DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Plain language re-drafting—*Hair and Beauty Industry Award 2010*

(AM2016/15)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 4 JULY 2022

4 yearly review of modern awards – plain language re-drafting – Hair and Beauty Industry Award 2010

Introduction

[1] In a Statement issued on 28 October 2020[1] (the October 2020 Statement) we set out the timetable for the plain language re-drafting of the *Hair and Beauty Industry Award 2010* (the current award) and also published a plain language exposure draft of the current award (PLED) and a document which compared the terms of the current award with the PLED.[2]

[2] In accordance with the October 2020 Statement submissions were received from the following interested parties:

- Australian Business Industrial and the NSW Business Chamber (ABI) (25 November 2020);
- Australian Industry Group (Ai Group) (25 November 2020);
- The Australian Workers' Union (AWU) (25 November 2020); and
- The Shop, Distributive and Allied Employees' Association (SDA) (1 December 2020).

[3] Submissions in reply were received from:

- Ai Group (9 December 2020);
- AWU (9 December 2020); and
- SDA (9 December 2020).

[1] [2020] FWCFB 5674.

[2] Hair and Beauty PLED dated 28 October 2020; Comparison document of the Hair and Beauty Award and the PLED.

[4] In a statement issued on 21 January 2021[3] (the January 2021 Statement) we set out minor errors identified by the parties in their submissions and at paragraph [4] expressed the *provisional view* that the minor amendments listed should be made to the PLED. At paragraph [6] we set out the issues for determination as identified by the parties in their submissions. A summary of submissions[4] was published on the same date together with a revised PLED[5] (January 2021 PLED), incorporating the minor amendments provisionally made.

[5] A conference of the interested parties was held on 12 February 2021[6] (the February 2021 conference) and an agenda,[7] setting out the proposed resolutions to certain items, was published prior to the conference.

[6] In a statement issued on 18 February 2021[8] (the February 2021 Statement) at paragraph [18] we confirmed our *provisional view* that the minor errors listed as items 3, 6, 12, 13, 14, 21, 31, 35, 37, 39, 51, 57, 62, 67, 68, 69, 70, 71 in the summary of submissions were now resolved.

[7] The February 2021 Statement noted, at paragraph [20], that no party took issue with the proposed resolutions set out in the agenda and we confirmed that we would adopt the proposed solutions set out in the agenda. We also noted that at the February 2021 conference the AWU withdrew its objection to the amendment proposed by Ai Group at item 34 and that we would amend the PLED in the manner proposed by Ai Group. A revised summary of submissions[9] and a revised PLED[10] (February 2021 PLED), incorporating the solutions was published on 18 February 2021. We confirm that items 1, 2, 4, 5, 7, 11, 17, 18, 19, 24, 34, 36, 42, 44, 45, 48, 52, 53, 60 listed in the summary of submissions are now resolved.

[8] In relation to the outstanding items listed in the summary of submission, the parties sought an opportunity to file further written submissions on certain items. In the February 2021 Statement we stated that items 9, 10, 23, 25, 26, 27, 41, 43, 46, 58, 61, 63, 64, 65 and 66 would be determined based on submissions already filed and that items 8, 15, 16, 20, 22, 28, 29, 30, 32, 33, 38, 40, 47, 49, 50, 54, 55, 56 and 59 would be determined based on submissions already filed *and* further written submissions.

[9] In accordance with the directions in the February 2021 Statement,[11] and the extension granted on 3 March 2021, submissions were received from the following interested parties:

- Ai Group (19 March 2021)
- AWU (19 March 2021)
- SDA (19 March 2021)

[10] Submissions in reply were received from:

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[3] [2021] FWCFB 293.

[4] Summary of submissions dated 21 January 2021.

[5] January PLED dated 21 January 2021.

[6] Transcript dated 12 February 2021.

[7] Agenda for Hair and Beauty Award conference dated 11 February 2021.

[8] [2021] FWCFB 858.

[9] Summary of submissions dated 18 February 2021.

[10] February 2021 PLED dated 18 February 2021.

[11] [2021] FWCFB 858 at [22] and [23].

- Ai Group (6 April 2021)
- AWU (6 April 2021)
- SDA (7 April 2021)

Outstanding matters

[11] We now turn to deal with the outstanding items to be determined, listed at [8] above.

Item 8 – clause 4.2—Coverage (industry definition)

[12] Item 8 relates to the drafting of the industry definition at clause 4.2(j), now 4.2(k) after the resolution of item 7. Clause 4.2(k) of the PLED states:

> '**(k)** body massage including high frequency body treatments and other specialised treatments using machinery and other cosmetic applications and techniques; or'

[13] The comparable expression in Clause 3 of the current award states:

> '**(b)** …high frequency body treatments, including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques,'

[14] Ai Group objects to the inverse order of 'high frequency body treatments' and 'body massage', submitting that this appears to substantively narrow the coverage of the award and seek that clause 4.2(k) of the PLED be amended as follows:

> '**(k)** ~~body massage including~~ high frequency body treatment including body massages and other specialised treatments using machinery and other cosmetic applications and techniques; or'[12]

[15] In response, the SDA submits that the change does not have a substantive effect and the AWU submits that the current award and the PLED wording have the same effect.[13]

[16] In its further submission, Ai Group reiterates that the approach adopted in the PLED potentially narrows the scope of the coverage of the instrument and that any change that might result in such an outcome should not be made.

[17] We agree with Ai Group. It is conceivable that the revised wording might alter the coverage of the award and so we will amend clause 4.2(k) of the PLED as follows:

> '**(k)** ~~body massage including~~ high frequency body treatments including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques; or'

[12] Ai Group submission dated 25 November 2020 at [7]–[9].

[13] SDA reply submission dated 9 December 2020 at [6]; AWU reply submission dated 9 December 2020 at [8].

[18] Item 8 is now resolved.

Item 9 – clause 4.3(a)—Coverage (on-hire)

[19] Item 9 concerns the drafting of the provision relating to coverage of on-hire employees at clause 4.3(a) of the PLED. Provisions for coverage of on-hire employees contained at clause 4.5 of the current award state:

> **'4.5** This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.'

[20] The provision at clause 4.3(a) of the PLED states:

> '**4.3** This industry award also covers:
>
> **(a)** on-hire employees working in the hair and beauty industry (with a classification defined in Schedule A—Classification Structure and Definitions) and the on-hire employers of those employees; and'

[21] Ai Group submits that under proposed clause 4.3 the coverage of an employee and their employer would turn on whether the on-hire *employee* is working in the hair and beauty industry. It submits that the provision does not appear to link coverage to the question of whether the on-hire employee is engaged in the performance of work for an *employer* in the industry and, given the way the hair and beauty industry is defined in the instrument, this approach may narrow the application of the clause. It further submits that the approach appears to raise the risk that, for example, an on-hire employee working as a receptionist at a business covered by the current award would not fall within the coverage as contemplated by the PLED.

[22] Ai Group also submits that, unlike the current award, the PLED neglects to provide that the instrument only covers a labour hire employer in respect of on-hire employees while they are engaged in the performance of relevant work in the industry. Ai Group seeks the retention of the wording in clause 4.5 of the current award.[14]

[23] Neither the AWU nor the SDA opposes Ai Group's proposal.[15]

[24] The re-drafting of provisions relating to on-hire and group training arrangements was discussed during the plain language re-drafting proceedings of the *Pharmacy Industry Award 2010*[16] (Pharmacy Award) and the wording in the Hair and Beauty Award PLED is based on the wording settled in those proceedings. However, we agree that the limitation of current award clause 4.5 should be reflected at clause 4.3 of the PLED, so that the instrument covers on-hire employees while they are engaged to perform work for a business in the hair and beauty industry and the on-hire employers of those employees. We have decided amend clause 4.3 of the PLED to cover on-hire employees while working for a business in the hair and beauty industry.

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[14] Ai Group submission dated 25 November 2020 at [10]–[14].

[15] AWU reply submission dated 9 December 2020 at [9]; SDA reply submission dated 9 December 2020 at [7].

[16] [2017] FWCFB 344; [2017] FWCFB 1612; [2017] FWCFB 3337; [2018] FWCFB 5504.

[25] We also note that in a decision issued in relation to the plain language re-drafting of the Pharmacy Award[17] the words 'with a classification' were changed to 'within a classification'. We will make that same change where the phrase occurs at clauses 4.1(b), 4.3(a) and 4.3(b). Clause 4.3(a) of the PLED will be amended as follows:

> '**4.3** This industry award also covers:
>
> **(a)** on-hire employees while working for a business in the hair and beauty industry (within a classification defined in Schedule A—Classification Structure and Definitions) and the on-hire employers of those employees; and'

[26] Item 9 is now resolved.

Item 10 – clause 4.5(d)—Coverage (exclusions)

[27] Item 10 relates to clause 4.5(d) of the PLED and the drafting of the provisions excluding employers from coverage of the instrument.

[28] In the current award, award coverage exclusions are listed at clauses 4.1 (in part), 4.2, 4.3 and 4.4. The relevant exclusion clauses of the current award state:

> **'4.1** …The award does not cover employees who perform hair and beauty work in the general retailing, theatrical, amusement and entertainment industries.
>
> **4.2** The award does not cover an employee excluded from award coverage by the Act.
>
> **4.3** The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
>
> **4.4** The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.'

[29] During the plain language re-drafting process related material was placed together to make the award easier to navigate and the coverage exclusions follow on from the coverage inclusions. The exclusion at current award clause 4.1 now appears at clause 4.4 of the PLED and the exclusions at current award clauses 4.2, 4.3 and 4.4 now appear at clause 4.5 of the PLED.

[30] Clause 4.5 of the PLED states:

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[17] [2018] FWCFB 5504 at [17].

'**4.5** This industry award also does not cover any of the following:

(a) employees excluded from award coverage by the Act; or

NOTE: See section 143(7) of the Act.

(b) employees covered by a modern enterprise award or an enterprise instrument; or

(c) employees covered by a State reference public sector modern award or a State reference public sector transitional award; or

(d) employers of employees mentioned in clause 4.5(b) or 4.5(c).'

[31] Ai Group submits that clause 4.5(d) of the PLED has the effect of excluding employers from its coverage if any of their employees are excluded from its coverage by virtue of clauses 4.5(a)–4.5(c). It submits that the exclusion extends beyond the scope of clauses 4.2–4.4 of the current award and would likely have the effect of removing most employers from coverage of the instrument because they employ at least one or some employees who are excluded from award coverage by the *Fair Work Act 2009* (the Act).

