this award term, and the arrangement doesn't meet a requirement outlined in section 144 of the Act, either the employee or the employer can terminate the arrangement by providing written notice of no more than 28 days (refer to section 145 of the Act).

(xxxi) Dispute Resolution Process for Flexible Working Arrangements (Clause 6)

Issue: Lack of specification on the resolution process for disputes about flexible working arrangements.

Solution: Clearly outline the process for resolving disputes related to flexible working arrangements.

Current wording

6. Requests for flexible working arrangements

[6 substituted by PR763326 ppc 01Aug23]

Requests for flexible working arrangements are provided for in the NES.

NOTE: Disputes about requests for flexible working arrangements may be dealt with under clause 34—Dispute resolution and/or under section 65B of the Act.

Proposed wording, Insert 65B of the Act.

(xxxii) Facilitative Provisions Definition (Clause 7.1)

Issue: Broad and potentially not immediately understood term "Facilitative provisions."

Solution: Provide a concise definition or explanation of "Facilitative provisions" for better understanding.

Current wording

> **7. Facilitative provisions**
>
> **7.1** This award contains facilitative provisions which allow agreement between an employer and an individual employee, or the majority of employees, on how specific award provisions are to apply at the workplace.

Proposed wording

> **7.1** This award incorporates facilitative provisions, allowing employers and individual employees, or a majority of employees, to agree on how specific award provisions should be applied in their workplace.
>
> **Refer Clause 7.2 Table 1 – Facilitative provisions.**

(xxxiii) Facilitative Provisions Application Clarity (Clause 7.2)

Issue: Lack of context for the facilitative provisions in Table 1, making practical application challenging to understand.

Solution: Provide additional context or examples to illustrate the application of facilitative provisions in Table 1.

Current Table

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
15.2(a)	Make-up time (introduction of system of make-up time)	the majority of employees
15.2(b)	Make-up time (agreement to take make-up time)	an individual employee
16.4	Agreement as to time of unpaid meal break	An individual employee
19.1	Payment of wages	an individual employee
19.2	Payment of wages	the majority of employees
23.5	Time off instead of payment for overtime	an individual employee
24.4(d)	Alternative payment for work on public holiday	an individual employee
25.8	Annual leave in advance	an individual employee
25.9	Cashing out of annual leave	an individual employee
30.2	Substitution of public holidays by agreement	an individual employee

Proposed Table

Clause	Provision	Agreement between and employer and:	Definition
15.2(a)	Make-up time (introductions of system of make-up time	The majority of employees	The employer and the majority of employees at a workplace may agree to introduce an arrangement at the workplace under which an employee takes time off during the employee's ordinary hours of work and makes up that time later.
15.2(b)	Make-up time (introductions of system of make-up time	an individual employee	If an agreement under clause 15.2(a) has been made for a workplace, an employee may elect, with the consent of the employer, to take time off and make up that time later.
16.4	Agreement as to time of unpaid meal break	an individual employee	An employer and an employee may 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 (a 'facilitation agreement').
19.1	Payment of wages	an individual employee	The employer may determine the pay period of an employee as being either weekly or fortnightly. However, the employer and an individual employee may agree to a monthly pay period.
19.2	Payment of wages	The majority of employees	Except on termination of employment, wages may be paid on any day of the week other than a Friday, Saturday or Sunday. However, if the employer and the majority of employees at a workplace agree, wages may be paid on the Friday of a week during which there is a public holiday.
23.5	Time off instead of payment for overtime	an individual employee	An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee. The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made. EXAMPLE: By making an agreement under clause 23.5 an employee who worked 2 overtime hours at the rate of time and a half is entitled to 3 hours' time off.
24.4 (d)	Alernative pament for work on public holiday	an individual employee	An employer and employee may agree that, instead of the employee being paid at 225% (as specified in clause 24.2) of the minimum hourly rate of the employee under Table 3—Minimum rates for hours worked on a public holiday, the following arrangements are to apply: the employee is to be paid at 125% of the minimum hourly rate of the employee under Table 3—Minimum rates for hours worked on the public holiday; and an amount of paid time equivalent to the hours worked on the public holiday is to be added to the employee's annual leave or the employee is to be allowed to take a day off during the week in which the public holiday falls or within a period of 28 days after the public holiday.
25.8	Annual leave in advance	an individual employee	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.
25.9 (c)	Cashing out of annual leave	an individual employee	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
30.2	Substitution of public holidays by agreement	an individual employee	An employer and employee may agree to substitute another day for a day that would otherwise be a public holiday under the NES.

(xxxiv) Expanded Types of Employment (Clause 8.1 & 8.2)

Issue: Lack of provisions for other types of employment arrangements.

Solution: Consider expanding the types of employment to include fixed-term contracts, temporary positions, or other emerging employment arrangements.

Current wording

8.1 An employee covered by this award must be one of the following:

(a) a full-time employee; or

(b) a part-time employee; or

(c) a casual employee.

Proposed wording

8.1 An Employee covered by this award can be one of the following:

(a) A full-time employee; or

(b) A part-time employee; or

(c) A casual employee; or

(d) A fixed-term contract employee; or

(e) A temporary contract employee

(xxxv) Daily or Hourly Limits for Full-Time Employees (Full-time Employees)

Issue: Lack of mention of daily or hourly limits for full-time employees.

Solution: Include provisions specifying daily or hourly limits for full-time employees to prevent potential exploitation or overworking.

Current wording

9. Full-time employees

An employee who is engaged to work an average of 38 ordinary hours per week over a period of no more than 4 weeks is a full-time employee.

Proposed wording

An employee who is engaged to work an average of 38 ordinary hours per week over a period of no more than 4 weeks is a full-time employee.

The minimum number of ordinary hours that may be worked by a full-time employee on any day is 6 (excluding meal breaks); and
The maximum number of ordinary hours that may be worked on any day is 11.5 (excluding meal breaks)

(xxxvi) Part-Time Employees Classifications (Clause 10.1)

Issue: No clear indication of classifications available for part-time employees.

Solution: Define and outline the classifications available for part-time employees, ensuring clarity and transparency.

Current wording

10.1 Classifications

An employer may employ a part-time employee in any classification defined in Schedule A—Classification Structure and Definitions.

Proposed wording

10.1 Classifications

An employer may employ a part-time employee in any classification that is listed and defined in Schedule A – Classification Structure and Definitions

(xxxvii) Part-Time Employee Definition Clarity (Clause 10.2)

Issue: Lack of details about the structure of working hours for part-time employees.

Solution: Specify whether part-time employees can work flexible hours or if there are specific hours and days during which they should be available.

Current wording

> **10.2 Definition of part-time employee**
>
> A part-time employee is an employee who:
>
> **(a)** is engaged to work at least 8 and fewer than 38 ordinary hours per week (or, if the employer operates a roster, an average of at least 8 and fewer than 38 hours per week over the roster cycle); and
>
> **(b)** has reasonably predictable hours of work.

Proposed wording (addition of point C)

> **(c)** Employer and Employee must agree to days and hours to be worked to enable workplace flexibility and employee availability.

(xxxviii) Proportionate Basis for Part-Time Employees (Clause 10.3)

Issue: Lack of guidance on how the proportionate basis for part-time employees should be calculated.

Solution: Clarify the method for calculating the proportionate entitlements of part-time employees to ensure a fair and consistent application of pay and conditions.

Current wording

> **10.3** A part-time employee is entitled, on a proportionate basis, to the same pay and conditions as those of full-time employees who do the same kind of work.

Proposed wording

> **10.3** A part-time employee is entitled, on a pro rata basis, to the same pay and conditions as those of full-time employees who do the same kind of work.

(xxxix)Changes to Guaranteed Hours Process (Clause 10.4)

Issue: Lack of detail on how changes to guaranteed hours and availability agreements for part-time employees should be managed or documented.

Solution: Specify the process for making changes to the guaranteed hours and availability of part-time employees, ensuring that any changes are agreed upon in writing and documented appropriately.

Current wording

10.4 Setting guaranteed hours and availability

At the time of engaging a part-time employee, the employer must agree in writing with the employee on all of the following:

(a) the number of hours of work which is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which is guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed hours**); and

(b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (the **employee's availability**).

10.5 Any change to a part-time employee's guaranteed hours may only be made with the written consent of the employee.

Proposed wording

10.4 Setting guaranteed hours and availability.
At the time of engaging a part-time employee, the employer must agree in writing with the employee on all of the following:

a) the number of hours and days fitting with the employee's availability and with the businesses needs of which work is guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours and/ of work which is guaranteed to be provided and paid to the employee over the roster cycle (the guaranteed hours); and

b) the days of the week on which, and the hours on those days during which, the employee is available to work the guaranteed hours (the employee's availability).

10.5 Any change to a part-time employee's guaranteed hours may only be made in writing with the written consent of the employee.

(xl) Assessment of Increased Guaranteed Hours Requests (Clause 10.8)

Issue: No guidance on how employers should assess or respond to requests for an increase in guaranteed hours by part-time employees.

Solution: Provide clear criteria and procedures for employers to assess and respond to requests for an increase in guaranteed hours by part-time employees.

(xli) Purpose of 25% Loading for Casual Employees (Clause 11.1)

Issue: Lack of clarity on the purpose of the 25% loading for casual employees.

Solution: Clearly outline the purpose of the 25% loading for casual employees and specify whether it includes compensation for leave entitlements or other benefits.

Current wording

> **11.1** An employer must pay a casual employee for each hour worked a loading of **25%** on top of the minimum hourly rate otherwise applicable under clause 17—Minimum rates.

Proposed wording

> 11.1 An employer must pay a casual employee for each hour worked a loading of 25% on top of the minimum hourly rate to compensate for not accruing any Annual leave or Sick leave. Casual employees will still accrue Long Service Leave, applicable under clause 17—Minimum rates.

(xlii) Predictable or Guaranteed Hours for Casual Employees (Clause 11.1)

Issue: No provision for predictable or guaranteed hours for casual employees.

Solution: Consider including provisions that address the predictability and guarantee of hours for casual employees, offering them more stability in their work arrangements.

(xliii) Minimum Engagement Period for Casual Employees (Clause 11.2)

Issue: Requirement for a minimum engagement of 2 consecutive hours may not be suitable for all industries or roles.

Solution: Provide flexibility for employers and casual employees to negotiate and agree on suitable minimum engagement periods based on the nature of the work.

Current wording

> **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.
>
> [11.5 renumbered as 11.3 by PR733977 from 27Sep21]
>
> **11.3** The circumstances are:
>
> **(a)** the employee is a full-time secondary school student; and
>
> **(b)** the employee is engaged to work between 3:00 pm and 6:30 pm on a day on which the employee is required to attend school; and
>
> **(c)** the employee, with the approval of the employee's parent or guardian, agrees to work for fewer than 3 hours; and
>
> **(d)** employment for a longer period than the agreed period is not possible either because of the operational requirements of the employer or the unavailability of the employee.

Proposed wording

11.2 The minimum daily engagement of a casual employee is 3 hours based on the nature of the work or role, or 1.5 hours' in the circumstances set out in clause 11.3. The minimum can be negotiated by agreement between the employee and employer in writing providing there is no coercion by the employer and the employee understands the agreement fully. If the employee is under the age of 18, then a parent or guardian must also sign the agreement.

(xliv) Offers and Requests for Casual Conversion Process (Clause 11.6)

Issue: Lack of detailed process for how offers and requests for casual conversion should be managed.

Solution: Establish a clear process for both employers and casual employees to initiate and respond to offers and requests for casual conversion, in line with the National Employment Standards.

Current wording

11.6 Offers and requests for casual conversion

[11.7 renumbered as 11.6 and renamed and substituted by PR733861 from 27Sep21]

Offers and requests for conversion from casual employment to full-time or part-time employment are provided for in the NES.

Proposed wording – Insert clause from the NES.

(xlv) Apprenticeship Engagement Compliance (Clause 12.2)

Issue: Mention of compliance with the law without details on specific laws or regulations governing apprenticeships.

Solution: Specify the relevant laws or regulations governing apprenticeships to ensure clarity and compliance in the engagement of apprentices.

(xlvi) Training Provisions for Apprentices (Clause 12.7)

Issue: Lack of specificity regarding the release of apprentices for training, reimbursement of fees, and the timeline for reimbursements.

Solution: Provide detailed guidelines on the release of apprentices for training, reimbursement of fees, and the specific timeline for fulfilling reimbursement obligations, ensuring clarity for both employers and apprentices.

(xlvii) Classification Guidelines for Employers (Classifications)

Issue: Lack of information on how employers should classify employees.

Solution: Provide clear guidelines and criteria for employers to classify employees according to the Classification Structure and Definitions outlined in Schedule A, ensuring consistency and fairness in the classification process.

6.General Retail Industry Award [MA000004]

6.1 Summary

(a) The General Retail Industry Award (GRIA) exhibits a series of challenges rooted in its clauses, which can be grouped into distinct themes demanding attention for improved interpretation and application.