[32] Ai Group submits that clause 4.5(d) should be amended so that it excludes employers from the coverage of the PLED only in relation to the employees described at clauses 4.5(a)–4.5(c) as follows:

'**(d)** employers in relation to ~~of~~ employees mentioned in clauses ~~4.5(b) or~~ 4.5(a) – 4.5(c); or'[18]

[33] Neither the AWU nor the SDA opposes Ai Group's proposal.[19]

[34] At clauses 4.3 and 4.4, the current award states that the award does not cover '…employees…or employers in relation to those employees'. The equivalent provisions appear at clauses 4.5(b) and (c) of the PLED, with the reference to employers appearing at clause 4.5(d). We agree that the scope at clauses 4.3 and 4.4 of the current award should be reflected in the PLED and will amend clause 4.5(d) to avoid substantively changing the clause.

[35] We also note that Ai Group refers to '4.5(a)–4.5(c)'in their proposed variation whereas the PLED clause states '4.5(b) or 4.5(c)'. Clause 4.5(a) of the PLED is equivalent to clause 4.2 of the current award. Clause 4.2 of the current award does not make reference to employers; however, if the award does not cover employees excluded from award coverage by the Act, then it is reasonable that the award does not cover employers in relation to those employees. To clarify this exclusion, clause 4.5(d) of the PLED should be amended by adding clause 4.5(a) to the list. We will amend clause 4.5(d) of the PLED as follows:

'**(d)** employers ~~of~~ in relation to employees mentioned in clauses 4.5(a), 4.5(b) or 4.5(c).'

[18] Ai Group submission dated 25 November 2020 at [15]–[16].

[19] AWU reply submission dated 9 December 2020 at [10]; SDA reply submission dated 9 December 2020 at [8].

[36] Item 10 is now resolved.

Item 15 – clause 9—Full-time employees

[37] The SDA initially raised a concern with the drafting of clause 9 of the PLED but, after the February 2021 conference, submitted that it no longer sought any changes to be made to the clause.[20] Item 15 is withdrawn.

Item 16 – clause 10.3—Part-time employees

[38] Item 16 relates to clause 10.3(a) of the PLED and the SDA's objection to the inclusion of the word 'ordinary' before 'hours'. Clause 10.3(a) states:

> '**10.3** At the time of engaging a part-time employee, the employer and the employee must agree in writing on a regular pattern of work. That agreement must include at least all of the following:
>
> **(a)** the number of ordinary hours to be worked each day; and…'

[39] The SDA submits that the written agreement should include all hours to be worked by the employee and seek that the word 'ordinary' be deleted. It submits that the current award wording is consistent with the *General Retail Industry Award 2020* (General Retail Award) at clause 10.5 and it would be beneficial to maintain that consistency across instruments.[21]

[40] Ai Group submits that the SDA's position is not logical as they do not appear to contend that an employer and part-time employee must reach agreement at the time of engagement regarding all hours of work, ordinary and overtime hours, but submit that the word 'ordinary' should not be included in clause 10.3(a) of the PLED because it is not found in a comparable award provision.

[41] Ai Group submits that the insertion of the word 'ordinary' in clause 10.3(a) clarifies the operation of the clause and that the clause operates in tandem with clause 10.7 of the PLED, which states that any time worked outside a part-time employee's agreed ordinary hours (or as varied) constitutes overtime. It submits that consistency with the drafting of other awards is not of itself a basis for amending the PLED.[22]

[42] The part-time provision in the General Retail Award is different in a number of significant respects to that in the current award and therefore does not, in our view, provide any useful guidance as to the drafting of clause 10.3(a). Clause 12.2 of the current award relevantly provides:

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[20] SDA submission dated 1 December 2020 at [6]–[8]; Ai Group reply submission dated 9 December 2020 at [5]; SDA submission dated 19 March 2021 at [32]; AWU submission dated 19 March 2021 at [2]; Ai Group submission dated 19 March 2021 at [4].

[21] SDA submission dated 1 December 2020 at [9]–[10]; SDA submission dated 19 March 2021 at [13]–[15].

[22] Ai Group reply submission dated 9 December 2020 at [6]; Ai Group submission dated 6 April 2021 at [5]–[6].

> '**12.2** At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:
>
> - the hours worked each day;
>
> . . .

[43] The word 'ordinary' does not currently appear in the provision. However, the 'hours worked each day' that are referred to are those which form part of the 'regular pattern of hours' required in the chapeau to the provision. This connotes ordinary hours. The position is confirmed by clause 31.2(a)(ii)(A) of the current award, which provides that hours worked in excess of the hours agreed in clause 12.2 (or as varied pursuant to clause 12.3) are overtime hours, meaning that the 'hours worked each day' in clause 12.2 do *not* include overtime hours.

[44] We therefore consider, as submitted by Ai Group, that the insertion of the word 'ordinary' in clause 10.3(a) of the PLED clarifies the operation of the provision without changing the existing meaning. The change sought by the SDA will therefore not be made.

[45] Item 16 is now resolved.

New item – current award (renumbered) clause 12.8—Part-time employees

[46] Both the AWU and the SDA have raised an additional issue in submissions made after the February 2021 conference noting that the provisions of clause 12.9 (renumbered as 12.8[23]) of the current award regarding award entitlements have been omitted from the PLED.

[47] Clause 12.8 of the current award states:

> '**12.8 Award entitlements**
>
> A part-time employee will be entitled to payments in respect of annual leave, public holidays, personal/carer's leave and compassionate leave arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.'

[48] The AWU submits that the provision assists in clarifying the entitlements of part-time employees and should be included. [24]

[49] The SDA submits that the clause has the effect of clarifying the equal application of provisions to both full-time and part-time employees and confirming the award's alignment with the obligations outlined in the International Labour Organisation Convention 175 (Part-Time Work Convention) and, therefore, should be retained in the PLED.[25]

[50] The inclusion of equivalent provisions to clause 12.8 were considered in the plain language re-drafting proceedings of the *Clerks—Private Sector Award 2010* (Clerks Award).

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[23] PR733848.

[24] AWU reply submission dated 6 April 2021 at [13].

[25] SDA reply submission dated 7 April 2021 at [49]–[50].

Clauses 10.2 and 10.3 of the Clerks Award PLED published on 7 July 2017[26] contained the same information as that contained in clause 12.8 of the Hair and Beauty current award.

[51] In our decision published on 6 September 2018[27] we concluded that the equivalent clause in the Clerks Award PLED should be deleted.

[52] Consistent with the decision in the Clerks Award, clause 12.8 of the current award was not included in the Hair and Beauty PLED as it is not necessary, for the following reasons:

- the exposure draft refers to the NES in relation to the specific entitlements and those entitlements accrue on a proportionate basis to part-time employees because they accrue by reference to ordinary hours worked; and

- based on normal principles of statutory interpretation, the award would be read as applying to everybody covered by it unless it specifically provided otherwise.

[53] We have decided not to amend clause 10 of the PLED to include a provision equivalent to clause 12.8 of the current award. The new item regarding clause 12.8 of the current award is now resolved.

New item – current award (renumbered) clause 12.9—Part-time employees

[54] After the February 2021 conference the SDA submitted that clause 12.10 (renumbered as 12.9[28]) of the current award regarding the conversion of existing employees to part-time employment has not been included in the PLED. They propose that the clause be added and suggest that clause 10 of the PLED would be an appropriate location.[29]

[55] The premise of the SDA's submission is wrong. The provisions at clause 12.9 of the current award are located at clause 8.3 of the PLED, as set out in the comparison document published along with the first Hair and Beauty PLED.[30] This resolves this new item.

Items 20, 30 and 55 – clause 11.4—casual employees and penalty rates

[56] Items 20, 30 and 55 concern the drafting of provisions relating to penalty rates for casual employees.

(i) Items 20 and 55

[57] Ai Group submitted that clause 11.4 of the PLED, along with rows 2 and 3 of Table 17 in clause 23, should be deleted.[31] Ai Group later withdrew their submission after discussions

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[26] Clerks Award PLED published 7 July 2017.

[27] [2018] FWCFB 5553 at [47]–[52]; see also [2018] FWC 411 at [17]–[19].

[28] PR733848.

[29] SDA reply submission dated 7 April 2021 at [71].

[30] HABIA comparison document dated 28 October 2020.

[31] Ai Group submission dated 25 November 2020 at [27] and [70].

with the SDA and AWU[32] and confirmation, in a decision issued on 5 March 2021[33] in AM2017/51, that casual employees are entitled to penalty rates for work performed outside the spans of hours set out in clause 28.2(a) of the current award. Items 20 and 55 are withdrawn.

(ii) Item 30

[58] Item 30 relates to the interaction between clauses 11.4 and 14.4 of the PLED. The clauses in the PLED relevant to item 30 are clauses 11.3, 11.4, 14.1, 14.4 and 23.1, which state as follows:

> **'11.3** An employer must pay a casual employee for each ordinary hour worked between 7.00 am and 9.00 pm Monday to Friday: …'
>
> **11.4** An employer must pay a casual employee working outside the span of hours in clause 14.4 at the rates specified in clause 23—Penalty rates.
>
> **14.1** Clause 14 applies to full-time and part-time employees.
>
> **14.4** Ordinary hours may be worked by an employee within the following span of hours:
>
> **Table 2—Span of ordinary hours**

Days	**Span of hours**
Monday to Friday, inclusive	7.00 am – 9.00 pm
Saturday	7.00 am – 6.00 pm
Sunday	10.00 am – 5.00 pm'

> **23.1** An employer must pay penalty rates to an employee who works ordinary hours as follows:
>
> **Table 14—Penalty rates**

For ordinary hours worked:	**Full-time and part-time employees**	**Casual employees**
	% of minimum hourly rate	**% of minimum hourly rate**
Monday to Friday—before 7.00 am and after 9.00 pm	See clause 22	150
Saturday—before 7.00 am and after 6.00 pm	See clause 22	150
Saturday—between 7.00 am and 6.00 pm	133	133

[32] Ai Group submission dated 19 March 2021 at [5] and [42]; SDA submission dated 19 March 2021 at [21]–[22].

[33] [2021] FWCFB 1121; see also [2021] FWCFB 4656; PR732340.