(i) Coverage and Classification**:** Ambiguities arise from the award's references to external schedules and varied links, potentially leading to misinterpretations. To mitigate this, it is recommended to incorporate a clear classification table within Clause 4, eliminating reliance on external references and ensuring precise industry coverage.

(ii) Termination and Notice Periods**:** Clarity is lacking in termination clauses, particularly concerning notice periods post-amendment. A straightforward solution involves simplifying and updating termination clauses to explicitly state the reduced notice period, streamlining the understanding for both employers and employees.

(iii) Work Pattern Alterations**:** Uncertainties surround the understanding of implications related to altering regular work patterns, fostering potential misunderstandings. To address this, Clause 10.6 requires enhancement for clarity, explicitly articulating that the employee understands that any alterations result in ordinary pay, not overtime, and they understand and agree without coercion.

(iv) Leave and Time-Off Management**:** A lack of clarity persists regarding the treatment of unused Rostered Days Off (RDOs) and confusion in compensating public holiday work. Resolving these issues involves specifying the handling of unused RDOs and providing transparent guidelines on public holiday compensation in relevant clauses.

(v) Penalty Rates and Allowances**:** Inconsistencies and a lack of flexibility in penalty rate arrangements, intricate leave loading calculations, and confusing naming conventions for allowances pose challenges. Solutions include introducing flexibility in penalty rate negotiations, simplifying leave loading calculations, and ensuring consistent naming conventions for allowances.

(vi) Hours of Work and Breaks**:** Misinterpretations of trading hour extensions, confusion in break payment components, and unclear provisions for consecutive workdays complicate matters. Clearing these concerns involves clarifying trading hour extension entitlements, specifying payment components for breaks, and offering guidance on consecutive workdays.

(vii) Wage Structure and Definitions**:** Complex structures for apprentice rates, inadequate definitions for higher duties, and cold work allowances contribute to challenges. Streamlining apprentice rate clauses, adding specificity to higher duties conditions, and clarifying cold work allowance triggers are recommended solutions.

(viii) Overtime and Shiftwork**:** Lack of clarity in assessing overtime reasonableness, complexity in overtime payment clauses, and vague shiftwork definitions present challenges. Defining clear criteria for overtime reasonableness, simplifying language in overtime payment clauses, and providing explicit shiftwork definitions are proposed solutions.

(b) By addressing these thematic concerns, the GRIA award can achieve enhanced clarity, consistency, and applicability, fostering a more efficient and equitable framework for both employers and employees in the retail industry.

6.2 Part 2 updated - Issues & Proposed Solutions

(a) The General Retail Industry Award (GRIA) is a pivotal framework governing employment conditions within the retail sector. However, a thorough examination of its clauses has revealed several intricacies and ambiguities that warrant careful consideration and refinement. This detailed list of issues provides a granular exploration of specific challenges within the award, each accompanied by a reference to the pertinent clause. Addressing these issues comprehensively is crucial for fostering a more transparent, equitable, and user-friendly regulatory environment for employers and employees alike. The proposed solutions aim to enhance clarity, streamline processes, and establish a solid foundation for effective implementation, ultimately contributing to a more robust and accessible GRIA framework.

(ix) Coverage (Clause 4):

Issue: References to Schedules and varied by links can lead to incorrect interpretations.

Solution: Create a classification table within the clause, listing industries without references to external schedules.

(x) Coverage (Clause 4.5):

Issue: Lack of clarity on "most appropriate" classification determination.

Solution: Clearly define "most appropriate" and provide guidelines for determination.

(xi) Agreement Termination (Clause 5.11):

Issue: Clause can be simplified post-2013 amendment.

Solution: Update to state a 4-week written notice for agreement termination.

(xii) Changes to Regular Pattern of Work (Clause 10.6 and 10.7):

Issue: Lack of clarity regarding understanding regular pattern changes.

Solution: To mitigate the implications of incorrect understanding of altering regular work patterns. Clause 10.6 requires enhancement to articulate that the employee understands any alterations will result in ordinary pay, not overtime, and they understand and agree without coercion. See below for proposed rewording.

Current wording

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.

NOTE 2: An agreement under clause 10.6 cannot result in the employee working 38 or more ordinary hours per week.

EXAMPLE: Sonya's guaranteed hours include 5 hours work on Mondays. During a busy Monday shift, Sonya's employer sends Sonya a text message asking her to vary her guaranteed hours that day to work 2 extra hours at ordinary rates (including any penalty rates). Sonya is happy to agree and replies by text message confirming that she agrees. The variation is agreed before Sonya works the extra 2 hours. Sonya's regular pattern of work has been temporarily varied under clause 10.6. She is not entitled to overtime rates for the additional 2 hours.

10.7 The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6 or 10.11, and, if requested by the employee, give another copy to the employee.

Proposed wording

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.

NOTE 2: An agreement under clause 10.6 cannot result in the employee working 38 or more ordinary hours per week.

EXAMPLE: Sonya's guaranteed hours include 5 hours work on Mondays. During a busy Monday shift, Sonya's employer sends Sonya a text message asking her to vary her guaranteed hours that day to work 2 extra hours at ordinary rates (including any penalty rates). Sonya is happy to agree and replies by text message confirming that she agrees. The variation is agreed before Sonya works the extra 2 hours. Sonya's regular pattern of work has been temporarily varied under clause 10.6. She is not entitled to overtime rates for the additional 2 hours.

10.7 The employer must keep a copy of any agreement under clause 10.5, and any variation of it under clause 10.6 or 10.11, and, if requested by the employee, give another copy to the employee.

(a) The agreement must specify in clear print that alteration of the regular work pattern under clause 10.6 will result in ordinary pay, not overtime, and the employee understands and agrees without coercion.

(xiii) Minimum daily engagement of a part time employee (Clause 10.9):

Issue: It is unclear that a breach of this clause has a financial consequence (e.g. whether there should be a top-up in payment to ensure the part-time employee receives a minimum payment for 3 hours for the day).
Solution: Use similar wording as per Hospital Industry (General) Award 2020 (for casuals) as follows:

Current wording

10.9 The minimum daily engagement for a part-time employee is 3 consecutive hours.

Proposed wording

10.9 *A part-time employee must be engaged and paid for at least 3 consecutive hours on each occasion they are required to attend work.*

(xiv) Minimum daily engagement of a casual employee (Clause 11.2):

Issue: It is unclear that a breach of this clause has a financial consequence (e.g. whether there should be a top-up in payment to ensure the casual employee receives a minimum payment for 3 hours for the day).

.Solution: Use consistent wording as per Hospital Industry (General) Award 2020 as follows:

Current wording

11.2 The minimum daily engagement of a casual employee is 3 hours, or 1.5 hours' in the circumstances set out in clause

Proposed wording

11.2 *A casual employee must be engaged and paid for at least 3 consecutive hours, or 1.5 hours in the circumstances set out in clause 11.3 of work, on each occasion they are required to attend work.*

(xv) Banking of RDOs (Clause 15.6(m)):

Issue: Lack of clarity on actions if RDOs aren't taken in the year.

Solution: Clarify what happens with unused RDOs at the year-end threshold by way of the proposed rewording below:

Current wording

(m) Banking of rostered days off

(i) By agreement between the employer and an employee, up to 5 rostered days off may be banked in any one year.

(ii) A banked rostered day off may be taken at a time that is mutually convenient to the employer and the employee.

Proposed wording

(m) Banking of rostered days off

(i) By agreement between the employer and an employee, up to a maximum of 5 rostered days off may be banked in any one year.

(ii) A banked rostered day off may be taken at a time that is mutually convenient to the employer and the employee.

(iii) Banked rostered days off must be used within 12 months from date of inception, any unused days remaining after 12 months will be forfeited .

(xvi) Trading Hours Extension (Clause 15.2):

Issue: Misinterpretation leading to omitted entitlements.

Solution: Clarify that the extension doesn't remove entitlement to After 6pm penalty.

(xvii) Rostering rest and meal breaks (Clause 16.4)

Issue: This clause is subjective (what are meaningful breaks?) and does not create a direct financial consequence. It is better placed as an introduction to Clause 16.

Current wording

16.4 In rostering rest and meal breaks, the employer must seek to ensure that the employee has meaningful breaks during work hours.

Proposed wording

None, we note that Clause 16. 1 and 16.2 (below) is sufficient and the removal of this clause with help with compliance with clause 16.1 and 16.2 (below)

16.1 Clause 16 gives an employee an entitlement to meal breaks and rest breaks.

16.2 An employee who works the number of hours in any one shift specified in column 1 of Table 3—Entitlements to meal and rest break(s) is entitled to a rest break or rest breaks as specified in column 2 or a meal break or meal breaks as specified in column 3. Table 3—Entitlements to meal and rest break(s).

Table 3—Entitlements to meal and rest break(s)

Column 1 **Hours worked per shift**	**Column 2** **Breaks**	**Column 3** **Meal breaks**
4 or more but no more than 5	One 10 minute paid rest break	
More than 5 but less than 7	One 10 minute paid rest break	One unpaid meal break of at least 30 minutes and not more than 60 minutes
7 or more but less than 10	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	One unpaid meal break of at least 30 minutes and not more than 60 minutes
10 or more	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	Two unpaid meal breaks of at least 30 minutes and not more than 60 minutes

NOTE 1: An employee who works less than 4 hours in a shift has no entitlement to a paid rest break.

NOTE 2: The rest breaks and meal breaks of shiftworkers are paid. See clause 26—Rest breaks and meal breaks.

(xviii) Breaks Between Work Periods (Clause 16.6(b)):

Issue: Lack of clarity on the 200% payment components.

Solution: Specify if the 200% is a penalty or overtime until a 12-hour break is taken.

(xix) Apprentice Rates (Clause 17.3):

Issue: Confusing distinction between pre and post-2014 apprentices.

Solution: Streamline the clause and create a pay rate table for clarity.

(xx) Payment on termination of employment (Clause 18.4):

Issue: Clarity is lacking on Payment of termination date and clause when payment of termination is due.

Solution: Rewording to simplify understanding for both employers and employees.

Current wording

18.4 Payment on termination of employment
(a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:
(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
(ii) all other amounts that are due to the employee under this award and the NES.

Proposed wording

18.4 **Payment on termination of employment**

(a) The employer must pay an employee who is paid weekly, fortnightly or monthly - no more than 7 calendar days from the date of Termination ***or*** a date mutually agreed by the employer and employee no more than 14 calendar days from the date of Termination.

(i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and

(ii) all other amounts that are due to the employee under this award and the NES.

(xxi) Superannuation fund (Clause 20.4):

Issue: Misalignment with Australian Taxation Office (ATO) Stapled Super Funds information.

Solution: Rewording to align with ATO stapled super funds requirements.[18]

Current wording

20.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 20.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 20.2 and pay the amount authorised under clause 20.3(a) or 20.3(b) to one of the following superannuation funds or its successor:

(a) The Retail Employees Superannuation Trust (REST);

(b) Sunsuper;

(c) Statewide Superannuation Trust;

(d) Tasplan;

(e) MTAA Superannuation Fund;

(f) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund and is a fund that offers a MySuper product or is an exempt public sector superannuation scheme; or

(g) a superannuation fund or scheme which the employee is a defined benefit member of.

[18] https://www.ato.gov.au/businesses-and-organisations/super-for-employers/setting-up-super-for-your-business/offer-employees-a-choice-of-super-fund/request-stapled-super-funds-for-employers

Proposed wording

20.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 20.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 20.2 and pay the amount authorised under clause 20.3(a) or 20.3(b).

(a) to a superannuation fund or scheme which the employee is a defined benefit member of.

(b) to a superannuation fund or scheme fund that is chosen by the employee.

(xxii) Recall Allowance (Clause 19.11):

Issue: Naming inconsistency (Call back or Call in allowance).

Solution: Use consistent naming conventions across all awards.

(xxiii) Payment of overtime (Clause 21.2 (a)) and 15.6 (a):

Issue: It is unclear whether leave hours and absences on a public holiday should be included when determining if a full-time employee is entitled to overtime for working more than 38 hours a week. This gives room for different interpretation (e.g. EPI Capital Pty Ltd [2023] FWC 841).

Solution: change 15.6(a) as follows:

Current wording

21.2 (a) An employer must pay a full-time employee for hours worked in excess of the ordinary hours of work or outside the span of hours (excluding shiftwork) or outside the roster conditions prescribed in clause 15—Ordinary hours of work at the overtime rate specified in column 2 of Table 10—Overtime rates.

15.6 (a) In each establishment an assessment must be made as to the kind of arrangement for working the average of 38 ordinary hours per week required for full-time employment that best suits the business of the establishment.

Proposed wording

15.6 (a) In each establishment an assessment must be made as to the kind of arrangement for working the average of 38 ordinary hours per week required for full-time employment that best suits the business of the establishment. *For the purpose of determining whether overtime applies as per clause 21.2 (a) ordinary hours refer to the ordinary hours worked, leave taken hours and absences on public holidays.*

(i) Overtime rate (Clause 21.2 (e):

Issue: It is unclear the overtime rates that are applicable for a shift that started on a Saturday and finished on a Sunday. For instance, if two hours of overtime apply from 11pm (Saturday) to 1am (Sunday) would the employee be entitled to 1 hour of overtime at 150% and 1 hour of overtime at 200%?

Solution: change 21.2 (e) as follows:

Current wording

21.2 (e) An employer must pay an employee for overtime worked in accordance with clause 21.2 at the following rates:

Table 10—Overtime rates

Column 1 **For overtime worked on**	**Column 2** **Overtime rate** **Full-time and part-time employees** **% of minimum hourly rate of pay**	**Column 3** **Overtime rate** **Casual employees** **% of minimum hourly rate of pay** **(inclusive of casual loading)**
Monday to Saturday—first 3 hours	150%	175%
Monday to Saturday—after 3 hours	200%	225%
Sunday	200%	225%
Public holiday	250%	275%

Proposed wording

Insert Note 3.
"*Note 3 – Where an employee's shift is an overnight shift that crosses from Monday to Saturday into Sunday or a Public Holiday, the portion of the shift that occurs on a Sunday or Public Holiday should be paid at the higher Overtime Rate applicable to the Sunday or Public Holiday.*"

(ii) Public Holiday Work (Clause 22.2(b)):

Issue: Lack of clarity on the time addition to leave.

Solution: Specify whether time is added to annual leave or TOIL and clarify time limits.

(iii) Leave Loading Calculation (Clause 28.3):

Issue: Confusing title; clarity needed in payment options. This title is a considerable source of non-compliance according to AWCC Ltds research amongst payroll professionals and EmployTech.

Solution: Rename to "Leave Loading" and simplify payment options as proposed below:

Current wording

28.3 Additional payment for annual leave

(a) During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.

(b) The additional payment is payable on leave accrued.

(c) For an employee other than a shiftworker the additional payment 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 employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 22—Penalty rates.

(d) For a shiftworker the additional payment 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 employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 25—Rate of pay for shiftwork.

Proposed wording

28.3 Leave Loading payment for annual leave

(a) During a period of paid annual leave an employer must pay an employee an additional payment of Leave Loading in accordance with clause 28.3 for the employee's ordinary hours of work in the period.

(b) The additional payment [Leave Loading] is payable on leave accrued.

(c) For an employee other than a shiftworker the additional payment [Leave 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 employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 22—Penalty rates.

(d) For a shiftworker the additional payment [Leave 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 employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 25—Rate of pay for shiftwork.

7. Children's Services Award [MA000120]

7.1 Summary

(a) Upon thorough examination, the Children's Award exhibits overarching challenges that impact the overall clarity, communication, and practical implementation of its crucial provisions. These identified themes signify areas demanding improvement for the mutual benefit of employers and employees.

(i) Definition and Interpretation Challenges: One significant challenge arises from the lack of clarity in defining key terms such as "childcare" and "regular casual employee." To address this, there is a proposed solution to introduce precise definitions and immediate clarifications, ensuring a more nuanced and understandable interpretation.

(ii) Industry Scope Concerns**:** The industry's scope within the Children's Services and Early Childhood Education sector faces challenges due to inadequate demarcation. To remedy this, there is a proposal to offer an expanded definition, providing a clearer understanding of the covered services and fostering improved comprehension.

(iii) Exclusions and Coverage Ambiguity**:** Uncertainty surrounds the definition and rationale for exclusions within the award, resulting in ambiguity. A proposed solution suggests clarifying these exclusions and providing illustrative examples to enhance stakeholders' understanding.

(iv) Award Accessibility Challenges**:** Issues regarding the accessibility of the award, particularly through electronic means, coupled with a lack of employee awareness of entitlement to a copy, pose challenges. The proposed solution involves specifying details on electronic access and ensuring employees are informed about their entitlement to a copy.

(v) Operational Complexity**:** Operational complexity emerges from the absence of immediate clarification or reference for terms like "regular casual employee." The proposed solution advocates for providing immediate clarification or reference within the relevant clause to alleviate this challenge.

(b) These themes collectively underscore the pivotal areas necessitating enhancement within the Children's Award, aiming to streamline operations, improve communication, and establish a more equitable and understandable framework for all stakeholders involved.

7.2 Issues & Proposed Solutions

(a) The comprehensive analysis of the Children's Award has uncovered a series of nuanced challenges spanning various clauses, each representing a distinct facet of the regulatory framework within the childcare sector. This detailed list encapsulates the key systemic issues identified, providing a granular examination of specific clauses where clarity, definition, and operational procedures require refinement. The forthcoming sections delve into each issue, offering a meticulous exploration of the challenges at hand, accompanied by proposed solutions aimed at fostering an improved and more comprehensible regulatory environment for both employers and employees.

(vi) "Childcare" Definition - Definitions and Interpretation (Clause 3)

Issue: Lack of concise definition or clarification for "childcare."

Solution: Add a concise definition or clarification for "childcare" for better understanding.

(vii) **"**Children's Services and Early Childhood Education Industry Definition" - Definitions and Interpretation (Clause 3)

Issue: Insufficient clarity on the industry scope.
Solution: Elaborate on the scope of the industry to provide clarity on covered services.

(viii) "Regular Casual Employee" - Definitions and Interpretation (Clause 3)

Issue: Lack of immediate clarification or reference for the term "regular casual employee."
Solution: Provide immediate clarification or reference for the term *"regular casual employee" within clause 3.*

(ix) Exclusion Clarifications (Coverage - Clauses 4.1 to 4.7)

Issue: Unclear definition of exclusions and the rationale behind them.
Solution: Clarify exclusions and provide examples for better understanding.

(x) Multiple Awards Coverage:

Issue: Lack of guidance on determining the most appropriate award classification when covered by more than one award.
Solution: Offer guidance on determining the most appropriate award classification when an employer is covered by more than one award.

(xi) Access to the Award**:**

Issue: Lack of specification on electronic means of access and employee awareness of entitlement to a copy.
Solution: Specify details on electronic means of access and ensure employees are aware of their entitlement to a copy.

(xii) Accessibility Requirements (National Employment Standards - Clauses 5 and 6)

Issue: Unclear timeframe for making copies of the award and NES available, especially with electronic means.
Solution: Specify the timeframe for making copies of the award and NES available to employees, especially when using electronic means.

(xiii) Minimum Conditions:

Issue: Need to emphasise that the NES and the award set the minimum employment conditions.
Solution: Emphasise that the NES and the award set the minimum employment conditions, and employers may provide better conditions if desired.

(xiv) Definitions and requirements related to age groups and educational qualifications for employees in different roles (Age Groups and Educational Qualifications Definitions)

Issue: Ambiguities or lack of clarity in job classifications leading to disputes or misunderstandings.

Solution: Review changes that impact classifications in alignment with ABS/ANZSCO changes to skill levels.

(xv) Working Hours: Flexibility for Split Shifts (Working Hours)

Issue: Lack of explicit clarification on the rules and conditions for split shifts.
Solution: Clarification on working hours, breaks, and overtime for employees involved in childcare services.

(xvi) Breaks: Meal Break Interruptions:

Issue: Need for additional context, including example scenarios for guidance.
Solution: Additional context, including example scenarios, should be provided for guidance.

(xvii) Breaks: Paid Meal Breaks on Premises:

Issue: Lack of clarity on situations necessitating paid meal breaks on premises.
Solution: Clarify what constitutes a meal as part of the definition.

(xviii) Breaks: Rest Pauses:

Issue: Mention of paid rest periods without specifying situations.
Solution: Provide scenarios that offer clear context examples for rest pauses in a childcare setting.

(xix) Emergency Overtime Definition (Overtime and Penalty Rates):

Issue: Lack of explicit definition for "emergency" concerning overtime.
Solution: Define what constitutes an emergency and set boundaries for reasonable employer requests and employee responses for emergency overtime.

(xx) Time Off Instead of Payment for Overtime:

Issue: Lack of standard form or template for agreements on time off instead of payment for overtime.
Solution: Provide a standardised form or template for Time Off Instead of Payment for Overtime agreements.

(xxi) Shiftwork:

Issue: Lack of clarification on how shiftwork arrangements are made, especially in the childcare sector.
Solution: Clarify reasonability boundaries regarding how shiftwork arrangements are made, especially in a sector like childcare with flexible working hours.

(xxii) Weekend and Public Holiday Work:

Issue: Rules for weekend and public holiday work lack sufficient context for practical guidance.
Solution: Include examples or scenarios to illustrate how these provisions apply in practice.

(xxiii) Provisions related to the safety and well-being of children and staff: References to National Employment Standards (NES) - (Flexible Working Arrangements)

Issue: Mention of NES provisions without a brief summary or reference for clarity.
Solution: Instead of a reference, provide a brief summary or reference to the specific NES provisions for clarity.

(xxiv) Agreement Scope: Variation Options (Individual Flexibility Arrangements - Clauses 7.1 to 7.13)

Issue: Lack of clear boundaries for what individual flexibility arrangements cannot vary.
Solution: Create clear boundaries of what individual flexibility arrangements cannot vary.

(xxv) 7.2 Agreement Integrity: Genuine Agreement:

Issue: Need to emphasise that agreements must be genuinely made without coercion or duress.
Solution: Emphasise that agreements must be genuinely made without coercion or duress. Provide clear context of what coercion or duress would look like.

(xxvi) 7.3 Agreement Timing: Commencement:

Issue: Unclear timing for making agreements after the individual employee has commenced employment.
Solution: Specify that agreements may only be made after the individual employee has commenced employment. A decision tree/question set to determine whether criteria have been met would be helpful in guiding employers.

(xxvii) 7.4 Agreement Initiation: Employee Proposal:

Issue: Lack of clarification that the employer initiating the agreement must provide a written proposal to the employee.
Solution: Clarify that the employer initiating the agreement must provide a written proposal to the employee.

(xxviii) Language Consideration:

Issue: Emphasise the need for language accessibility, especially for employees with limited understanding of written English.
Solution: Use plain English language and provide interpretations for minors and non-English speaking backgrounds.

(xxix) 7.5 Better Off Requirement: Overall Benefit:

Issue: Lack of emphasis on the requirement that the agreement must result in the employee being better off overall at the time of making the agreement.
Solution: Highlight that the agreement must result in the employee being better off overall at the time of making the agreement.

(xxx) 7.6 Agreement Contents: Mandatory Inclusions:

Issue: Lack of clarity on mandatory inclusions that provide required context.
Solution: Specify the required elements of the agreement, including the names of the parties, the award terms being varied, details of variations, and the commencement date.

(xxxi) 7.7 Agreement Form (written and signed) requirements:

Issue: Lack of clarity, particularly for minors, on the expected level of comprehension.

Solution: Clearly state that agreements must be in writing, signed by both parties and, if applicable, by the parent or guardian if the employee is under 18.

(xxxii) 7.8 Approval and Consent: Limitations:

Issue: Unclear limitations on approval or consent requirements, especially for employees under age 18.
Solution: Clarify that an agreement must not require approval or consent from a third party, except for the signatures of the parties involved. Clarify how this would apply to employees under age 18.

(xxxiii) 7.9 Record Keeping: Employer's Responsibility:

Issue: Lack of emphasis on the employer's responsibility to maintain the agreement as a time and wages record and provide a copy to the employee.
Solution: Highlight that the employer must maintain the agreement as a time and wages record and provide a copy to the employee.

(xxxiv) 7.10 Genuine Agreement: Free from Duress:

Issue: Lack of emphasis on the requirement that both parties must genuinely agree without duress or coercion.
Solution: Reinforce that both parties must genuinely agree without duress or coercion to any variation.

(xxxv) 7.11 Agreement Termination: Mutual Termination**:**

Issue: Lack of clarification that agreements can be terminated by mutual agreement or with notice.
Solution: Clarify that agreements can be terminated by mutual agreement or with notice.

(xxxvi) Notice Periods:

Issue: Lack of clarity on notice periods for termination and any reduction based on the agreement's commencement date.
Solution: Clearly state the notice periods for termination and any reduction based on the agreement's commencement date.

(xxxvii) 7.12 Termination Effect: Ceasing of Effect:

Issue: Lack of explanation that a terminated agreement ceases to have effect at the end of the specified notice period.
Solution: Explain that a terminated agreement ceases to have effect at the end of the specified notice period.

(xxxviii) 7.13 Additional Right: Non-Impact on Other Terms:

Issue: Lack of clarification that the right to make an agreement under Clause 7 is additional and does not affect other terms of the award.
Solution: Clarify that the right to make an agreement under Clause 7 is additional and does not affect other terms of the award related to agreements between employers and individual employees.

(xxxix) 34. Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Lack of guidance on discussion topics during major workplace changes.

Solution: Guidance on discussion topics: Discuss changes, their likely effects, and measures to mitigate adverse impacts as soon as practicable.

(xl) Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Unclear requirements for providing written information during major workplace changes.
Solution: Provide clear guidance on written information to be provided to employees about workplace changes, including timelines for transparency.