For ordinary hours worked:	Full-time and part-time employees	Casual employees
	% of minimum hourly rate	% of minimum hourly rate
Sunday—before 10.00 am and after 5.00 pm	200	200
Sunday—between 10.00 am and 5.00 pm	200	200
Public holiday—all ordinary hours	250	250
Rostered day off—all ordinary hours	200	–’

[59] The AWU submits that the interaction between clauses 11.4 and 14.4 of the PLED is confusing because clause 14—Ordinary hours of work does not apply to casual employees. It submits that the span of hours for full-time and part-time employees set out in clause 14.4 of the PLED is important for casual employees because it determines when ordinary rates and penalty rates apply in accordance with clause 11.4. The AWU submits that the confusion can be resolved by deleting the application clause at clause 14.1 and specifying instead that clauses 14.7, 14.8 and 14.9 apply to full-time and part-time employees.[34]

[60] The SDA supports the AWU’s proposal to delete clause 14.1 of the PLED but submits that the issue could be rectified by retaining rows 2 and 3 of Table 14 in clause 23.[35]

[61] Ai Group opposes the AWU’s proposal, submitting that the current award clause 28, and therefore the spans of hours set out in clause 28.2(a), do not apply to casual employees. It submits that in the PLED, clause 14, and therefore the span of hours set out in clause 14.4, does not apply to casual employees either. Ai Group acknowledges, however, that casual employees are entitled to the payment of a penalty for work performed outside the span of hours set out in clause 28.2 of the current award.

[62] Ai Group submits that the AWU’s proposal to alter the application of clause 14 of the PLED by deleting clause 14.1 and specifying that clauses 14.7, 14.8 and 14.9 apply to full-time and part-time employees would be a substantive change to the terms of the award and should not be made.[36]

[63] The drafting of clause 11.4 (provisionally deleted but reinstated and renumbered as 11.3[37]) of the PLED was based on the drafting of clause 13.3 of the award as at 28 October 2020. Clause 13.3 was subsequently updated as a result of the decision issued on 2 August 2021

[34] AWU submission dated 25 November 2020 at [3]–[4]; AWU submission dated 19 March 2021 at [2]; AWU submission dated 6 April 2021 at [3].

[35] SDA submission dated 19 March 2021 at [29]–[31].

[36] Ai Group reply submission dated 9 December 2020 at [16]; Ai Group submission dated 19 March 2021 at [11]; Ai Group submission dated 6 April 2021 at [10].

[37] PR733848; [2021] FWCFB 858 at [19].

in AM2017/51[38] (August 2021 HABIA Overtime decision) and now sets out the conditions for paying a casual employee overtime or a particular penalty rate and refers the reader to the rates in clause 31.2. Clause 13.3 was later renumbered as 13.2.[39]

[64] In the current award, a casual employee is paid the minimum hourly rate plus the casual loading for work between the span of hours of 7.00 am and 9.00 pm Monday to Friday, as set out in clause 13.1. A casual employee is paid penalty rates for working ordinary hours outside the spans of hours in clause 28.2(a) for Monday to Friday or within the span of hours in clause 28.2(a) on Saturday and Sunday. The penalty rates are set out at clauses 31.2(c), 31.2(d) and 31.2(e). The days and spans in clauses 28.2(a), 31.2(c), 31.2(d) and 31.2(e) are, in effect, days and spans outside the span of ordinary hours for casual employees in clause 13.1.

[65] In the PLED, the span of ordinary hours for casual employees is set out at clause 11.3 (renumbered as 11.2[40]). Clause 11.2 states that a casual employee is paid the minimum hourly rate plus the casual loading for working between the span of hours of 7.00 am and 9.00 pm Monday to Friday. The penalty rates applicable to a casual employee for working ordinary hours outside that span are set out in Table 14 in clause 23.

[66] Given that the penalty rates for casual employees in clause 23 of the PLED are based around the span of hours for casual employees set out in clause 11.2, it is not necessary at clause 11.3 to refer to the span for full-time employees set out at clause 14.4. The correct reference in clause 11.3 is to the span of hours for casual employees, which is set out in clause 11.2.

[67] To resolve any potential ambiguity arising from the interaction between clause 11.3 and clause 14.4 of the PLED, we will amend clause 11.3 to refer to a casual employee being paid penalty rates for working ordinary hours outside the span of hours for casual employees set out in clause 11.2, as follows:

> '**11.43** An employer must pay a casual employee working ordinary hours outside the span of hours in clause ~~14.4~~ 11.2 at the rates specified in clause 23.2—Penalty rates.'

[68] The reference to clause 23.2 is explained at items 54 and 56 below. Item 30 is now resolved.

Item 22 – clause 12.2—Apprentices

[69] Ai Group objects to the wording of clause 12.2, which states:

> '**12.2** Any engagement must be in accordance with the law regulating apprenticeships in force in the place in which the apprentice is engaged.'

[70] Ai Group submits that clause 12.2 appears to create a requirement that is not contained in the current award and to that extent is a substantive change, and that the inclusion of the

[38] [2021] FWCFB 4656; PR732340; see also [2021] FWCFB 1121; [2020] FWCFB 5636, PR723908; [2020] FWCFB 4350.

[39] PR733848.

[40] PR733848; [2021] FWCFB 858 at [19].

provision creates an award-derived obligation to engage apprentices in accordance with certain laws and that it should, therefore, be deleted.[41]

[71] The SDA and the AWU disagree with Ai Group's submission. The SDA submits that this does not constitute a substantive change; rather it simply and clearly points to the fact that there are requirements for apprentices that are outside the award and that a provision specifying that legislative requirements should be applied and adhered to does not amount to a substantive change. Both unions point out that the disputed clause also appears in the General Retail Award at clause 12.2 and submit that there is no apparent reason why its inclusion in the PLED is problematic.[42]

[72] The non-wage conditions of employment for apprentices were inserted at clause 19.5 of the current award as a result of a decision dated 17 December 2014[43] during the review of apprentice conditions (AM2014/192) (the Apprentices decision). The provision appearing at clause 12.2 of the PLED is not in the current award.

[73] The provision appearing at clause 12.2 of the Hair and Beauty PLED was inserted in error and accordingly we will amend clause 12 of the PLED by deleting clause 12.2 and renumbering the subsequent clauses accordingly. Item 22 is now resolved.

Item 23 – clause 12.3—Apprentices

[74] Ai Group objects to the re-drafted clause 12.3. The equivalent provision in the current award, clause 19.5(a) states:

> '**(a)** Except as provided in this clause or where otherwise stated, all conditions of employment specified in this award apply to apprentices.'

[75] Clause 12.3 of the PLED states:

> '**12.3** This award applies to an apprentice in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.'

[76] Ai Group submits that clause 12.3 of the PLED does not appear to reflect any existing provision of the current award and is confusing and misleading and, as apprentices can be engaged on a part-time basis in some states and territories, there is no justification for the provisions applying to a part-time apprentice on the same basis as a full-time employee. It submits that the application of specific provisions of the instrument to part-time apprentices should be considered discreetly, having regard to the terms of the relevant instruments and that clause 12.3 of the PLED should be replaced with the wording at clause 19.5(a) of the current award.[44]

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[41] Ai Group submission dated 25 November 2020 at [29]–[30]; Ai Group submission dated 19 March 2021 at [6].

[42] SDA reply submission dated 9 December 2020 at [17]; AWU reply submission dated 9 December 2020 at [22]; SDA reply submission dated 7 April 2021 at [6]–[8].

[43] [2014] FWCFB 9156; PR559281 and [2013] FWCFB 5411.

[44] Ai Group submission dated 25 November 2020 at [31]–[32].

[77] Neither the SDA nor the AWU oppose clause 12.3 of the PLED being replaced with clause 19.5(a) of the current award.[45]

[78] Clause 12.3 of the PLED has been renumbered as clause 12.2 as a result of the resolution to item 22. Clause 12.2 of the PLED is intended to reflect the terms of clause 19.5(a) of the current award; however, we agree that the proposed wording could be misleading. To avoid confusion, we will replace the proposed wording at clause 12.2 with the wording at clause 19.5(a) of the current award as follows:

> '**12.2** Except as provided in clause 12 or where otherwise stated, all conditions of employment specified in this award apply to apprentices. ~~This award applies to an apprentice in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.~~'

[79] Item 23 is now resolved.

Item 25 – clause 12.6—Apprentices – training

[80] Item 25 relates to the drafting of clause 12.6 of the PLED and the omission of the provisions contained in clause 19.5(f) of the current award. Clause 19.5(e) of the current award provides for the employer to reimburse the employee for any fees charged by a registered training organisation (RTO) Clause 19.5(f) provides that an employer may meet its obligations under clause 19.5(e) by paying any relevant fees and costs directly to the RTO.

[81] Ai Group submits that clause 12.6(c) of the PLED requires an employer to reimburse an apprentice for fees paid to a registered training organisation (RTO), and that omitting the option of an employer paying for the relevant fees directly to an RTO amounts to a substantive change. It submits that clause 19.5(f) of the current award should be included in the PLED.[46]

[82] The AWU notes that it is not uncommon for employers to pay fees directly to an RTO and do not oppose including clause 19.5(f) of the current award in the PLED.

[83] Clause 12.6 of the PLED has been renumbered as clause 12.5 as a result of the resolution to item 22. We agree that there is no provision in the PLED giving an employer the option to pay the RTO directly. To align with the current award, we will amend clause 12.5(c) of the PLED as follows:

> '**(c)** An employer must either:
>
> **(i)** reimburse an apprentice for all fees paid by the apprentice themselves to a registered training organisation (RTO) for courses that the apprentice is required to attend, and all costs incurred by the apprentice in purchasing textbooks (not provided or otherwise made available by the employer) that the apprentice is required to study, for the purposes of the apprenticeship; or
>
> **(ii)** pay any training course fees and/or textbook costs directly to the RTO.'

[45] SDA reply submission dated 9 December 2020 at [18]; AWU reply submission dated 9 December 2020 at [23].

[46] Ai Group submission dated 25 November 2020 at [33]–[34].

[84] Item 25 is now resolved.

Items 26 and 27 – clause 12.7—Apprentices – block release training

[85] Items 26 and 27 both relate to the drafting of clause 12.7 of the PLED, and it is convenient to deal with them together. Item 26 relates to the omission of the word 'excess' from the references to reasonable travel costs in clauses 12.7(b), 12.7(d) and 12.7(e). Item 27 relates to omission of the words '(where necessary)' in clause 12.7(d)(ii) of the PLED. The relevant provisions in clause 19.5 of the current award state:

> **'(b)** Where an apprentice is required to attend block release training for training identified in or associated with their training contract, and such training requires an overnight stay, the employer must pay for the excess reasonable travel costs incurred by the apprentice in the course of travelling to and from such training. Provided that this clause will not apply where the apprentice could attend an alternative Registered Training Organisation (RTO) and the use of the more distant RTO is not agreed between the employer and the apprentice.'
>
> **(c)** For the purposes of clause 19.5(b) above, excess reasonable travel costs include the total costs of reasonable transportation (including transportation of tools where required), accommodation costs incurred while travelling (where necessary) and reasonable expenses incurred while travelling, including meals, which exceed those incurred in travelling to and from work. For the purposes of this subclause, excess travel costs do not include payment for travelling time or expenses incurred while not travelling to and from block release training.' [Emphasis added]

[86] The relevant provisions in clause 12.7 of the PLED state:

> **'(b)** If the training requires an overnight stay, the employer must pay for the reasonable travel costs incurred by the apprentice in travelling to and from the training.
>
> …
>
> **(d)** Reasonable travel costs in clause 12.7(b) include:
>
> **(i)** the total cost of reasonable transportation (including transportation of tools, where required) to and from the training; and
>
> **(ii)** accommodation costs; and
>
> **(iii)** reasonable expenses, including for meals, incurred which exceed those incurred in the normal course of travelling to and from the workplace.
>
> **(e)** Reasonable travel costs in clause 12.7(b) do not include payment for travelling time or expenses incurred while not travelling to and from the block release training.'