(xli) Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Lack of context on when employers are not required to disclose confidential information during major workplace changes.
Solution: Context example should be provided on when it is acceptable not to disclose on the basis of interests and what constitutes inappropriate non-disclosure/refusal.

(xlii) Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Lack of emphasis on promptly considering and addressing matters raised by employees during discussions.
Solution: Employers must promptly consider and address matters raised by employees or their representatives during discussions.

(xliii) Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Undefined terms related to significant effects of major workplace changes.
Solution: Define "significant effects" to include termination, workforce changes, job opportunities, job tenure, altered work hours, retraining, and job restructuring.

(xliv) Consultation about Major Workplace Change (Clauses 8.1 to 8.6):

Issue: Lack of clarification that alterations covered by the award do not have a "significant effect."
Solution: Clarify that alterations covered by the award do not have a "significant effect."

(xlv) Consultation about Changes to Rosters or Hours of Work (Clauses 8A.1 to 8A.5):

Issue: Lack of clarity on scope, applying when changing regular rosters or ordinary hours.
Solution: Scope: This applies when changing regular rosters or ordinary hours, excluding irregular, sporadic, or unpredictable work.

(xlvi) Consultation about Changes to Rosters or Hours of Work (Clauses 8A.1 to 8A.5):

Issue: Lack of guidance on mandatory consultation requirements.
Solution: Employers must consult with affected employees and their representatives.

7.3 Part 2 addition – Individual Flexibility Arrangements (Clause 7)

1. Clauses 7.1 to 7.13 Flexibility Agreements outlines the following conditions for varying award terms:

7. Individual flexibility arrangements

[Varied by PR542240; 7—Award flexibility renamed and substituted by PR610286 ppc 01Nov18]

7.1 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.

7.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

7.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

7.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

7.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

7.7 An agreement must be:

(a) in writing; and

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

7.8 Except as provided in clause 7.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

7.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

7.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

Note: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in s.144 then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see s.145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

(a) The language in the clauses needs improvement to ensure it's understandable to a wider audience given the broad application of the award across multiple sectors. There is an absence of clear guidance around flexibility arrangements with respect to what should be a consideration for the assessment of whether the employee is better off overall with the individual flexibility arrangement in place. A broad cross-section of Payroll practitioners have noted over the course of the last 3 years of 7 Enterprise Agreements that passed the "better off overall" test, but still have breached other instruments including the Taxation Act.

(b) The language should be simplified for better readability. Additionally, the award should provide additional guidance on assessing whether an employee is "better off overall" under the agreement.

(c) According to the not-for-profit Multicultural Youth South Australia (2022, p. 2 & p.3)[19], young refugees in South Australia face significant challenges in understanding Australian employment systems and are vulnerable to exploitation in the workplace. Furthermore, several sources frequently intermix reports which contain together "exploitation, migrant workers and underpayments," [202122] further supporting the needs for clearer language easily understood by those workers whose first language is not English or of a high literacy level.

(d) AWCC proposed the following changes for the Commissions consideration.

7.1 Despite anything else in this award, both the ~~an~~ employer and an individual employee ~~can~~ may agree to ~~vary the application of the~~ adjust certain 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 w~~When work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

7.2 ~~An~~ The agreement must be ~~one that is~~ genuinely made by the employer and the individual employee without ~~coercion or duress~~ pressure or threat.

7.3 ~~An~~ Such agreements ~~may~~ can only be made after the ~~individual~~ employee has commenced employment with the employer.

7.4 ~~An~~ If the employer ~~who wishes~~ wants to ~~initiate~~ propose ~~the making of~~ an agreement, they must:

(a) ~~give~~ Present ~~the employee~~ a written proposal to the employee; and

(b) ~~if the employer is aware that the employee has, or should reasonably be aware that the employee may have,~~ If the employee has limited understanding of written English, take reasonable steps ~~(including providing a translation in an appropriate language)~~ to ensure that the employee understands the proposal (including providing a translation in an appropriate language).

7.5 ~~An~~ The agreement must ~~result in~~ ensure that the employee is ~~being~~ better off overall compared to the standard terms of the award when the agreement is ~~at the time the agreement is made than if the agreement had not been~~ made.

7.6 ~~An~~ The agreement must include ~~do all of the following~~:

(a) ~~state the n~~Names of the employer and the employee; and

(b) ~~identify T~~the specific award term, or award terms, ~~the application of which is to be varied~~ being adjusted; and

[19] https://www.homeaffairs.gov.au/reports-and-pubs/files/migration-system-aust-future-submissions/m-r/Multicultural_Youth_South_Australia_MYSA.pdf

[20] https://www.abf.gov.au/newsroom-subsite/Pages/Employers-named-and-shamed-for-exploiting-migrant-workers-.aspx

[21] https://www.fairwork.gov.au/newsroom/media-releases/2023-media-releases/august-2023/20230815-polytrade-penalty-media-release

[22] https://www.migrantjustice.org/migrant-workers-access-to-justice-in-australia

(c) ~~set out how the application of the award term, or each award term, is varied~~ How the specific award terms and/or their application is being adjusted; and

(d) ~~set out h~~How the agreement results in the employee being better off overall at the time ~~the agreement is made~~ than if the agreement had not been made; and

(e) The ~~state the~~ date when the agreement ~~is to~~ starts.

(f) The employer is to ensure a conversation to determine if an employee is "better off overall" under the agreement, including expected hours of work and span of hours, overtime hours, reasonable expectation of overtime hours and conditions both before and after the agreement. The employer and employee should assess if the changes improve the employee's situation overall, taking into account factors such as financial benefits, work-life balance, and job security.

(g) The classification is to be agreed upon, specifically part time, full time or casual. For part time, hours are to be both written and agreed upon in the agreement. With casual, anticipated or expected hours to work acknowledging the nature of casual employment.

(h) The determination for the financial component including salaries is also to comply with other legal instruments outside of this award including taxation and superannuation act.

(i) If there is any uncertainty from the employer and/or employee, the employer should seek advice or clarification to ensure fairness and compliance.

7.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, ~~by~~ the employee's parent or guardian must also sign.

7.8 Except ~~as provided~~ for (b) in clause 7.7~~(b)~~, ~~an~~the agreement ~~must~~ does not ~~require the~~ need approval or consent of ~~a person other than the employer and the employee~~ anyone else.

7.9 The employer must keep the agreement ~~as a time and wages record~~ and provide ~~give~~ a copy to the employee.

7.~~10~~ ~~The employer and the employee~~ Both parties must genuinely agree to any changes, without ~~duress or coercion~~ feeling forced or threatened ~~to any variation of an award provided for by an agreement~~.

7.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

7.12 An agreement terminated as mentioned in clause 7.11(b) ceases to have effect at the end of the period of notice required under that clause.

7.13 The right to make an agreement under clause 7 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

7.4 Part 2 addition – cashing out of annual leave

(a) Clause 24.9 refers to cashing out of annual leave, outlining the following conditions for the award terms:

24.9 Cashing out of annual leave

[24.9 inserted by PR582984 ppc 29Jul16]

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 24.9.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 24.9.

(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.

(d) An agreement under clause 24.9 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made.

(e) An agreement under clause 24.9 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.

(f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 24.9 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 24.9.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 24.9.

Note 3: An example of the type of agreement required by clause 24.9 is set out at Schedule G. There is no requirement to use the form of agreement set out at Schedule G.

(b) The current clause 24.9 within the award permits the cashing out of annual leave, yet it lacks explicit guidance on the frequency and conditions governing this practice. This deficiency could potentially lead to misunderstandings between employers and employees regarding the process and limitations of cashing out annual leave.

(c) Furthermore, there is inconsistency in the interpretation of Time Off In Lieu (TOIL) as a cashable leave type given the definition provided for in clause 23.11 as outlined in the following:

23.3 Time off instead of payment for overtime

[23.3 inserted by PR584086 ppc 22Aug16]

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 23.3.

(c) An agreement must state each of the following:

(i) the number of overtime hours to which it applies and when those hours were worked;

(ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;

(iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;

(iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

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.

(d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 23.3 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(e) Time off must be taken:

(i) within the period of 6 months after the overtime is worked; and

(ii) at a time or times within that period of 6 months agreed by the employee and employer.

(f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 23.3 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.

(g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.

(h) The employer must keep a copy of any agreement under clause 23.3 as an employee record.

(i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.

(j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 23.3 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

[Note varied by PR763327 ppc 01Aug23]

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65A(3) of the Act).

(k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 23.3 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 23.3.

(d) The award clause fails to clarify whether employees are entitled to receive payment for accrued time off for overtime cashed out at the overtime rate as differentiated from annual leave, instead defaulting to payment at ordinary hours unless specifically agreed upon, as stipulated in section 23.3.

(e) To address the issues related to the consistency of payment of time off for overtime (TOIL) accrued, it is proposed that leave classified as TOIL be handled in accordance with the agreed overtime rate applicable at the time the TOIL was accrued as per clause 23. This ensures clarity and consistency in the treatment of TOIL as a cashable leave type, aligning with the understanding that TOIL represents compensation for overtime work. By specifying that TOIL must be compensated at the agreed overtime rate, employers and employees can accurately assess the value of TOIL accruals and avoid potential disputes over payment rates resulting from incorrectly applying the annual leave cash-out clause which is silent on the reference to overtime rates that are required to be applied to accrued time off for overtime worked.

(f) AWCC proposed the following changes for the Commissions consideration.

24.9 Cashing out of annual leave

[24.9 inserted by PR582984 ppc 29Jul16]

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 24.9.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 24.9.

(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.

(d) An agreement under clause 24.9 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made, ensuring clarity on the timeline for the transaction.

(e) An agreement under clause 24.9 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.

(f) The payment for cashed-out leave must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 24.9 as an employee record.

(j) Guidance:

(i) **Frequency and Conditions:** Cashing out of annual leave should only occur through a formal written agreement between the employer and the employee. Each instance of cashing out must be documented separately.

(ii) **Agreement Details:** The agreement must specify the amount of leave being cashed out and the corresponding payment, along with the date of payment. This ensures transparency and clarity for both parties.

(iii) **Minimum Payment:** The payment for cashed-out leave should be at least equivalent to what the employee would have received if they had taken the leave instead.

(iv) **Minimum Accrued Leave:** Employees must retain a minimum accrued entitlement to paid annual leave, ensuring they have at least 4 weeks of leave remaining after cashing out.

(v) **Maximum Amount:** There is a cap on the amount of annual leave that can be cashed out in a 12-month period, set at 2 weeks.

(vi) **Record-Keeping:** Employers are responsible for maintaining records of all agreements regarding cashing out of annual leave.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 24.9.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 24.9.

Note 3: An example of the type of agreement required by clause 24.9 is set out at Schedule G. There is no requirement to use the form of agreement set out at Schedule G.

NOTE 4: As outlined in 23.3(k), upon termination of employment, time off for overtime worked by the employee to which clause 23 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

8.Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]

8.1 Summary

(a) This summary provides a comprehensive overview of the identified issues within the Social, Community, Home Care, and Disability Services Industry Award 2010 (SCHADS Award). The analysis categorises the issues into key themes, encompassing language clarity, definitions, operational complexities, and transitional arrangements.

(b) Notable concerns include the need for improved inclusivity in award titles, enhanced readability of transitional arrangements, and clearer definitions, especially regarding the social and community services sector. Additionally, the review highlights challenges in the application of individual flexibility arrangements, consultation processes, and dispute resolution mechanisms.

(c) The summary further underscores the importance of providing explicit guidance on employment types, termination procedures, and minimum wage classifications. As part of the broader initiative initiated by the Minister for Employment and Workplace Relations, the outlined themes serve as a foundation for targeted improvements to ensure the SCHADS Award remains a robust and accessible framework for the evolving dynamics within the social and community services sector.

8.2 Issues & Proposed Solutions

(a) In the process of reviewing the Social, Community, Home Care, and Disability Services Industry Award 2010 (SCHADS Award), key complexities have been identified within various clauses. This comprehensive analysis aims to highlight specific issues within the award's language, definitions, and operational aspects. The identified concerns range from clarity in terminology to the usability of transitional arrangements. By delving into each section, from application and operation to leave and public holidays, this examination provides a nuanced understanding of the challenges present in the award. The subsequent recommendations propose targeted solutions to address these issues, ensuring that the SCHADS Award aligns with the Minister for Employment and Workplace Relations' call for a review and maintains its effectiveness in governing employment relations within the social and community services sector.

(i) Title - Part 1—Application and Operation (Clause 1)

Issue: The title is clear but could be more inclusive.

Solution**:** Use language that reflects the diverse nature of the industry, ensuring it encompasses all sectors within its scope.

(ii) Commencement and Transitional - Part 1—Application and Operation (Clause 2)

Issue: Transitional arrangements are comprehensive but may benefit from simplification for readability.

Solution**:** Simplify the language to enhance readability for both employers and employees.

(iii) Casual employee definition - Part 1—Application and Operation (Clause 3)

Issue: Casual employee definition is not clear.

Solution: Provide additional clarification or examples to avoid potential disputes over the classification of employees.