[87] Ai Group submits that the word 'excess' should be inserted before 'reasonable' in clauses 12.7(b), 12.7(d) and 12.7(e) to be consistent with the Apprentices decision[47] so that an employer must pay for, amongst other costs, excess reasonable travel costs incurred by an employee while attending block training. In the Apprentices decision the Full Bench said:

> '[331] At this stage we will only vary the awards to provide for the payment of excess travel costs for attendance at block release training which requires overnight stay, except where it is open to the apprentice to attend an alternative RTO at a location closer to their usual workplace and the use of the more distant RTO is not agreed between the employer and the apprentice.'

[88] Ai Group submits that, although the scope of 'excess' travel costs is not expressly defined in the award, the use of the word denotes the notion of the relevant costs exceeding those that would normally be incurred and, in its absence, clause 12.7 of the PLED appears to require the employer to pay for a potentially broader scope of costs.

[89] Ai Group also submits that clause 12.7(d)(ii) of the PLED should be amended by inserting '(where necessary)' after 'accommodation costs' as, under the current award, an employer is liable to pay for accommodation costs incurred by an apprentice travel in the relevant circumstances where those costs are necessary and, if the employee incurs accommodation costs that are not necessary for the purposes of attending their block training, for example if they choose to stay an extra night, the employer is not required to pay for that cost. It submits that the omission of the limitation potentially expands the circumstances in which an employer may be required to pay for accommodation costs.[48]

[90] The AWU and the SDA do not oppose either of Ai Group's proposals.[49]

[91] Clause 12.7 of the PLED has been renumbered as clause 12.6 as a result of the resolution to item 22. In relation to inserting the word 'excess' before 'reasonable' in clauses 12.6(b), 12.6(d) and 12.6(e), the same issue was raised during the plain language redrafting proceedings for the Hospitality Award PLED. The plain language drafter's comments were set out in the submission summary at item 22.[50] The drafter noted that 'the word "excess" is not necessary given that the clause is redrafted on the assumption that in the current award clause the expression "which exceed those incurred in travelling to and from work" only governs "reasonable expenses incurred while travelling, including meals".'

[92] We consider that it is clear that in clause 19.5(b) of the current award the expression 'excess reasonable travel costs' has the meaning assigned to it in clause 19.5(c). The definition of that expression has 3 elements:

(1) total costs of reasonable transportation (including transportation of tools where required);

(2) accommodation costs incurred while travelling (where necessary); and

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[47] [2013] FWCFB 5411 at [331].

[48] Ai Group submission dated 25 November 2020 at [35]–[40].

[49] AWU reply submission dated 9 December 2020 at [25]; SDA reply submission dated 9 December at [19]–[20].

[50] Hospitality Award PLED submission summary dated 15 December 2017 at item 22.

(3) reasonable expenses incurred while travelling, including meals, which exceed those incurred in travelling to and from work.

[93] We agree with the plain language drafter's comment in relation to the Hospitality Award PLED that the words 'which exceed those incurred in travelling to and from work' only qualify the third element, not all 3 elements. We consider that clause 12.6(d)(ii) of the PLED should be amended to capture these 3 elements in the same way. Accordingly, clause 12.6(d)(ii) will provide:

'(d) Reasonable travel costs in clause 12.6(b) include:

(i) the total cost of reasonable transportation (including transportation of tools, where required) to and from the training; and

(ii) accommodation costs (where necessary); and

(iii) reasonable expenses incurred while travelling, including for meals, which exceed those incurred in the normal course of travelling to and from the workplace.'

[94] Items 27 is now resolved.

Items 28 and 29 – clause 13.2—Classifications

[95] Items 28 and 29 can be dealt with together as they both relate to the omission of the current award phrase 'as determined by the employer' from clause 13.2 of the PLED. Clause 13.2 of the PLED states:

'**13.2** The classification by the employer must be based on the competencies that the employee is required to have, and skills that the employee is required to exercise, in order to carry out the principal functions of the employment.

[96] The relevant provision at clause 16.2 of the current award states:

'**16.2** The classification by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.'

[97] Ai Group submits that the words 'as determined by the employer' at the end of clause 16.2 of the current award make it clear that the employer is to assess what the principal functions of an employee's employment are and that an employee is to be classified accordingly. It submits that it is no longer clear how the principal functions of the employee's employment are to be determined and the words 'as determined by the employer' should be reinserted at the end of the clause.[51]

[51] Ai Group submission dated 25 November 2020 at [41]–[44].

[98] ABI proposes amending the clause as follows:

> 'The classification by the employer must be based on the competencies that the employee is required to have, and skills that the employee is required by the employer to exercise, in order to carry out the principal functions of the employment.[52]

[99] The SDA supports the deletion of the words 'as determined by the employer', submitting that it is sufficiently clear that it is the employer who assesses the competencies of employees before assigning them to a classification and that making this assessment necessarily requires determining what the 'principal functions of employment' are.[53]

[100] In response to Ai Group's submission and proposal, the union parties[54] submit the following:

- The AWU does not support Ai Group's proposal and submits that it is clear that it is the employer who determines the classification of an employee, based upon an assessment of the employee's competencies, and inherent to this assessment is a determination of what the 'principal functions of the employment' are.

- The SDA supports the PLED drafting and submits that the change aids clarity without changing the fundamental meaning of the term. It submits that the current provision implies that the employer has an unfettered discretion in determining classifications. It suggest thats if the current award provision is retained, then a note stating that the test is based on the duties actually performed would assist.

[101] In response to ABI's submission and proposal, the other parties[55] submit as follows:

- Ai Group agrees that clause 13.2 of the PLED is deficient but submits that the deficiency should be resolved in line with its own proposal.

- The AWU and the SDA oppose ABI's proposal and refer to their submissions in reply to Ai Group's proposal.

[102] In response to SDA's submission and proposal, the other parties[56] submit as follows:

- The AWU supports the SDA's proposal.

- Ai Group refers to its own submission and proposal regarding clause 13.2 of the PLED.

[103] In further submissions, Ai Group submits that clause 13.2 of the PLED amounts to a substantive change.[57]

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[52] ABI submission dated 25 November 2020 at [3.2].

[53] SDA submission dated 1 December 2020 at [13].

[54] AWU reply submission dated 9 December 2020 at [27]; SDA reply submission dated 9 December 2020 at [21]–[25].

[55] Ai Group reply submission dated 9 December 2020 at [28]; AWU reply submission dated 9 December 2020 at [55]; SDA reply submission dated 9 December 2020 at [60].

[56] AWU reply submission dated 9 December 2020 at [56]; Ai Group reply submission dated 9 December 2020 at [9].

[57] Ai Group submission dated 19 March 2021 at [7]–[10].

[104] In reply, the SDA points to the wording of the equivalent provision in other plain language awards and reiterates that the PLED wording aids clarity without changing the fundamental meaning of the provision.[58]

[105] The wording of the provision was considered during the plain language re-drafting proceedings of the Clerks Award and in that mater it was decided to amend the provision to clarify that the classification of an employee is based on the requirements of the employer.[59] Those requirements are necessarily based on the employer's determination of the principal functions of the employee's employment and the skill level that the employer requires the employee to exercise to carry out those functions. We have decided to amend clause 13.2 of the PLED to be in similar terms as clause 12.2 of the Clerks Award, as follows:

> **'13.2** The classification by the employer must be based on the competencies that the employer requires the employee ~~is required~~ to have and the skills that the employer requires the employee ~~is required~~ to exercise~~,~~ in order to carry out the principal functions of the employment.'

[106] Items 28 and 29 are now resolved.

Item 32 and 33 – clause 15.1—Rostering principles—all employees

[107] Items 32 and 33 both relate to whether clause 15.1 of the PLED applies to casual employees.

[108] Clause 13.4 (renumbered as clause 13.3[60]) of the current award is relevant to this issue, it states:

> **'13.3** The following provisions of this award do not apply to casuals:
>
> - Clause 14—Termination of employment;
> - Clause 15—Redundancy;
> - Clause 21.2—Meal allowances;
> - Clause 21.4—Excess travelling costs;
> - Clause 21.5—Travelling time reimbursement;
> - Clause 21.8—Transport of employees' reimbursement;
> - Clause 28—Hours of work;
> - Clause 29—Notification of rosters; and
> - Clause 31.2(a)—Overtime and penalty rates.'

[109] During the plain language re-drafting of the current award, clause 13.3 was not replicated in the PLED. Instead, the information contained at clause 13.3 was added to each

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[58] SDA reply submission dated 7 April 2021 at [9]–[16].

[59] [2018] FWCFB 5553 at [58]–[60].

[60] PR733848.

relevant provision to clarify that the provision does not apply to casual employees so that the information is immediately accessible when looking at each specific clause.

[110] In the current award, rostering provisions are set out in clauses 29—Notification of rosters and clause 30—Rostering principles. In the PLED rostering provisions are set out in clause 15—Rostering arrangements. The provisions set out in current award clause 29 are set out at PLED clauses 15.2 and 15.3. The provisions set out in current award clause 30 are set out at PLED clause 15.1. Clause 15.1 of the PLED states:

> '**15.1 Rostering principles—all employees**
>
> **(a)** The employer must prepare a roster for each employee for a maximum of a 4-week period.
>
> **(b)** Ordinary hours must not be worked on more than 5 days in each week, except as provided in clause 15.1(c).
>
> **(c)** Ordinary hours can only be worked on 6 days in one week if ordinary hours in the following week are worked on no more than 4 days.
>
> **(d)** Ordinary hours and any reasonable additional hours must not be worked over more than 6 consecutive days.
>
> **(e)** If an employee elects to work ordinary hours on a Sunday, then the employer must roster the employee so that they have at least one Sunday off every 4 weeks. The employer and the employee may agree to a different arrangement.
>
> **(f) Consecutive days off**
>
> **(i)** The employer must roster an employee to work ordinary hours so they have 2 consecutive days off per week or 3 consecutive days off per 2 week period.
>
> **(ii)** The employer and an individual employee can make different arrangements to those made in clause 15.1(f)(i) at the written request of the employee.
>
> **(iii)** The employer cannot make it a condition of employment that an employee make this type of request.
>
> **(iv)** The employer must keep a copy of the written request mentioned in clause 15.1(f)(ii) as a time and wages record.
>
> **(v)** The employee may terminate the agreement by giving 4 weeks' notice to the employer.'