(iv) Agreement requirements (Clause 7.6) - Part 1—Application and Operation (Clause 7.6)

Issue: Detailed but could be simplified for better understanding.

Solution**:** Simplify requirements and include examples or templates for assistance.

(v) Clarity in language (Clause 7.1) - Part 2—7. Individual flexibility arrangements (Clause 7.1)

Issue: Language could be simplified.

Solution**:** Simplify language for better understanding.

(vi) Flexible working agreement (Clause 7.3)

Issue: This clause will force a change in employment terms post commencement and can require manual intervention to process the change - particularly if the change date is not aligned to a pay period.

Solution**:** Deleting Clause 7.3 would allow employees to negotiate flexibility before they choose to accept a role.

Current wording

7.3 An agreement may only be made after the individual employee has commenced employment with the employer.

Proposed wording

Deletion of clause 7.3

(vii) Initiation process (Clause 7.4) - Part 2—7. Individual flexibility arrangements (Clause 7.4)

Issue: Process outlined, but guidance on clear communication, especially regarding language barriers, could be beneficial.

Solution**:** Provide additional guidance on facilitating clear communication.

(viii) Full time employment (Clause 10.2)

Issue: Over what total period is Average of 38 hours per week calculated? Is this to be read in conjunction with clause 25.1 or in isolation?

Solution**:** provide clearer wording as follows:

Current wording

10.2 Full-time employment

A full-time employee is one who is engaged to work 38 hours per week or an average of 38 hours per week.

Proposed wording

10.2 Full-time employment

A full-time employee is one who is engaged to work 38 hours per week or an average of 38 hours per week *n accordance with the patterns outlined in clause 25.1.*

(ix) Part-time employment (Clause 10.3 (a)

Issue: Over what total period is Average of 38 hours per week calculated? Is this to be read in conjunction with clause 25.1 or in isolation?

Solution**:** provide clearer wording as follows:

Current wording

10.3 Part-time employment

[10.3 substituted by PR737905 ppc 01Jul22]

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.

Proposed wording

10.3 Part-time employment

(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week*, in accordance with the patterns outlined in clause 25.1,* and who has reasonably predictable hours of work.

(x) Minimum payments for part-time and casual employees (Clause 10.5 (a and b)

Issue: This requires employers to assess whether an SCE is undertaking DS work, requiring manual determination, outside of payroll. Also, it is unclear that a breach of this clause has a financial consequence.

Solution**:** provide clearer wording as follows, which will, result in a change in wage treatment for some employees – so is not an employer-cost neutral recommendation.

Current wording

10.5 Minimum payments for part-time and casual employees

[New 10.5 inserted by PR737905 ppc 01Jul22]

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:

(a) social and community services employees (except when undertaking disability services work)—3 hours;

(b) all other employees—2 hours.

Proposed wording

10.5 Minimum payments for part-time and casual employees

Part-time and casual employees *must* ~~will~~ be paid for following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(a) social and community services employees ~~(except when undertaking disability services work)~~ - 3 hours;

(b) all other employees—2 hours.

(xi) Minimum payments for part-time and casual employees (Clause 10.5 (a and b)

Issue: This requires employers to assess whether an SCE is undertaking DS work, requiring manual determination, outside of payroll. Also, it is unclear that a breach of this clause has a financial consequence.

Solution**:** provide clearer wording as follows, which will result in a change in wage treatment for some employees – so is not an employer-cost neutral recommendation.

Current wording

10.5 Minimum payments for part-time and casual employees

[New 10.5 inserted by PR737905 ppc 01Jul22]

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:

(a) social and community services employees (except when undertaking disability services work)—3 hours;

(b) all other employees—2 hours.

Proposed wording

10.5 Minimum payments for part-time and casual employees

Part-time and casual employees *must* ~~will~~ be paid for following minimum number of hours, at the appropriate rate, for each shift or period of work in a broken shift:

(a) social and community services employees ~~(except when undertaking disability services work)~~ - 3 hours;

(b) all other employees—2 hours.

(xii) Clothing and equipment (Clause 20.2 (b)

Issue: This clause uses unrelated terms of measurement (shift and week). Suggest the Award uses days and weeks. Also, week is not defined. Does a week run from Monday to Sunday, or is a week aligned to the employer's pay period or some other set period? Same comments for laundry allowance

Solution**:** provide clearer wording as follows:.

Current wording

20.2 (b) Clothing and equipment
(b) Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of $1.23 per shift or part thereof on duty or $6.24 per week, whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of $0.32 per shift or part thereof on duty or $1.49 per week, whichever is the lesser amount.

Proposed wording

20.2 (b) Clothing and equipment
Instead of the provision of such uniforms, the employer may, by agreement with the employee, pay such employee a uniform allowance at the rate of $1.23 per ~~shift~~ *day* worked or part thereof on duty, or $6.24 per week whichever is the lesser amount. Where such employee's uniforms are not laundered by or at the expense of the employer, the employee will be paid a laundry allowance of $0.32 per ~~shift~~ *day* worked or part thereof on duty or part thereof on duty or $1.49 per week, whichever is the lesser amount.

(xiii) Meal allowance (Clause 20.5 (c)

Issue: The inclusion of clause (c) is difficult to administer and monitor, as it creates variability within workforces that are not centrally controlled

Solution**:** delete this clause as follows:.

Current wording

20.5 Meal allowances
(c) On request, meal allowance will be paid on the same day as overtime is worked.

Proposed wording Delete clause.

(xiv) First aid allowance (Clause 20.6 (a)

Issue: If applying a percentage against a standard rate, it is easier to implement within employment technology with a set $ rate.

(ii) - this requires manual intervention to update each week whether an employee is required to perform first aid in their workplace.
Suggestion is to provide the allowance to any employee required to be in a position to provide first aid, not that they actually perform first aid.
Solution**:** provide clearer wording as follows:

Current wording

20.6 (a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or

(iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

Proposed wording

20.6 (a) First aid allowance—full-time employees

A weekly first aid allowance of ~~1.67% of the standard rate per week~~ *$19.05* will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

~~(ii)~~ an employee~~, other than a home care employee,~~ is required by their employer to ~~perform~~ be responsible for the provision of first aid at their workplace. ~~; or~~

~~(iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.~~

(xv) Broken shift allowance (Clause 20.12 (a) and (b))

Issue: Difficult for technology to record 'agreement'. What constitutes agreement? What if agreement is not received from employee, or they state later they did not agree? What is the penalty if agreement was not received?

Solution**:** Reword to make allowance an automatic entitlement for the employee which can be easily coded for Employment Technology Providers as follows:

Current wording

20.12 Broken shift allowance

(a) An employee required to work a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of **1.7%** ($19.39) of the standard rate, per broken shift.
(b) An employee who agrees to work a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of **2.25%** ($25.67) of the standard rate, per broken shift.

Proposed wording

20.12 Broken shift allowance

(a) An employee who works a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of **1.7%** ($19.39) of the standard rate, per broken shift.
(b) An employee who ~~agrees to work~~ *works* a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of **2.25%** ($25.67) of the standard rate, per broken shift.

(xvi) Ordinary hours of work (Clause 25.1)

Issue: Difficult for technology to record 'agreement'. What constitutes agreement? What if agreement is not received from employee, or they state later they did not agree? What is the penalty if agreement was not received?

Solution**:** Reword to make an easier entitlement to code for Employment Technology Providers as follows:

Current wording

25.1 Ordinary hours of work

(a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week and will be worked either:

(i) in a week of five days in shifts not exceeding eight hours each;

(ii) in a fortnight of 76 hours in 10 shifts not exceeding eight hours each; or

(iii) in a four week period of 152 hours to be worked as 19 shifts of eight hours each, subject to practicality.

(b) By agreement, the ordinary hours in clause 25.1(a) may be worked up to 10 hours per shift.

Proposed wording

25.1 Ordinary hours of work

(a) The ordinary hours of work will be 38 hours per week or an average of 38 hours per week and will be worked either:

(i) in a week of five days in week ~~not exceeding eight hours each~~;

(ii) in a fortnight of 76 hours in up to 10 shifts ~~not exceeding eight hours each~~; or

(iii) in a four week period of 152 hours to be worked as up to 19 shifts ~~of eight hours each, subject to practicality~~.

(b) ~~By agreement, the~~ *The* ordinary hours in clause 25.1(a) may be ~~worked up to~~ *between 8 and* 10 hours per shift.

(xvii) Rostered days off (Clause 25.3)

Issue: This clause has proven to be open to interpretation. What constitutes a 'full day' when considering rostered days off. Is it a 24 hour period of time, or does a day restart at midnight?

Solution**:** Reword as follows:

Current wording

25.3 Rostered days off

Employees, other than a casual employee, will be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, days off will be consecutive.

Proposed wording

25.3 Rostered days off

Employees, other than a casual employee, will be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, days off will be consecutive.

Rostered day off definition. A rostered day off is considered to be the current standard working day of the employee for the purposes of calculating other entitlements, including full time, part time and casual. If the employee has a roster system which varies in shift length (ie, casual who may have as few as 3 hours or as many as 8), the longest shift is to apply for the purposes of calculation.

Penalty clause: A penalty is to be applied if days off are not rostered. The penalty is to be calculated at a rate of one additional day off (or payment in lieu of one day off) for each Rostered day off not taken.

(xviii) Change in Rosters (Clause 25.5 (d))

Issue: The penalty for lack of notice is not provided

Solution**:** Reword as follows:

Current wording

(d) Change in roster

[25.5(d) substituted by PR531544 ppc 21Nov12]

(i) Seven days' notice will be given of a change in a roster.

[25.5(d)(ii) substituted by PR737905 ppc 01Jul22]

(ii) However, a roster may be changed at any time:

(A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer; or

(B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

(iii) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.

(e) Where practicable, accrued days off (ADOs) will be displayed on the roster.

Proposed wording

(d) Change in roster

(i) Seven days' notice will be given of a change in a roster.

(ii) *Subject to clause (iii) below, where an employee is not provided seven days' notice, the employee can refuse to work the additional hours requested.*

(iii) However, a roster may be changed at any time:

(A) if the change is proposed by an employee to accommodate an agreed shift swap with another employee, subject to the agreement of the employer; or

(B) to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness, or in an emergency.

(iv) This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has four rostered days off in that fortnight or eight rostered days off in a 28 day roster cycle, as the case may be.

~~**(e)** Where practicable, accrued days off (ADOs) will be displayed on the roster.~~

(xix) Definition of 'social and community services sector' - Part 3—Definitions (Clause 3)

Issue: Consider further clarification or examples for clear understanding.

Solution**:** Provide additional examples or clarification.

(xx) Simplification (Clause 4.8) - Part 4—Coverage (Clause 4.8**)**

Issue: Language could be simplified.

Solution**:** Simplify language for easier comprehension.

(xxi) Clarity in language (Clause 5) - Part 5—Access to the award and the National Employment Standards (Clause 5)

Issue: Requirement for employers to make the award and NES available could be communicated more clearly.

Solution**:** Communicate requirements more clearly, possibly with specific guidelines.

(xxii) Integration of standards (Clause 6) - Part 6—The National Employment Standards and this award (Clause 6)

Issue: Consider providing examples or specific guidance on how NES and the award interact.

Solution**:** Provide examples or guidance for a better understanding of the interaction.

(xxiii) Clarity of Language (8.1) - Part 2—Consultation and Dispute Resolution - 8. Consultation about major workplace change (Clause 8.1**)**

Issue: Language is comprehensive, but potential improvement in clarity.

Solution: Simplify the wording without losing legal precision.

8.3 Part 2 addition – Sleepovers (Clause 25).

(a) Clause 25.7 to 5.13 Flexible Agreements outlines the following conditions for varying award terms.

25.7 Sleepovers

[25.7 substituted by PR531544 ppc 21Nov12]

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.

(b) The provisions of 25.5 apply for a sleepover. An employee may refuse a sleepover in the circumstances contemplated in 25.5(d)(i) but only with reasonable cause.

[25.7(c) substituted by PR737905 ppc 01Jul22]

(c) The span for a sleepover will be a continuous period of 8 hours. Employees will be provided with a separate room with a bed and clean linen, the use of appropriate facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) The employee will be entitled to a sleepover allowance of 4.9% of the standard rate for each night on which they sleep over.

(e) In the event of the employee on sleepover being required to perform work during the sleepover period, the employee will be paid for the time worked at the prescribed overtime rate with a minimum payment as for one hour worked. Where such work exceeds one hour, payment will be made at the prescribed overtime rate for the duration of the work.

(f) An employer may roster an employee to perform work immediately before and/or immediately after the sleepover period, but must roster the employee or pay the employee for at least four hours' work for at least one of these periods of work. The payment prescribed by 25.7(d) will be in addition to the minimum payment prescribed by this subclause.

(g) The dispute resolution procedure in clause 9 of this Award applies to the sleepover provisions.