[111] Ai Group submits that, by virtue of clause 13.3, clause 29 of the current award does not apply to casual employees. It submits that clause 29 of the current award imposes an obligation on an employer to create and provide a roster to full-time and part-time employees only and that, because clause 30 of the current award establishes 'rostering principles' and sets

parameters within which rosters required by clause 29 are to be prepared, clauses 29 and 30 are inherently interconnected.

[112] Ai Group further submits that clause 15.1(a) of the PLED provides for the preparation and notification of rosters for *all* employees and that the current award does not so provide. Ai Group submits that applying clause 15.1(a) of the PLED to casuals amounts to a substantive change which would have serious implications for employers of casual employees covered by the Award. Ai Group contends that, although the overtime provisions in clause 31.2(b) of the current award contemplate that a casual employee may work in accordance with a roster to enable a casual's ordinary hours to be averaged for the purpose of calculating overtime, they do not create an award-derived obligation to create a roster or to apply clause 30 to them.

[113] Ai Group also submits that clauses 15.1(b)–(f) of the PLED correspond with clause 30 of the current award, which prescribes various principles that apply to the preparation of rosters required by clause 29 of the current award. It is argued that, as clause 29 does not apply to casual employees, nor does clause 30.

[114] Finally, Ai Group submits that the issues raised concerning clause 15.1 can be rectified by amending the heading by replacing 'all' with 'full-time and part-time' and that this does not amount to a substantive change.[61]

[115] The AWU submits that clause 15.1 reflects clause 30 of the current award and clause 30 is omitted from the provisions listed at clause 13.3 of the current award and that, contrary to Ai Group's submissions, there is nothing in either clause 13 or 30 of the current award which indicates that casual employees are excluded from the operation of clause 30. The AWU also submits that clause 29 is specifically listed in clause 13.3 as a provision that does not apply to casual employees and clause 30 is not; and no provision in clause 30 limits its operation to permanent employees. The AWU contends that Ai Group's proposal amounts to a substantive change to the current award.[62]

[116] The SDA submits that clause 15.1 of the PLED is aligned with clause 30 of the current award and, as clause 30 is not listed in clause 13.3 of the current award, casuals are not intended to be excluded from clause 30. The SDA opposes Ai Group's proposal to amend the heading of clause 15.1 but submit that, to ameliorate Ai Group's concerns regarding the applicability of clause 15.1(a) to casual employees, clause 15.1(a) of the PLED could be amended to capture the content of clauses 30.1 and 31.2(b) of the current award as follows:

> '**(a)** The employer must prepare a roster for a permanent employee for a maximum of a 4-week period. Where a casual employee works in accordance with a roster, the roster should be for a maximum of a 4-week period.'

[117] Finally, the SDA disputes the proposition that current award clauses 29 and 30 are 'inherently connected'. It submits that the current award does not exclude casual employees from the equivalent provisions specified in clause 15.1(b)–(f). The SDA contends that accepting

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[61] Ai Group submission dated 25 November 2020 at [48]–[51]; Ai Group submission dated 19 March 2021 at [12]–[18]; Ai Group reply submission dated 6 April 2021 at [11]–[12].

[62] AWU reply submission dated 9 December 2020 at [29]; AWU reply submission dated 6 April 2021 at [4]–[6].

Ai Group's proposal to amend the clause to apply only to permanent employees would have the effect of excluding casual employees from accessing provisions that currently apply to them.[63]

[118] The rostering provisions were considered during the substantive variations' proceedings of the current award as part of the Review.[64]. The National Retailers Association (NRA) sought to vary clause 30 to address ambiguity and uncertainty around its application, but later withdrew the claim.[65] The Commission issued a draft report summarising the items discussed at a conference between the parties and noted at paragraph [2] that the 'parties are to have further discussions and exchange further proposed variations to, in particular, clauses 29 and 30 of the Award.' The result of parties' discussions was the consent position set out in the consent determination attached to correspondence from Ai Group. No change to clause 30 was contemplated in the consent determination and parties made submissions supporting the consent determination.[66] Substantive variations were settled in a decision dated 14 June 2019[67] and clauses 28 and 29 of the current award were updated in accordance with the decision. Clause 30 was not amended to exclude casual employees and clause 13.3 was not amended to include clause 30.

[119] As set out at [108] above, clause 13.3 of the current award contains the list of the clauses that do not apply to casual employees. As clause 29 is listed at clause 13.3, the provisions in clause 29 do not apply to casual employees. As clause 30 is not listed at clause 13.3, the provisions in clause 30 do appear to apply to casual employees. This is consistent with clause 31.2(b)(i), which expressly contemplates that casual employees may work in accordance with a roster.

[120] As clause 15.1 of the PLED contains equivalent provisions to clause 30 of the current award and, therefore, applies to all employees, altering the application to full-time and part-time employees only would amount to a substantive change to the terms of the award. We have decided not to alter the application of clause 15.1 as part of these technical and drafting proceedings.

[121] In relation to clause 15.1(a), we agree that the current award does not require an employer to prepare a roster for each employee and, therefore, clause 15.1(a) of the PLED does not correctly reflect clause 30.1 of the current award. To avoid any unintended consequences we will replace the wording at clause 15.1(a) with the wording at clause 30.1 of the current award. Clause 15.1(a) will be amended as follows:

> '**(a)** ~~The employer must prepare a roster for each employee for a maximum of a 4-week period.~~ A roster period cannot exceed 4 weeks.'

[122] Items 32 and 33 are now resolved.

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[63] SDA reply submission dated 9 December 2020 at [27]–[30]; SDA submission dated 19 March 2021 at [16]–[20]; SDA reply submission dated 7 April 2021 at [17]–[32].

[64] AM2017/50.

[65] Hair and Beauty Award Summary of substantive variations, items S11, S12, S13 and S14; NRA correspondence dated 8 September 2017.

[66] AM2017/50 draft report dated 14 December 2017; Ai Group correspondence dated 22 February 2018; Ai Group submission dated 8 March 2018; SDA submission dated 8 March 2018; ABI submission dated 9 March 2018; AWU reply submission dated 22 March 2018.

[67] [2019] FWCFB 3529; PR709361.

Item 38 – clause 17.2—Junior rates – question to parties

[123] Item 38 relates to junior employees, principally which classification levels apply to junior employees and whether junior employees holding trade qualifications should be paid adult rates. A junior employee in the award is an employee aged under 18 years of age. The current award does not exclude junior employees from being paid at all levels; however, Schedule B of the PLED sets out rates for junior employees classified at levels 1, 2 and 3 only.

[124] Ai Group submits that junior employees are to be classified consistent with all other employees, so the classification structure would apply to junior employees in the same way as it does to adult employees. It submits that requiring junior employees who hold trade qualifications to be paid adult rates would amount to a substantive variation to the award and should not be dealt with as part of the redrafting process.[68]

[125] The AWU considers that junior rates are not appropriate for employees performing work at level 2 or above and should be confined to the level 1 classification, on the basis that employees performing work at level 2 or above are required to have at least Certificate II qualifications or are performing skilled work. They suggest that if the Full Bench does not restrict junior rates to level 1 only, then junior rates should be limited to levels 1 and 2 only, based on a decision on junior rates in the General Retail Award issued on 24 November 2020[69] (Retail junior rates decision).

[126] The AWU submits that, applying the Full Bench's reasoning in the Retail junior rates decision to the current award, junior rates must be confined to level 1 and 2 only, as the relevant tradesperson rate in the current award is that of level 3 (as aligned with the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2020*). The AWU submits that the achievement of the minimum wages objective requires that minimum wage rates reflect the value of work performed by employees.[70] It is contrary to the minimum wages objective for employees who are tradespersons to be paid less than the full trade rate when considering the level of skill, qualifications and significant degree of work experience obtained by employees with a trade. It also submits that junior rates should not be applicable to employees classified at levels 4, 5 and 6 if they are not applicable to level 3 employees.[71]

[127] Ai Group opposes the AWU's submission and proposed variation, contending that it would amount to a substantive change and if made, would significantly increase employer costs. It submits there is no evidence or other material before the Commission to satisfy it that the proposed variation is necessary to ensure that the award achieves the modern award objective, that the AWU's proposed variation would amount to a variation to modern award minimum wages for the purposes of s.135 of the Act, and that the relevant wages can only be varied if the Commission is satisfied that the variation is justified by work value reasons.

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[68] Ai Group submission dated 25 November 2020 at [56]–[57].

[69] [2020] FWCFB 6301 at [84].

[70] [2020] FWCFB 6301 at [83].

[71] AWU submission dated 25 November 2020 at [12]–[17].

[128] Ai Group notes that the AWU asserts that not only should employees who are trade qualified be entitled to the adult rate regardless of their age, all employees who have completed a Certificate II, and are classified at level 2 under the award, should also be entitled to the adult wage. It submits that AWU appears to seek an outcome beyond even the scope of the determination in the Retail junior rates decision and that, if the unions wish to pursue the matter, it is open them to file a separate application seeking the relevant variation.[72]

[129] In reply, the AWU accepts that limiting the payment of junior rates to employees in the level 1 and 2 classifications would be consistent with the outcome of the Retail junior rates decision and do not oppose that approach being adopted in the PLED.[73]

[130] The SDA submits that junior rates should be limited to junior employees classified at level 1 and 2 only and should not be applicable beyond level 2, as the relevant tradesperson rate is level 3 and should not be paid less than the full trade rate. It submits that junior rates applying beyond level 2 does not align with the modern awards objectives at s.134 of the Act, and that junior employees holding trade qualifications in line with PLED clauses A.3, A.4 and A.5 (Classification structure and definitions) should be paid the full rate relating to those classifications, not the junior rates.[74]

[131] Currently, there is nothing in the award that excludes a junior employee from being classified at levels 4, 5 or 6. This means that under clause 18 of the current award, trade and higher qualified employees are paid at the junior rate if they are under 18 years of age.

[132] The issue in the General Retail Award was raised by the SDA during the substantive variations proceedings to the General Retail Award. In the General Retail Award at the time junior employees classified from levels 1 to 8 could be paid at junior rates.[75] In the related supporting Information Note published on 5 November 2020, it was noted at Table 5 that, similar to the General Retail Award, the *Hair and Beauty Industry Award 2010* contains a junior rates clause with no limitations to the application of the clause.[76]

[133] The current award does not contain limitations to junior rates and limiting junior rates to junior employees classified at levels 1 and 2 only, as proposed by the AWU and the SDA, would amount to a substantive change. We have decided not to amend clause 17.2 of the PLED to apply junior rates to levels 1 and 2 only, as part of the plain language drafting proceedings. Schedule B will be amended to specify junior rates of pay for all classification levels. It is open to the AWU and SDA to make an application to vary the award to confine the application of junior rates to specific classifications. Item 38 is now resolved.

Item 40 – clause 18.3—Apprentice, trainee and graduate rates – question to parties

[134] Item 40 relates to a question put to parties about whether the term 'pre-apprentice' should be defined for the purposes of clause 18.3 of the PLED and, if so, what that definition should be.

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[72] Ai Group reply submission dated 9 December 2020 at [18]; Ai Group submission dated 19 March 2021 at [19]–[25].

[73] AWU reply submission dated 6 April 2021 at [7].

[74] SDA submission dated 1 December 2020 at [20]; SDA reply submission dated 7 April 2021 at [33]–[35].

[75] General Retail Industry Award 2010 summary of substantive issues dated 23 January 2018 at item 4.

[76] AM2017/60 – Information Note—Junior Rates in Modern Awards dated 5 November 2020.

[135] The AWU supports the inclusion of a definition of 'pre-apprentice' and proposes the following:

> 'A pre-apprentice is an employee undertaking an accredited pre-apprenticeship course. A pre-apprentice must be paid in accordance with the minimum rates prescribed in clause 18.3. The pre-apprentice rates can be paid for a maximum period of 2 weeks.'[77]

[136] Ai Group opposes the definition proposed by the AWU, submitting that the basis for the proposed 2-week limitation is unclear and that pre-apprenticeships can take several weeks to complete. It advises that the parties are in discussion regarding a potential definition that can be agreed and notes that the issue gives rise to complex issues that intersect with state-based training requirements and regulations.[78]

[137] The parties have not provided further information regarding the outcome of discussions and we are not inclined to determine a definition of 'pre-apprentice' absent further submissions. We do not propose to take this matter any further. It is open to any of the parties to make a separate application to vary the award in accordance with the Act. Item 40 is now resolved.

Item 41 – clause 18.4—Minimum rates for adult apprentices

[138] Item 41 relates to the adult apprentice rates at clause 18.4. Ai Group submits that, for consistency with clause 19.4 of the current award, clause 18.4 of the PLED should state that it applies only to adult apprentices who began their apprenticeship on or after 1 January 2014. Neither the SDA nor the AWU oppose Ai Group's suggested amendment.[79]

[139] The reference to adult apprentices 'who commenced on or after 1 January 2014' appearing in clause 19.4 of the current award was omitted from clause 18.4 of the PLED because the information is not necessary.

[140] It is inherently unlikely that any adult apprenticeships that began before 1 January 2014 remain incomplete, and accordingly, we will not amend clause 18.4 to include the words 'who commenced on or after 1 January 2014'. Item 41 is now resolved.

New item – clause 18.6(a)—definition of 'hairdressing trainee' etc

[141] Definitions for 'hairdressing trainee', 'hairdressing graduate' and 'beauty therapy graduate' were proposed by the SDA in response to a request from the Commission in the Hair and Beauty Award exposure draft.[80]

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[77] AWU submission dated 25 November 2020 at [11].

[78] Ai Group reply submission dated 9 December 2020 at [20]; Ai Group submission dated 19 March 2021 at [26]–[27]; Ai Group reply submission dated 6 April 2021 at [15]–[17]; AWU reply submission dated 6 April 2021 at [8]; SDA reply submission dated 7 April 2021 at [36].

[79] Ai Group submission dated 25 November 2020 at [59]; SDA reply submission dated 9 December 2020 at [32]; AWU reply submission dated 9 December 2020 at [36].

[80] SDA submission dated 21 December 2016; Business SA submission dated 18 January 2017; Ai Group submission dated 22 February 2017.

[142] The SDA's definitions were included at clause 18.6(a) of the PLED published on 28 October 2020, thereby providing the parties another opportunity to comment. Ai Group advises that the parties are involved in ongoing discussions regarding the proposed definitions with the view to advancing a joint position and note that the issue gives rise to complex issues that intersect with training requirements and regulations.[81]

[143] The parties have not provided further information regarding the outcome of discussions, and we are not inclined to determine the proposed definitions absent further submissions. We have decided not to take this matter further, and clause 18.6(a) of the PLED will be omitted. It is open to any of the parties to apply to vary the award in accordance with the Act. The new item is now resolved.

Item 43 – clause 20.7—Special clothing allowance

[144] Item 43 relates to the definition of 'special clothing' at clause 20.7 of the PLED. The SDA submits that clause 20.7 should be amended to include the word 'special' in the definition of the term 'special clothing', as follows:

> 'If an employer requires an employee to wear any article of clothing, such as a uniform, dress, protective, special or other clothing ~~**(special clothing)**~~, then the employer must:'[82]

[145] Ai Group do not oppose the proposed amendment.[83]

[146] Clause 20.7 of the PLED is drafted to define 'special clothing'. We are not persuaded that adding 'special' to the list of items in the definition would assist. We prefer the approach taken in clause 19.5 of the *Pharmacy Industry Award 2020* whereby a succinct definition of 'special clothing' was included. Consistent with this approach, clause 17.5 will be amended to read as follows:

> '**17.5 Special clothing allowance**
>
> If an employer requires an employee to wear ~~any article of~~ special clothing, such as a uniform~~, dress,~~ or protective ~~or other~~ clothing, ~~(~~**~~special clothing~~**~~)~~, then the employer must:'

[147] Item 43 is now resolved.

Item 46 – clause 20.9(a)(ii)—Travelling time reimbursement

[148] Item 46 relates to the provisions for reimbursement of travelling time set out in clause 20.9 of the PLED and the proposed drafting at clause 20.9(a)(ii). The relevant provision in the current award states:

> '**21.5 Travelling time reimbursement**

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[81] Ai Group correspondence dated 11 February 2020; Ai Group submission dated 19 March 2021; Ai Group submission dated 6 April 2021; SDA reply submission dated 7 April 2021.

[82] SDA submission dated 1 December 2020 at [15].

[83] Ai Group reply submission dated 9 December 2020 at [12].

(a) An employee who on any day is required to work at a place away from their usual place of employment, for all time reasonably spent in reaching and returning from such place (in excess of the time normally spent in travelling from their home to their usual place of employment and returning), will be paid travelling time and also any fares reasonably incurred in excess of those normally incurred in travelling between their home and their usual place of employment.'

[149] Clause 20.9(a) of the PLED states:

'**20.9 Travelling time reimbursement**

(a) If an employer requires a full-time or part-time employee to work on any day at a place other than their usual place of work, then the employer must:

(i) pay the employee for any extra time reasonably spent travelling to and from work in excess of their normal travel times, as calculated under clause 20.9(b) at the rates set out in clause 20.9(c); and

(ii) reimburse the employee for any additional costs incurred in travelling to and from the other place of work.'

[150] Ai Group notes that under the current award an employee is entitled, in the relevant circumstances, to be paid for any fares reasonably incurred in excess of those normally incurred in travelling between their home and their usual place of employment. Ai Group submits that under clause 20.9(ii) of the PLED does not properly reflect clause 21.5(a) of the current award in three important aspects:

(1) It requires payment for any additional costs which potentially incorporates costs other than fares.

(2) It requires payment for any additional costs, regardless of whether they were reasonably incurred.

(3) Though the provision refers to additional costs, it does not make clear what those costs would be additional to, specifically that they are additional to fares reasonably incurred in travel to and from the employee's usual place of work.

[151] Ai Group submits that, for these reasons, the proposed clause should be replaced with the following:

'**(ii)** reimburse the employee for any fares reasonably incurred in travelling to and from the employee's residence and the other place of work that are in excess of the fares normally incurred in travelling between the employee's residence and their usual place of work.'[84]

[84] Ai Group submission dated 25 November 2020 at [60]–[62].

[152] The SDA does not oppose the inclusion of the words 'any additional costs' in clause 20.9(a)(ii) of the PLED and note that the words are included in other plain language awards.[85] The AWU also does not oppose Ai Group's proposed amendment.[86]

[153] We agree that using the term 'additional costs incurred' does not properly reflect the terms of the current award and may cause ambiguity. We will amend clause 20.9(a)(ii) of the PLED to provide clarity to the provision, as follows:

> '**20.9 Travelling time reimbursement**
>
> **(a)** If an employer requires a full-time or part-time employee to work on any day at a place other than their usual place of work, then the employer must:
>
> **(i)** pay the employee for any extra time reasonably spent travelling to and from work in excess of their normal travel times, as calculated under clause 20.9(b) at the rates set out in clause 20.9(c); and
>
> **(ii)** reimburse the employee for any ~~additional costs~~ fares reasonably incurred in excess of those normally incurred travelling to and from the ~~other place of work.~~ employee's residence and their usual place of work.'

[154] Item 46 is now resolved.

Item 47 – clause 20.10(b)—Transport of employee reimbursement

[155] Item 47 relates to Ai Group's concern about the use of the term 'commercial passenger vehicle' at clause 20.10(b) of the PLED. The relevant provision in the current award states:

> '**21.8 Transport of employees' reimbursement**
>
> **(a)** Where an employee commences and/or ceases work after 10.00 pm on any day or prior to 7.00 am on any day and the employee's regular means of transport is not available and the employee is unable to arrange their own alternative transport, the employer will reimburse the employee for the cost of a taxi fare from the place of employment to the employee's usual place of residence. This will not apply if the employer provides or arranges proper transportation to and/or from the employee's usual place of residence, at no cost to the employee.'

[156] Clause 20.10(b) of the PLED states:

> '**(b)** The employer must reimburse the employee, as applicable, for any cost they reasonably incur in taking a commercial passenger vehicle:
>
> **(i)** from their usual place of residence to their place of work; or
>
> **(ii)** from their place of work to their usual place of residence.'

[85] SDA reply submission dated 9 December 2020 at [33]–[34].

[86] AWU reply submission dated 9 December 2020 at [37].