(b) The current wording of certain clauses in employment regulations, particularly regarding the rostering of employees before and after sleepover shifts, leads to confusion among employers. There's a need for clarity on whether a minimum of four hours of work is required for shifts surrounding sleepovers. Additionally, employers seek clearer definitions distinguishing between Home care and Social and Community streams within the award to guide appropriate payment practices. Furthermore, the complexity of language in clauses concerning rest breaks between rostered work requires revisions for better understanding. Explicit clarification is also needed regarding the compensation rates for shifts alongside sleepovers.

(c) The proposed solution involves revising the language of the relevant clauses in employment regulations to provide clarity on the minimum hours of work required for shifts surrounding sleepovers. This includes specifying that employees must be rostered for a four-hour shift either before or after the sleepover, with additional work periods possible. Clear definitions distinguishing between Home care and Social and Community streams within the award should be provided to guide employers on appropriate payment practices. Additionally, revisions are proposed for clauses concerning rest breaks between rostered work to simplify language for better understanding. Furthermore, it's suggested to explicitly state that shifts alongside sleepovers should be compensated at night rates or the relevant rate for the work performed, whichever is higher, to address concerns among employers.

(d) Accordingly, AWCC submits the below rewording for the Commissions consideration:

25.7 Sleepovers
[25.7 substituted by PR531544 ppc 21Nov12]

(a) A sleepover ~~means when~~ refers to the situation where an employer requires an employee to ~~sleep~~ stay overnight at premises where the client for whom the employee is responsible is located, ~~(~~including respite care~~),~~ and ~~is~~ not a 24-hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.

(b) The provisions of 25.5 apply for a sleepover. An employee may ~~refuse~~ decline a sleepover in the circumstances ~~contemplated~~ as outlined in 25.5(d)(i) but only with reasonable cause.

[25.7(c) substituted by PR737905 ppc 01Jul22]

(c) The ~~span~~ duration of ~~for~~ a sleepover ~~will be~~ shall span a continuous period of 8 hours. Employees ~~will~~ must be provided with a separate room containing ~~with~~ a bed and clean linen, access to ~~the use of appropriate~~ facilities (including access to food preparation facilities and staff facilities where these exist) and free board and lodging for each night when the employee sleeps over.

(d) ~~The~~ An employee on a sleepover shall ~~will~~ be entitled to a sleepover allowance of 4.9% of the standard rate for each night spent on duty ~~on which they sleep over~~.

(e) ~~In the event of the~~ If an employee on a sleepover ~~being~~ is required to perform work during the sleepover period, the employee will be ~~paid~~ compensated for the time worked at the prescribed overtime rate with a minimum payment equivalent to ~~as~~ for one hour of work~~ed~~. ~~Where~~ If the duration of such work exceeds one hour, payment ~~will~~ shall be made at the prescribed overtime rate for the entire duration of the work.

(f) In the event that ~~A~~an employer ~~may roster~~ schedules an employee to ~~perform~~ work immediately before and/or immediately after the sleepover period, ~~but~~ the employer must either roster the employee for a minimum of four hours' work for at least one of these periods immediately before or after the sleepover shift or pay the employee accordingly. Other periods of work may also be rostered before or after the sleepover with the minimum payment made accordingly. ~~for at least four hours' work for at least one of these periods of work~~. The payment prescribed ~~by~~ in clause 25.7(d) ~~will~~ shall be in addition to the minimum payment ~~prescribed by~~ specified in this subclause.

(g) The dispute resolution procedure outlined in clause 9 of this Award shall ~~applies~~ apply to the matters concerning sleepover provisions.

8.4 Part 2 addition – Rest breaks between rostered work (clause 25.4)

(a) Clauses 25.4 Rest breaks between rostered work outline the following conditions for minimum rest breaks and rostering arrangements between rostered shifts:

> **25.4 Rest breaks between rostered work**
>
> [25.4 substituted by PR531544 ppc 21Nov12]
>
> **(a)** An employee will be allowed a break of not less than 10 hours between the end of one shift or period of work and the start of another;
>
> **(b)** Notwithstanding the provisions of subclause (a), by agreement between the employee and the employer, the break between:
>
> **(i)** the end of a shift and the commencement of a shift contiguous with the start of a sleepover; or
>
> **(ii)** a shift commencing after the end of a shift contiguous with a sleepover
>
> may not be less than eight hours.

(b) The current wording of section 25.4 regarding rest breaks between rostered work in the SCHADS award is widely perceived as overly complex and difficult to understand by many individuals. Specifically, the phrases "contiguous with the start of a sleepover" and "contiguous with a sleepover" are causing confusion among both employers and employees. Moreover, there is a lack of clarity regarding the payment rates for shifts alongside a sleepover.

(c) The proposed revisions to section 25.4 of the SCHADS award aim to address concerns regarding the clarity and interpretation of certain terms related to rest breaks between rostered work, particularly those concerning sleepover shifts. By replacing ambiguous phrases with clearer language, such as specifying the exact timing of breaks relative to sleepover shifts, the revisions seek to simplify understanding for both employers and employees.

(d) Accordingly, AWCC submits the below rewording for the Commissions consideration:

> **25.4 Rest breaks between rostered work**
>
> [25.4 substituted by PR531544 ppc 21Nov12]
>
> **(a)** An employee ~~will be allowed~~ must have a break of ~~not less~~ at least ~~than~~ 10 hours between the conclusion ~~end~~ of one shift or period of work and the commencement of another;
>
> **(b)** Notwithstanding the provisions of subclause (a), ~~by~~ upon mutual agreement between the employee and the employer, the break between:
>
> **(i)** the interval between the conclusion of a shift and the initiation of a shift directly preceding ~~end of a shift and the commencement of a shift contiguous with the start of~~ a sleepover; or
>
> **(ii)** the time between a shift commencing subsequent ~~after the end of~~ to a shift directly following ~~contiguous with~~ a sleepover ~~may~~ shall not be less than eight hours.

8.5 Part 2 addition - Cashing out of annual leave (Clause 31.5)

(a) Clause 31.5 refers to cashing out of annual leave, outlining the following conditions for the award terms:

31.5 Cashing out of annual leave

[31.5 inserted by PR583077 ppc 29Jul16]

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 31.5.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 31.5.

(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.

(d) An agreement under clause 31.5 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made.

(e) An agreement under clause 31.5 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.

(f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 31.5 as an employee record.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 31.5.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 31.5.

Note 3: An example of the type of agreement required by clause 31.5 is set out at Schedule I. There is no requirement to use the form of agreement set out at Schedule I.

(b) The current clause 31.5 within the award permits the cashing out of annual leave, yet it lacks explicit guidance on the frequency and conditions governing this practice. This deficiency could potentially lead to misunderstandings between employers and employees regarding the process and limitations of cashing out annual leave.

(c) Furthermore, there is inconsistency in the interpretation of Time Off In Lieu (TOIL) as a cashable leave type given the definition provided for in clause 28.2 as outlined in the following:

28.2 Time off instead of payment for overtime

[28.2 substituted by PR546788, PR587178 ppc 14Dec16]

(a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.

(b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 28.2.

(c) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 28.2 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

(d) Time off must be taken:

(i) within the period of 3 months after the overtime is worked; and

(ii) at a time or times within that period of 3 months agreed by the employee and employer.

(e) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 28.2 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked, based on the rates of pay applying at the time payment is made.

(f) If time off for overtime that has been worked is not taken within the period of 3 months mentioned in paragraph (d), the employer must pay the employee for the overtime, in the next pay period following those 3 months, at the overtime rate applicable to the overtime when worked, based on the rates of pay applying at the time payment is made.

(g) The employer must keep a copy of any agreement under clause 28.2 as an employee record.

(h) An employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement to take time off instead of payment for overtime.

(i) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 28.2 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

[Note varied by PR763307 ppc 01Aug23]

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65A(3) of the Act).

(j) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 28.2 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked, based on the rates of pay applying at the time payment is made.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 28.2.

(d) The award clause fails to clarify whether employees are entitled to receive payment for accrued time off for overtime cashed out at the overtime rate as differentiated from annual leave, instead defaulting to payment at ordinary hours unless specifically agreed upon, as stipulated in section 28.2(j).

(e) To address the issues related to the consistency of payment of time off for overtime (TOIL) accrued, it is proposed that leave classified as TOIL be handled in accordance with the agreed overtime rate applicable at the time the TOIL was accrued as per clause 28.2. This ensures clarity and consistency in the treatment of TOIL as a cashable leave type, aligning with the understanding that TOIL represents compensation for overtime work. By specifying that TOIL must be compensated at the agreed overtime rate, employers and employees can accurately assess the value of TOIL accruals and avoid potential disputes over payment rates resulting from incorrectly applying the annual leave cash-out clause which is silent on the reference to overtime rates that are required to be applied to accrued time off for overtime worked.

(f) Accordingly, AWCC submits the below rewording for the Commissions consideration:

31.5 Cashing out of annual leave

[31.5 inserted by PR583077 ppc 29Jul16]

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 31.5.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 31.5.

(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.

(d) An agreement under clause 31.5 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made, ensuring clarity on the timeline for the transaction.

(e) An agreement under clause 31.5 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.

(f) The payment for cashed-out leave must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 31.5 as an employee record.

(h) Guidance:

(i) **Frequency and Conditions:** Cashing out of annual leave should only occur through a formal written agreement between the employer and the employee. Each instance of cashing out must be documented separately.

(ii) **Agreement Details:** The agreement must specify the amount of leave being cashed out and the corresponding payment, along with the date of payment. This ensures transparency and clarity for both parties.

(iii) **Minimum Payment:** The payment for cashed-out leave should be at least equivalent to what the employee would have received if they had taken the leave instead.

(iv) **Minimum Accrued Leave:** Employees must retain a minimum accrued entitlement to paid annual leave, ensuring they have at least 4 weeks of leave remaining after cashing out.

(v) **Maximum Amount:** There is a cap on the amount of annual leave that can be cashed out in a 12-month period, set at 2 weeks.

(vi) **Record-Keeping:** Employers are responsible for maintaining records of all agreements regarding cashing out of annual leave.

Note 1: Under section 344 of the Fair Work Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 31.5.

Note 2: Under section 345(1) of the Fair Work Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 31.5.

Note 3: An example of the type of agreement required by clause 31.5 is set out at Schedule I. There is no requirement to use the form of agreement set out at Schedule I.

NOTE 4: As outlined in 28.2(j), upon termination of employment, time off for overtime worked by the employee to which clause 28.2 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

9.Clerks Private Sector Award [MA000002]

9.1 Summary

(a) The Clerks Award, a pivotal instrument shaping employment relation in the clerical sector, reveals multiple notable challenges that demand attention for clarity, transparency, and practicality. This executive summary provides an insightful overview of the issues identified within the award, categorising them into key themes.

(i) Clarity and Definitions: One of the fundamental concerns pertains to the clarity and definitions embedded within the award. Definitions, such as those outlining employment types and conditions, lack the necessary precision and alignment with industry standards. The potential for ambiguity raises the need for a comprehensive review and refinement to ensure clarity and a shared understanding.

(ii) Transparency and Explanation: The Title and Commencement clause presents challenges related to transparency. There is a recognised lack of clarity regarding variations made since the award's commencement in 2010. To address this, a more detailed explanation or reference to the nature of variations is essential, promoting transparency in the application of the award.

(iii) Format and Accessibility: Accessibility and format concerns are highlighted in clauses referencing the National Employment Standards (NES) and the award. The absence of guidance on the format and accessibility of electronic copies for employees calls for explicit clarification. Establishing a clear framework will ensure ease of reference and understanding for all stakeholders.

(iv) Readability and Guidance: Several clauses, notably those regarding Individual Flexibility Arrangements and Requests for Flexible Working Arrangements, exhibit language complexity. Simplification of language is imperative for improved readability. Additionally, explicit guidance on critical aspects, such as assessing whether an employee is "better off overall," is necessary for comprehensive application.

(v) Illustration and Scenarios: The award lacks practical illustrations and scenarios, particularly evident in Facilitative Provisions. Examples are essential to illustrate the application of facilitative provisions, providing tangible guidance for employers and employees alike.

(vi) Process Clarification: Certain clauses, such as those delineating part-time and full-time employment conditions, require detailed process clarification. Practical illustrations are necessary to elucidate conditions and expectations, ensuring a smoother implementation process.

9.2 Issues & Proposed Solutions

(a) This comprehensive list outlines the identified issues and proposed solutions within each specified clause of the Clerks Award, serving as a foundation for a targeted and strategic approach to highlighting and addressing these challenges.

(i) Title and Commencement (Clause 1):

Issue: Lack of transparency regarding variations made since 2010.

Solution: Provide a detailed explanation or reference to variations for enhanced transparency.

(ii) Definitions (Clause 2):

Issue: Lack of precision and alignment with industry standards.

Solution: Review and refine definitions to ensure clarity and industry alignment.

(iii) The National Employment Standards and this Award (Clause 3):

Issue: Lack of guidance on the format and accessibility of electronic copies.

Solution: Explicitly outline the format and accessibility of electronic copies for ease of reference.

(iv) Coverage (Clause 4):

Issue: Lack of clarity on exclusions and rationale behind them.

Solution: Clarify exclusions and provide examples for better understanding.

(v) Individual Flexibility Arrangements (Clause 5):

Issue: Complex language and insufficient guidance on assessing employee benefit.

Solution: Simplify language and offer additional guidance on assessing employee benefit.

(vi) Facilitative Provisions (Clause 7):

Issue: Lack of examples or scenarios for the application of facilitative provisions.

Solution: Provide illustrative examples to enhance understanding.

(vii) Requests for Flexible Working Arrangements (Clause 6):

Issue: Lack of clarification on dispute resolution for flexible working arrangements.

Solution: Clarify dispute resolution procedures for flexible working arrangements.

(viii) Types of Employment (Clause 8):

Issue: Need for maintaining clarity in language and providing practical examples.

Solution: Ensure clarity and offer examples or scenarios to aid understanding.

(ix) Full-time Employees (Clause 9):

Issue: Lack of practical illustrations to clarify conditions.

Solution: Provide examples or practical illustrations to clarify full-time employment conditions.

(x) Part-time Employees (Clause 10):

Issue: Need for clarification on handling changes to working hours and days.

Solution: Clarify the process for handling changes to working hours and days.

(xi) Casual Employees (Clause 11):

Issue: Lack of clarity in the process for offers and requests for casual conversion.

Solution: Clarify the process for offers and requests for casual conversion.

(xii) Classifications (Clause 12):

Issue: Lack of guidance on factors for classifying employees.

Solution: Provide guidance on factors to consider when classifying employees.

(xiii) Ordinary Hours of Work (Clause 13):

Issue: Need for examples or scenarios to illustrate the application of ordinary hours.

Solution: Include examples or scenarios to illustrate the application of ordinary hours.

(xiv) Breaks (Clause 15):

Issue: Lack of a clear definition of "ordinary hours" leading to potential confusion.

Solution: Define "ordinary hours" and clarify when rest breaks should be taken.

(xv) Wages and Allowances (Clause 16):

Issue: Need for examples or scenarios to clarify the application of minimum rates.

Solution: Provide examples or scenarios to clarify the application of minimum rates.

(xvi) Payment of Wages (Clause 17):

Issue: Lack of a definition for "ordinary time of ending work."

Solution: Include a definition for "ordinary time of ending work."

(xvii) Annualised Wage Arrangements (Clause 18):

Issue: Lack of clarity on the definition of "reasonable overtime."

Solution: Define "reasonable overtime" for better understanding.

(xviii) Allowances (Clause 19):

Issue: Lack of specific examples illustrating when allowances are applicable.

Solution: Include examples or scenarios illustrating when allowances are applicable.

(xix) Overtime and Penalty Rates (Clause 21):

Issue: Clarity concerns in defining conditions triggering overtime pay.

Solution: Clarify conditions triggering overtime pay, providing clear definitions.

(xx) Time Off Instead of Payment for Overtime (Clause 23):

Issue: Lack of clarity in the process and requirements for time off instead of payment.

Solution: Clearly outline the process and requirements for time off instead of payment.

(xxi) Shiftwork (Clause 25):

Issue: Lack of clarity regarding the applicability of different shift types.

Solution: Specify the types of employees and industries to which each shift type applies.

(xxii) Breaks for Shiftwork (Clause 27):

Issue: Need for clear definition of when paid rest breaks should be taken and tracked.

Solution: Clearly define when paid rest breaks should be taken and guide employers on what should be expected to maintain as proof of breaks taken.

(xxiii) Overtime for Shiftwork (Clause 28):

Issue: Lack of clarity on circumstances triggering the provision of a minimum of 4 hours at the overtime rate.

Solution: Define specific situations triggering the requirement for a minimum of 4 hours at the overtime rate.

(xxiv) Time Off Instead of Payment for Overtime for Shiftwork (Clause 29):

Issue: Lack of guidance on the agreement process for time off instead of payment.

Solution: Clearly outline the process and requirements for the agreement on time off instead of payment.

(xxv) Annual Leave (Clause 32):

Issue: Complexity in the formula for calculating annual leave loading.

Solution: Revise the wording to provide a clearer explanation of the formula with examples.

(xxvi) Direction to Take Annual Leave During Shutdown (Clause 32.5):

Issue: Lack of details on what constitutes a "reasonable" direction.

Solution: Define criteria for a "reasonable" direction and provide examples.

(xxvii) Excessive Leave Accruals (Clauses 32.6-32.8):

Issue: Complexity in requirements and conditions for addressing excessive leave accruals.

Solution: Provide a simplified summary or flowchart outlining the steps and conditions.

(xxviii) Cashing Out of Annual Leave (Clause 32.9):

Issue: Lack of guidance on the frequency and conditions for cashing out annual leave.

Solution: Clearly outline the conditions and limits for cashing out annual leave with examples.

(xxix) Personal/Carer's Leave and Compassionate Leave (Clause 33):

Issue: Lack of clarity on the process for obtaining longer leave periods with employer agreement.

Solution: Specify the process and conditions for casual employees to obtain longer leave periods.

(xxx) Parental Leave and Related Entitlements (Clause 34):

Issue: Lack of context provided, leaving uncertainty about parental leave and related entitlements.

Solution: Include relevant NES context in Clause 34 or provide a cross-reference.

(xxxi) Family and Domestic Violence Leave (Clause 36):

Issue: Lack of clarity on proof requirements and the accrual and utilisation of family and domestic violence leave.

Solution: Clearly define the proof requirements, accrual and utilisation process for family and domestic violence leave.

(xxxii) Notice of Termination and Redundancy (Clause 36):

Issue: Need for clarification on notice periods for termination and redundancy.

Solution: Clearly define notice periods for termination and redundancy with practical examples.

(xxxiii) Consultation and Dispute Resolution (Clause 37):

Issue: Lack of details on dispute resolution processes for specific scenarios.

Solution: Specify dispute resolution processes for various scenarios, ensuring comprehensive coverage.

(xxxiv) Superannuation (Clause 38):

Issue: Lack of clarity on superannuation contributions for annual leave loading.

Solution: Clarify superannuation contribution requirements for annual leave loading.

(xxxv) Area, Incidence, and Duration (Clause 39):

Issue: Lack of explicit details on the application and duration of the award.

Solution: Provide clearer details on the application and duration of the award for better understanding.

(xxxvi) Facilitative Provisions (Clause 40):

Issue: Need for examples or scenarios illustrating the application of facilitative provisions.

Solution: Provide illustrative examples to enhance understanding of facilitative provisions.

9.3 Part 2 addition – Individual Flexibility Arrangements (Clause 5)

(a) Clause 5.1 to 5.13 Flexibility Agreements outlines the following conditions for varying award terms:

5. Individual flexibility arrangements

5.1 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.

5.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.

5.3 An agreement may only be made after the individual employee has commenced employment with the employer.

5.4 An employer who wishes to initiate the making of an agreement must:

(a) give the employee a written proposal; and

(b) if the employer is aware that the employee has, or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

5.6 An agreement must do all of the following:

(a) state the names of the employer and the employee; and

(b) identify the award term, or award terms, the application of which is to be varied; and

(c) set out how the application of the award term, or each award term, is varied; and

(d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and

(e) state the date the agreement is to start.

5.7 An agreement must be:

(a) in writing; and

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

5.8 Except as provided in clause 5.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.

5.9 The employer must keep the agreement as a time and wages record and give a copy to the employee.

5.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

5.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

5.12 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause.

5.13 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

(b) The language in the clauses needs improvement to ensure it's understandable to a wider audience given the broad application of the award across multiple sectors. There is an absence of clear guidance around flexibility arrangements with respect to what should be a consideration for the assessment of whether the employee is better off overall with the individual flexibility arrangement in place. A broad cross section of Payroll practitioners have noted over the course of the last 3 years of 7 Enterprise Agreements that pass the “better off overall” test, but still have breached other instruments including the taxation act.

(c) The language should be simplified for better readability along. Additionally, the award should provide additional guidance on assessing whether an employee is "better off overall" under the agreement.

(d) According to the not-for-profit Multicultural Youth South Australia (2022, p. 2 & p.3)[23], young refugees in South Australia face significant challenges in understanding Australian employment systems and are vulnerable to exploitation in the workplace. Furthermore, several sources frequently intermix reports which contain together “exploitation, migrant workers and underpayments,” [24][25][26] further supporting the needs for clearer language easily understood by those workers whose first language is not English or of a high literacy level.

[23] https://www.homeaffairs.gov.au/reports-and-pubs/files/migration-system-aust-future-submissions/m-r/Multicultural_Youth_South_Australia_MYSA.pdf
[24] https://www.abf.gov.au/newsroom-subsite/Pages/Employers-named-and-shamed-for-exploiting-migrant-workers-.aspx
[25] https://www.fairwork.gov.au/newsroom/media-releases/2023-media-releases/august-2023/20230815-polytrade-penalty-media-release
[26] https://www.migrantjustice.org/migrant-workers-access-to-justice-in-australia

(e) Accordingly, AWCC submits the below rewording for the Commissions consideration:

5.1 Despite anything else in this award, both the ~~an~~ employer and an individual employee ~~can~~ may agree to ~~vary the application of the~~ adjust certain 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 w~~When work is performed; or

(b) overtime rates; or

(c) penalty rates; or

(d) allowances; or

(e) annual leave loading.

5.2 ~~An~~ The agreement must be ~~one that is~~ genuinely made by the employer and the individual employee without ~~coercion or duress~~ pressure or threat.

5.3 ~~An~~ Such agreements ~~may~~ can only be made after the ~~individual~~ employee has commenced employment with the employer.

5.4 ~~An~~ If the employer ~~who wishes~~ wants to ~~initiate~~ propose ~~the making of~~ an agreement, they must:

(a) ~~give~~ Present ~~the employee~~ a written proposal to the employee; and

(b) ~~if the employer is aware that the employee has, or should reasonably be aware that the employee may have,~~ If the employee has limited understanding of written English, take reasonable steps ~~(including providing a translation in an appropriate language)~~ to ensure that the employee understands the proposal (including providing a translation in an appropriate language).

5.5 ~~An~~ The agreement must ~~result in~~ ensure that the employee is ~~being~~ better off overall compared to the standard terms of the award when the agreement is ~~at the time the agreement is made than if the agreement had not been~~ made.

5.6 ~~An~~ The agreement must include ~~do all of the following~~:

(a) ~~state the n~~Names of the employer and the employee; and

(b) ~~identify~~ T~~t~~he specific award term, or award terms, ~~the application of which is to be varied~~ being adjusted; and

(c) ~~set out how the application of the award term, or each award term, is varied~~ How the specific award terms and/or their application is being adjusted; and

(d) ~~set out h~~How the agreement results in the employee being better off overall at the time ~~the agreement is made~~ than if the agreement had not been made; and

(e) The ~~state the~~ date when the agreement ~~is to~~ starts.

(f) The employer is to ensure a conversation to determine if an employee is "better off overall" under the agreement, including expected hours of work and span of hours, overtime hours, reasonable expectation of overtime hours and conditions both before and after the agreement. The employer and employee should assess if the changes improve the employee's situation overall, taking into account factors such as financial benefits, work-life balance, and job security.

(g) The classification is to be agreed upon, specifically part time, full time or casual. For part time, hours are to be both written and agreed upon in the agreement. With casual, anticipated or expected hours to work acknowledging the nature of casual employment.

(h) The determination for the financial component including salaries is also to comply with other legal instruments outside of this award including taxation and superannuation act.

(i) If there is any uncertainty from the employer and/or employee, the employer should seek advice or clarification to ensure fairness and compliance.

5.7 An agreement must be:

(a) in writing; and

(b) signed by the employer and the employee and, if the employee is under 18 years of age, ~~by~~ the employee's parent or guardian must also sign.

5.8 Except ~~as provided~~ for (b) in clause 5.7~~(b)~~, ~~an~~the agreement ~~must~~ does not ~~require the~~ need approval or consent of ~~a person other than the employer and the employee~~ anyone else.

5.9 The employer must keep the agreement ~~as a time and wages record~~ and provide ~~give~~ a copy to the employee.

5.~~10~~ ~~The employer and the employee~~ Both parties must genuinely agree to any changes, without ~~duress or coercion~~ feeling forced or threatened ~~to any variation of an award provided for by an agreement~~.

5.11 An agreement may be terminated:

(a) at any time, by written agreement between the employer and the employee; or

(b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act).

5.12 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause.

5.13 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

9.4 Part 2 addition – Facilitative provisions (Clause 7)

(a) The current clause 7 outlines the following conditions for facilitative provisions as follows:

7. Facilitative provisions

7.1 This award contains facilitative provisions which allow agreement between an employer and an individual employee, or the majority of employees, on how specific award provisions are to apply at the workplace.