[157] Ai Group submits that clause 20.10(b) of the PLED is potentially much broader than the current award and the change would amount to a substantive change. They submit that the PLED provision requires an employer to reimburse an employee for any cost reasonably incurred in taking a 'commercial passenger vehicle', whereas in clause 21.8(a) of the current award an employer's obligation is limited to the cost of a taxi fare.[87]

[158] Ai Group submits that taxi fares are regulated by state and territory governments and it is not appropriate that the minimum safety net require an employer to reimburse an employee for costs incurred in relation to other modes of transport that are not regulated in that way. It suggests that the provision should be re-drafted to enable an employer and employee to agree that the employee will be transported by a mode of transport other than a taxi; however, the employer would be liable to reimburse the employee for expenses incurred only if that is agreed by the employer, as follows:

> '**(b)** The employer must reimburse the employee, as applicable, for any cost they reasonably incur in either taking a taxi or commercial passenger vehicle that the employer agrees may be used, to travel:'[88]

[159] The AWU and the SDA oppose Ai Group's proposed variation. Each submits that the term is warranted given the increased use of other transport operators and that the inclusion of the word 'reasonably' will operate to prevent employees from using more expensive commercial passenger vehicle options. The SDA submits that the issue of 'commercial passenger vehicle' was dealt with comprehensively by the Full Bench in the plain language re-drafting of the Pharmacy Award and the settled wording was adopted in other awards. The SDA submits that Ai Group's proposed wording adds unnecessary complexity and subjectivity and that such a change may also give rise to a misunderstanding that the employer must agree for the employee to take a taxi. It submits that its proposal to insert the words 'equivalent to a taxi' at the end of clause 20.10(b) will mitigate Ai Group's concerns about 'premium services'.[89]

[160] As noted by the SDA, the use of the phrase 'commercial passenger vehicle' was dealt with during the plain language re-drafting of the Pharmacy Award. In a decision dated 21 March 2017[90] (the March 2017 decision) we confirmed the *provisional* view they had expressed in the decision dated 20 January 2017:[91]

> '[202] We note that clause 18.6 is confined to the reimbursement of the cost of taking a taxi. Given the emergence of other transport operators, such as Uber, our *provisional* view is that it is appropriate to extend the operation of the clause.
>
> [203] The words 'commercial passenger vehicle' have been used instead of naming a specific operator such as Uber in order to ensure that the provision applies to any future services that become available. The word 'reasonably' has been inserted to ensure that employees do not unreasonably seek reimbursement for the cost of more expensive

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[87] Ai Group submission dated 25 November 2020 at [63]–[64].

[88] Ai Group submission dated 19 March 2021 at [28]–[32].

[89] AWU reply submission dated 6 April 2021 at [9], SDA reply submission dated 7 April 2021 at [37]–[43].

[90] [2017] FWCFB 1612 at [75]–[77].

[91] [2017] FWCFB 344 at [192]–[204].

commercial passenger vehicle (such as Uber Black) when a more reasonably priced option is available.'

[161] In addition to the plain language Pharmacy Award, a clause in similar terms, using the words 'commercial passenger vehicle' and 'reasonably incurred' has been included in the plain language Clerks Award and General Retail Award.

[162] We do not propose to amend clause 20.10(b) of the PLED in the terms sought, as the protections provided by the March 2017 decision have been drafted into this provision. Item 47 is now resolved.

Items 49 and 50 – clause 22—Overtime

[163] Items 49 and 50 relate to clause 22 and the circumstances in which overtime is paid. The items overlap and the various elements can be summarised as follows:

- Issue 1—whether full-time employees should be paid overtime if they work in excess of an average of 38 hours per week;[92]
- Issue 2—whether full-time and part-time employees should be paid overtime if they work outside the span of ordinary hours;[93]
- Issue 3—whether full-time and part-time employees should be paid overtime if they work in excess of the maximum daily hours in clauses 14.7 and 14.8;[94]
- Issue 4—whether full-time, part-time and casual employees should be paid overtime if they work outside the rostering principles;[95]
- Issue 5—whether to insert a new clause stating that, for the purposes of calculating overtime rates, each day stands alone.[96]

Issue 1

[164] Both Ai Group and the AWU submit that clause 22.2 should state that overtime is paid if a full-time employee works in excess of an average of 38 ordinary hours per week, consistent with clauses 28.2 and 31.2(a) of the current award. The SDA submits that clause 22.2 should state that overtime is paid if a full-time employee works in excess of an average of 38 hours ordinary hours per week where the hours are averaged over a roster cycle. Ai Group later submitted that, based on discussions between the parties, it was their understanding that the SDA no longer oppose its proposal.[97]

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[92] Ai Group submission dated 25 November 2020 at [65]; AWU submission dated 25 November 2020 at [6]–[8].

[93] AWU submission dated 25 November 2020 at [6]–[8]; SDA submission dated 1 December 2020 at [8].

[94] AWU submission dated 25 November 2020 at [6]–[8]; SDA submission dated 1 December 2020 at [8].

[95] SDA submission dated 1 December 2020 at [8]; SDA submission dated 19 March 2021 at [5].

[96] Ai Group submission dated 19 March 2021 at [38].

[97] Ai Group submission dated 25 November 2020 at [65]; AWU submission dated 25 November 2020 at [6]–[8]; AWU reply submission dated 9 December 2020 at [40]; SDA reply submission dated 9 December 2020 at [39]–[40]; Ai Group submission dated 19 March 2021 at [33]; SDA submission dated 19 March 2021 at [4]; Ai Group submission dated 6 April 2021 at [3].

[165] Clause 22.2 of the PLED does not reflect the terms of the current award.[98] We will amend clause 22.2 of the PLED to reflect the parties' agreed proposal by replacing 'in excess of 38 ordinary hours per week' with 'in excess of an average of 38 ordinary hours per week'.

Issues 2, 3 and 4—summary

[166] Issue 2—the AWU and the SDA submitted that clauses 22.2 and 22.3 should state that overtime is paid if a full-time or part-time employee works outside the span of hours. Ai Group opposed that submission. The parties subsequently reached agreement that overtime is paid to full-time employees who work outside the span of hours.[99]

[167] In respect of part-time employees, Ai Group argues that clause 22.3 requires overtime rates to be paid for time worked in excess of the ordinary hours agreed pursuant to clause 10.3, subject to any variations made pursuant to clause 10.4, and that agreement regarding a part-time employee's ordinary hours of work pursuant to clause 10.3 can necessarily only involve hours within the spread of hours prescribed by clause 14.4. It submits that, by extension, hours worked outside the spread would necessarily be hours that fall beyond the scope of a part-time employee's agreed hours and therefore would attract overtime rates pursuant to clause 22.3. The AWU agrees with Ai Group. The SDA submits that it is necessary that the PLED expressly identifies that work done outside the span of hours by part-time employees attracts overtime.[100]

[168] Issue 3—the AWU submit that clauses 22.2 and 22.3 should state that overtime is paid if a full-time or part-time employee works in excess of the maximum daily hours in clauses 14.7 and 14.8, the SDA supports that submission.

[169] Issue 4—the SDA submits that the current award does not contain provisions that explicitly state that working outside the maximum daily hours and rostering principles would incur overtime; therefore, any work outside the rostering provisions is not permitted and would be an award breach.

[170] Ai Group opposes the AWU and SDA submissions in respect of Items 3 and 4, arguing that there is no provision in the current award that requires the payment of overtime rates for time worked in excess of the maximum daily hours prescribed by clause 28.2 for permanent employees or for work performed outside the rostering principles.[101]

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[98] Ai Group reply submission dated 6 April 2021 at [3].

[99] AWU submission dated 25 November 2020 at [6]–[8]; SDA submission dated 1 December 2020 at [8]; Ai Group reply submission dated 9 December 2020 at [22]–[23]; SDA submission dated 19 March 2021 at [5]; Ai Group submission dated 19 March 2021 at [34]–[35].

[100] Ai Group submission dated 19 March 2021 at [36]–[37]; Ai Group submission dated 6 April 2021 at [3]–[4]; AWU submission dated 6 April 2021 at [10]–[11]; SDA reply submission dated 7 April 2021 at [44]–[48].

[101] AWU submission dated 25 November 2020 at [6]–[8]; SDA submission dated 1 December 2020 at [8]; Ai Group reply submission dated 9 December 2020 at [22]–[24]; Ai Group submission dated 19 March 2021 at [34]–[35]; SDA submission dated 19 March 2021 at [4]–[8]; Ai Group reply submission dated 6 April 2021 at [3]; AWU reply submission, 6 April 2021 at [10]; SDA reply submission dated 7 April 2021 at [44]–[48].

[171] In the August 2021 HABIA Overtime decision[102] the Full Bench advised that certain issues relating to overtime for full-time and part-time employees (issues 2, 3 and 4) had been assigned by the President to that Full Bench to be determined as part of residual matters arising from drafting of the overtime provisions in the current award. In a decision issued on 17 December 2021[103] (December 2021 HABIA Overtime decision) the Full Bench decided issues 2, 3 and 4 as follows:

- Issues 2 and 3—that the award be varied to provide that, for full-time and part-time employees, overtime rates will apply to work performed outside the daily span of hours or in excess of the prescribed daily maximum hours.

- Issue 4—that the SDA's submission not be acted upon as part of the assigned AM2017/51 proceeding. If the SDA wishes to pursue the matter, they may file an application to vary the current award pursuant to s.158 of the Act.

[172] We will amend clauses 22.2 and 22.3 of the PLED to reflect the December 2021 HABIA Overtime decision by stating that overtime rates will apply to work performed by full-time and part-time employees outside the daily span of hours or in excess of the prescribed daily maximum hours.

Issue 5

[173] Ai Group submits, that as a result of discussions between themselves and the unions, the parties agree that a new clause should be inserted at clause 22.6 as follows:

> '**22.6** For the purposes of calculating overtime rates, each day stands alone.'[104]

[174] We note that neither the AWU nor the SDA have confirmed this position in their submissions in reply to Ai Group's submissions. We are not inclined to insert the clause absent submissions on the need and effect of its inclusion. It is open to any of the parties to apply to vary the award in accordance with the Act.

Additional matter

[175] A decision was issued on 7 October 2021[105] relating to penalty rates for casual employees in the *Hair and Beauty Industry Award 2010* (AM2017/40). The Full Bench in that matter decided that the 25% casual loading will be added to overtime hours worked by casual employees on a Sunday. The Full Bench also decided that the 25% casual loading would be phased in, with full implementation by 31 December 2023. The phased-in overtime rates for casual employees will be added to Table 13 in clause 22.5 of the PLED and information will be deleted from that table when it becomes redundant.

[176] We will amend clauses 22.2, 22.3, 22.5 and 22.6 of the PLED to take into account the resolutions to issues 1–5 and the additional matter, as follows:

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[102] [2021] FWCFB 4656 at [5]–[6].

[103] [2021] FWCFB 6071.

[104] Ai Group submission dated 19 March 2021 at [38].

[105] [2021] FWCFB 6019; PR734668; see also [2021] FWCFB 5577 and [2020] FWCFB 39.