7.2 The following clauses have facilitative provisions:

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
13.4	Altering spread of hours	an individual employee or the majority of employees
13.8	Make-up time	an individual employee
14.5(a)	Substitution of rostered days off	an individual employee
14.6(a)	Banking rostered days off	an individual employee
17.2(b)	Monthly pay periods	an individual employee or the majority of employees
23.1	Time off instead of payment for overtime	an individual employee
26.1(b)	Shiftwork—averaging ordinary hours	the majority of employees
26.4	Shiftwork—beginning and end of shifts	an individual employee
26.5	Shiftwork—make-up time	an individual employee
29.1	Shiftwork—time off instead of payment for overtime	an individual employee
32.4	Annual leave in advance	an individual employee
32.9	Cashing out of annual leave	an individual employee
37.3	Substitution of public holidays by agreement	an individual employee

(b) The existing wording of the facilitative provisions in the clerks award may be considered vague because it outlines the possibility of agreement between employers and employees on how specific award provisions apply at the workplace without providing explicit guidelines or examples. This vagueness can lead to uncertainty or confusion among employers and employees regarding the scope and application of these provisions.

(c) Scenarios are necessary to illustrate how these facilitative provisions can be practically applied in various situations. Without clear examples, employers and employees may struggle to understand the intent behind the provisions and how they can be utilized to address specific needs or preferences. Scenarios help clarify the intended use of facilitative provisions, providing concrete examples of how agreements can be reached to customize working arrangements within the framework of the award.

(d) Additionally, scenarios serve to highlight the potential benefits of utilizing facilitative provisions, demonstrating how they can enhance flexibility, accommodate individual circumstances, and promote positive outcomes for both employers and employees. By presenting real-life situations where these provisions can be applied, scenarios help

stakeholders grasp the practical implications and possibilities inherent in the facilitative provisions of the award. It is necessary to provide clearer wording and scenarios for the correct interpretation and application of facilitative provisions.

(e) Accordingly, AWCC submits the below rewording for the Commissions consideration:

7.1 This award contains facilitative provisions ~~which allow agreement~~ allowing for agreement between an employer and an individual employee, or the majority of employees, on how specific award provisions are to apply at the workplace.

7.2 The following clauses have facilitative provisions:

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
13.4	Altering spread of hours	an individual employee or the majority of employees
13.8	Make-up time	an individual employee
14.5(a)	Substitution of rostered days off	an individual employee
14.6(a)	Banking rostered days off	an individual employee
17.2(b)	Monthly pay periods	an individual employee or the majority of employees
23.1	Time off instead of payment for overtime	an individual employee
26.1(b)	Shiftwork—averaging ordinary hours	the majority of employees
26.4	Shiftwork—beginning and end of shifts	an individual employee
26.5	Shiftwork—make-up time	an individual employee
29.1	Shiftwork—time off instead of payment for overtime	an individual employee
32.4	Annual leave in advance	an individual employee
32.9	Cashing out of annual leave	an individual employee
37.3	Substitution of public holidays by agreement	an individual employee

Example Scenarios:

These scenarios are not exhaustive but are designed to demonstrate how facilitative provisions in the award can be utilised to customise certain provisions to better suit the needs of individual employees or the majority of employees in a workplace, fostering flexibility and mutual agreement between employers and employees.

1. Altering Spread of Hours (Clause 13.4): *Scenario:* An employer and an individual employee agree to alter the spread of hours to accommodate the employee's personal commitments. For example, the employee may request to compress their working hours into fewer days each week to have more consecutive days off for childcare responsibilities.

2. Make-up Time (Clause 13.8): *Scenario:* An individual employee requests to make up for hours missed due to personal reasons, such as attending a medical appointment during regular working hours. The employer agrees to allow the employee to make up for the lost time by working additional hours on other days within the same workweek.

3. Substitution of Rostered Days Off (Clause 14.5(a)): *Example Scenario:* An individual employee prefers to work on a public holiday and opts to take a different day off instead. The employer and the employee agree to substitute the rostered day off for another mutually agreed-upon day.

4. Banking Rostered Days Off (Clause 14.6(a)): *Scenario:* An individual employee wishes to accumulate additional days off for an extended vacation. The employer and the employee agree to bank the employee's rostered days off, allowing them to take an extended period of leave at a later date.

5. Monthly Pay Periods (Clause 17.2(b)): *Scenario:* The majority of employees in a workplace prefer to receive their pay on a monthly basis rather than the default weekly or fortnightly payments. The employer and the majority of employees agree to implement monthly pay periods for payroll processing.

9.5 Part 2 addition – Breaks (Employees other than shiftworkers) (Clause 15)

(a) The current clause 15 outlines the following conditions for breaks (for employees other than shiftworkers).

15. Breaks (employees other than shiftworkers)

15.1 Clause 15 applies to employees other than shiftworkers and gives them an entitlement to meal breaks and rest breaks.

NOTE: Breaks for shiftworkers are set out in Part 6—Shiftwork.

15.2 An employee who is required to work the number of hours on any one day specified in an item of column 1 of **Table 2—Entitlements to rest break(s)** is entitled to a break or breaks as specified in column 2.

Table 2—Entitlements to rest break(s)

Column 1 **Hours worked**	**Column 2** **Breaks**
More than 3 but not more than 8 ordinary hours	One 10 minute paid rest break (to be taken at a time determined by the employer)
More than 8 ordinary hours	Two 10 minute paid rest breaks (to be taken at a time determined by the employer)
More than 4 hours overtime on a Saturday morning	One 10 minute paid rest break

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.

15.4 An employer must pay an employee who is required to work through their meal break **200%** of the minimum hourly rate from when the meal break would have commenced until a meal break is allowed.

NOTE: Where suitable to business requirements, the employer may arrange for an employee who is entitled to 2 paid rest breaks to take one rest break before, and one rest break after, their unpaid meal break.

(b) The current definition provided lacks clarity regarding the arrangement of rest breaks before and after meal breaks for employees entitled to two paid rest breaks. While it specifies the compensation for employees working through their meal break, it fails to provide explicit guidance on when and how employers can schedule rest breaks around the meal break. This ambiguity may lead to confusion and inconsistencies in break scheduling practices, potentially affecting employee well-being and productivity. Clarification is needed to ensure compliance with the award and promote fair and effective break management within workplaces governed by the Clerks Award 2010.

(c) Provide clear guidelines within the Clerks Award 2010 regarding the arrangement of rest breaks before and after meal breaks for employees entitled to two paid rest breaks. This clarification would specify that employers have the discretion to schedule one rest break before and one after the unpaid meal break, contingent upon alignment with business needs. Additionally, the solution emphasises the importance of complying with operational requirements, considering employee preferences, accommodating peak workload periods, prioritising safety considerations, adhering to collective bargaining agreements, and ensuring legal compliance. By offering explicit guidance, the solution aims to promote consistency, fairness, and adherence to regulations in break scheduling practices across workplaces governed by the award. Accordingly, the clause 15 should be amended with the following:

(d) Accordingly, AWCC submits the below rewording for the Commissions consideration:

15.1 Clause 15 applies to employees other than shiftworkers and gives them an entitlement to meal breaks and rest breaks.

NOTE: Breaks for shiftworkers are set out in Part 6—Shiftwork.

15.2 An employee who is required to work the number of hours on any one day specified in an item of column 1 of **Table 2—Entitlements to rest break(s)** is entitled to a break or breaks as specified in column 2.

Table 2—Entitlements to rest break(s)

Hours worked	**Breaks**
More than 3 but not more than 8 ordinary hours	One 10 minute paid rest break (to be taken at a time determined by the employer)
More than 8 ordinary hours	Two 10 minute paid rest breaks (to be taken at a time determined by the employer)
More than 4 hours overtime on a Saturday morning	One 10 minute paid rest break

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.

15.4 An employer must pay an employee who is required to work through their meal break **200%** of the minimum hourly rate from when the meal break would have commenced until a meal break is allowed.

~~NOTE: Where suitable to business requirements, the employer may arrange for an employee who is entitled to 2 paid rest breaks to take one rest break before, and one rest break after, their unpaid meal break.~~

15.5 The following circumstances may be considered as justification under which an employer or employee can arrange rest breaks before and after a meal break.

1. **Operational Needs:** If the nature of the work or operational requirements of the business necessitates a specific break schedule, the employer may arrange rest breaks before and after the unpaid meal break to ensure smooth workflow and adequate coverage.

2. **Employee Preferences:** Employers may consider the preferences of their employees when scheduling breaks. Some employees may prefer having a break before their meal to recharge and refocus, while others may prefer it after to wind down after completing a task.

3. **Peak Workload Periods:** During peak workload periods, such as busy seasons or deadlines, employers may adjust break schedules to optimize productivity. Arranging rest breaks strategically before and after the meal break can help employees manage their energy levels more effectively during demanding work periods.

4. **Safety Considerations:** In certain industries or workplaces where safety is paramount, employers may schedule breaks to ensure that employees are alert and focused during critical tasks. By providing rest breaks before and after the meal break, employers can help mitigate fatigue-related risks and promote a safe working environment.

9.6 Part 2 addition – Cashing out of annual leave (Clause 32.9)

(a) Clause 32.9 refers to cashing out of annual leave, outlining the following conditions for the award terms:

> **32.9 Cashing out of annual leave**
>
> **(a)** Paid annual leave must not be cashed out except in accordance with an agreement under clause 32.9.
>
> **(b)** Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 32.9.
>
> **(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.
>
> **(d)** An agreement under clause 32.9 must state:
>
> **(i)** the amount of leave to be cashed out and the payment to be made to the employee for it; and
>
> **(ii)** the date on which the payment is to be made.
>
> **(e)** An agreement under clause 32.9 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.
>
> **(f)** The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
>
> **(g)** An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
>
> **(h)** The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
>
> **(i)** The employer must keep a copy of any agreement under clause 32.9 as an employee record.
>
> NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 32.9.
>
> NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 32.9.
>
> NOTE 3: An example of the type of agreement required by clause 32.9 is set out at Schedule G—Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule G—Agreement to Cash Out Annual Leave.

(b) The current clause 32.9 within the award permits the cashing out of annual leave, yet it lacks explicit guidance on the frequency and conditions governing this practice. This deficiency could potentially lead to misunderstandings between employers and employees regarding the process and limitations of cashing out annual leave.

(c) Furthermore, there is inconsistency in the interpretation of Time Off In Lieu (TOIL) as a cashable leave type given the definition provided for in clause 23.11 as outlined in the following:

> **23.11** If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 23 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.
>
> NOTE: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 23.

(d) The award clause fails to clarify whether employees are entitled to receive payment for accrued time off for overtime cashed out at the overtime rate as differentiated from annual leave, instead defaulting to payment at ordinary hours unless specifically agreed upon, as stipulated in section 29.3.

(e) To address the issues related to the consistency of payment of time off for overtime (TOIL) accrued, it is proposed that leave classified as TOIL be handled in accordance with the agreed overtime rate applicable at the time the TOIL was accrued as per clause 23. This ensures clarity and consistency in the treatment of TOIL as a cashable leave type, aligning with the understanding that TOIL represents compensation for overtime work. By specifying that TOIL must be compensated at the agreed overtime rate, employers and employees can accurately

assess the value of TOIL accruals and avoid potential disputes over payment rates resulting from incorrectly applying the annual leave cash-out clause which is silent on the reference to overtime rates that are required to be applied to accrued time off for overtime worked.

(f) Accordingly, AWCC submits the below rewording for the Commissions consideration:

32.9 Cashing out of annual leave

(a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 32.9.

(b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 32.9.

(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.

(d) An agreement under clause 32.9 must state:

(i) the amount of leave to be cashed out and the payment to be made to the employee for it; and

(ii) the date on which the payment is to be made, ensuring clarity on the timeline for the transaction.

(e) An agreement under clause 32.9 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.

(f) The payment for cashed-out leave must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.

(g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.

(i) The employer must keep a copy of any agreement under clause 32.9 as an employee record.

(j) Guidance:

(i) **Frequency and Conditions:** Cashing out of annual leave should only occur through a formal written agreement between the employer and the employee. Each instance of cashing out must be documented separately.

(ii) **Agreement Details:** The agreement must specify the amount of leave being cashed out and the corresponding payment, along with the date of payment. This ensures transparency and clarity for both parties.

(iii) **Minimum Payment:** The payment for cashed-out leave should be at least equivalent to what the employee would have received if they had taken the leave instead.

(iv) **Minimum Accrued Leave:** Employees must retain a minimum accrued entitlement to paid annual leave, ensuring they have at least 4 weeks of leave remaining after cashing out.

(v) **Maximum Amount:** There is a cap on the amount of annual leave that can be cashed out in a 12-month period, set at 2 weeks.

(vi) **Record-Keeping:** Employers are responsible for maintaining records of all agreements regarding cashing out of annual leave.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 32.9.
NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 32.9.
NOTE 3: An example of the type of agreement required by clause 32.9 is set out at Schedule G—Agreement to Cash Out Annual Leave. There is no requirement to use the form of agreement set out at Schedule G—Agreement to Cash Out Annual Leave.
NOTE 4: As outlined in 23.11, upon termination of employment, time off for overtime worked by the employee to which clause 23 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.