‘**22.2 Payment of overtime for full-time employees**

An employer must pay a full-time employee at the overtime rate in clause 22.5 for any hours worked at the direction of the employer ~~in excess of 38 ordinary hours per week~~ as follows:

(a) in excess of an average of 38 ordinary hours per week;

(b) outside the span of ordinary hours specified in clause 14.4; or

(c) in excess of the maximum daily ordinary hours specified in clauses 14.7 and 14.8.

22.3 Payment of overtime for part-time employees

An employer must pay a part-time employee at the overtime rate in clause 22.5 for any hours worked at the direction of the employer as follows:

(a) in excess of the number of ordinary hours agreed under clause 10.3~~,~~ or as varied under clause 10.4;

(b) outside the span of ordinary hours specified in clause 14.4; or

(c) in excess of the maximum daily ordinary hours specified in clauses 14.7 and 14.8.

22.5 Overtime rates

An employer must pay an employee for overtime worked as set out in clauses 22.2, 22.3 and 22.4 at the following rates:

Table 13—Overtime rates

For overtime worked:	**Full-time and part-time employees**	**Casual employees**
	% of minimum hourly rate	**% of minimum hourly rate**
Monday to Saturday—first 3 hours	150	175
Monday to Saturday—after 3 hours	200	225
Sunday—all overtime hours	200	~~200~~
– 30 April 2022 to 30 December 2022		210
– 31 December 2022 to 29 April 2023		215
– 30 April 2023 to 30 December 2023		220

For overtime worked:	Full-time and part-time employees	Casual employees
	% of minimum hourly rate	% of minimum hourly rate
– From 31 December 2023		225
Public holiday—all overtime hours	250	250
Rostered day off—all overtime hours	200	–

NOTE 1: The overtime rates for casual employees ~~for Monday to Saturday,~~ except on public holidays, have been calculated by adding the casual loading specified in clause 11.2(b) to the overtime rates for full-time and part-time employees specified in clause 22.5, subject to a phased-in implementation for overtime worked on a Sunday.

NOTE 2: Clause 23.3 sets out provisions relating to working on a rostered day off.

NOTE 3: Schedule B—Summary of Hourly Rates of Pay sets out the hourly overtime rate for all employee classifications.

22.6 For the purposes of calculating overtime rates, each day stands alone.'

[177] Items 49 and 50 are now resolved.

Item 54 – clause 23.1—Penalty rates

[178] Item 54 relates to the presentation of penalty rates in Table 17 (renumbered as Table 14 as a result of resolution of item 39) in clause 23.1.

[179] Ai Group initially submitted that it is misleading to refer to clause 22 in rows 2 and 3 of Table 14 in clause 23.1 because it suggests that a permanent employee can work ordinary hours during those times and that, if they do, they must be paid the rates in clause 22—Overtime.[106] Ai Group and the SDA both note that the parties have reached agreement that work performed by permanent employees outside the span of hours set out in clause 14.4 is overtime[107] The agreed amendments are set out at [23] of the SDA submission dated 19 March 2021.

[180] Given that hours worked by permanent employees outside the spans of hours set out in clause 14.4 are overtime hours and paid at overtime rates, and hours worked by casual employees outside those same spans are ordinary hours and paid at penalty rates, the most efficient way to set out these rates is in two tables, one for permanent employees and the other for casual employees. We will amend the PLED accordingly.

[106] Ai Group submission dated 25 November 2020 at [68]–[69].

[107] Ai Group submission dated 19 March 2021 at [40]–[41]; SDA submission dated 19 March 2021 at [21]–[26]; Ai Group reply submission dated 6 April 2021 at [7]–[8]; SDA reply submission dated 7 April 2021 at [53]–[54].

[181] As mentioned earlier, the Full Bench in AM2017/40 decided that the 25% casual loading would be added to ordinary hours worked by casual employees within the Saturday span of hours for a full-time employee and to ordinary hours worked by casual employees at any time of day on a Sunday. The Full Bench also decided that the 25% casual loading would be phased in, with full implementation on 31 December 2023. The phased-in penalty rates for casual employees will be added to the new table relating specifically to penalty rates for casual employees, Table 15, and information will be deleted from that table when it becomes redundant. Subsequent tables will be renumbered.

[182] We will amend clause 23 in the PLED by replacing clause 23.1, renumbering clause 23.2 as 23.3 and inserting a new clause 23.2 containing penalty a table setting out penalty rates for casual employees. New clauses 23.1 and 23.2 will read as follows:

‘**23. Penalty rates**

23.1 Full-time and part-time employees

An employer must pay penalty rates to a full-time or part-time employee who works ordinary hours as follows:

Table 14—Penalty rates—full-time and part-time employees

For ordinary hours worked:	**Full-time and part-time employees**
	% of minimum hourly rate
Saturday—between 7.00 am and 6.00 pm	133
Sunday—between 10.00 am and 5.00 pm	200
Public holiday—any time of day	250
Rostered day off—any time of day	200

NOTE: Schedule B—Summary of Hourly Rates of Pay sets out the hourly penalty rates for full-time and part-time employees.

23.2 Casual employees

An employer must pay penalty rates to a casual employee who works ordinary hours as follows:

Table 15—Penalty rates—casual employees

For ordinary hours worked:	**Casual employees**
	% of minimum hourly rate
Monday to Friday—before 7.00 am and after 9.00 pm	150
Saturday—before 7.00 am and after 6.00 pm	150

For ordinary hours worked:	Casual employees
	% of minimum hourly rate
Saturday—between 7.00 am and 6.00 pm	
– 30 April 2022 to 30 December 2022	143
– 31 December 2022 to 29 April 2023	148
– 30 April 2023 to 30 December 2023	153
– From 31 December 2023	158
Sunday—any time of day	
– 30 April 2022 to 30 December 2022	210
– 31 December 2022 to 29 April 2023	215
– 30 April 2023 to 30 December 2023	220
– From 31 December 2023	225
Public holiday—any time of day	250

NOTE 1: The penalty rates for casual employees who work ordinary hours on Saturday between 7.00 am and 6.00 pm and on Sunday at any time of day includes the casual loading specified in clause 11.2(b), subject to a phased-in implementation.

NOTE 2: Schedule B—Summary of Hourly Rates of Pay sets out the hourly penalty rates for casual employees.

[183] Item 54 is now resolved.

Item 56 – clause 23.2(a)—Rostered day off

[184] Item 56 relates to Ai Group's submission that clause 23.2(a) should be amended to ensure that it is consistent with clause 23.2(b) and clause 22.5 of the PLED and to clarify that, by written agreement between the employer and employee, the arrangement for an employee to work on a day that is their rostered day off is permitted by the award, rather than one that it is merely contemplated by it.

[185] The relevant provision in the current award, clause 31.2(e), states:

> 'Where it is mutually agreed upon between the employer and the employee (such agreement to be evidenced in writing), an employee may be employed on their rostered day off at the rate of **200%** of the ordinary hourly rate of pay for all time worked with a minimum payment as for four hours' work.'

[186] Ai Group suggest that clause 23.2(a) of the PLED be amended as follows:

> '**(a)** ~~Clause 23.2 applies if the~~ An employer and employee may agree in writing that the employee will work on a day that is their rostered day off.'[108]

[187] Both the AWU and the SDA oppose Ai Group's proposed amendment and submit that the words 'clause 23.2 applies if' ensure that it is simple and easy to understand when the entitlement to the 200% penalty rate for working on a rostered day off applies.[109]

[188] The SDA further submits that it and the AWU both support the current PLED drafting. It submits that Ai Group's proposed changes lessen the clarity of provision and referring to 'may' potentially introduces some uncertainty, as there must be written agreement between the employer and employee for the employee to work on a day that is their rostered day off.[110]

[189] We agree that, as currently drafted, it is not clear that the arrangement for an employee to work on their rostered day off is permitted. Clause 23.2 of the PLED has been renumbered as 23.3 as a result of the resolution of item 54. We will amend clause 23.3(a) of the PLED as follows:

> '**(a)** Clause 23.3~~2~~ applies if, by agreement in writing between the employer and employee, ~~agree in writing that~~ the employee ~~will~~ works on a day that is their rostered day off.'

[190] Item 56 is now resolved.

Items 57 and 58 – clause 24.2—Additional paid leave for certain shiftworkers

[191] Items 57 and 58 concern the drafting of clause 24.2 of the PLED, which provision relates to additional paid annual leave for certain shiftworkers. Item 57 relates to the reference to 'seven day' in relation to the term 'shiftworker' and item 58 relates to the deletion of the clause in its entirety. The equivalent provision in the current award, clause 33.2, states:

> '**33.2 Definition of shiftworker**
>
> For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week.'

[192] Clause 24.2 of the PLED published on 28 October 2020 was drafted as follows:

> **'24.2 Additional paid annual leave for certain shiftworkers**
>
> A shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for 7 days

[108] Ai Group submission dated 25 November 2020 at [71]; Ai Group submission dated 19 March 2021 at [43]; Ai Group submission dated 6 April 2021 at [13].

[109] AWU reply submission dated 9 December 2020 at [42]; SDA reply submission dated 9 December 2020 at [42].

[110] SDA submission dated 19 March 2021 at [9]–[12].

> a week is entitled to an additional week of paid leave under the NES. See section 87 of the Act.'

[193] It is convenient to deal with item 58 first. Ai Group contends that clause 24.2 of the PLED should be deleted in its entirety because the award does not contemplate the performance of shiftwork and, therefore, the clause has no work to do.[111]

[194] Both the AWU and the SDA oppose the deletion of clause 24.2, as suggested by Ai Group, submitting that this would amount to a substantive change to the award, which should be advanced under an award variation application.[112]

[195] We agree with Ai Group that, although clause 33.2 of the current award assumes the capacity to work shiftwork under the award, the award does not include any shift loadings or other provisions regulating shift work. The history of the Hair and Beauty Award suggests that the inclusion of a definition of shiftwork in clause 33.2 in the absence of any other shiftwork provisions was an error.

[196] During Award Modernisation, the AIRC initially proposed that the hair and beauty industry would be included in the coverage of the General Retail Award, which contains a detailed scheme of provisions concerning shiftwork. However, in a decision issued on 19 December 2008,[113] the AIRC decided to make a separate award for the hair and beauty industry and noted:

> '[283] The more awards with disparate provisions are aggregated the greater the extent of changes in the safety net. Changes may be able to be accommodated by a "swings and roundabouts" approach, specific provisions relevant to part of the industry or transitional provisions. However, significant changes may also result in net disadvantage to employees and/or increased costs for employers. The publication of an exposure draft which sought to rationalise the terms and conditions across the various types of retail establishment provided a means whereby the impact of such an approach could be fully evaluated.
>
> [284] We have considered these matters and the submissions of the parties and have decided to make separate awards for general retailing, fast food, hair and beauty, and community pharmacies. Further, we will exclude stand alone meat retailing and, at this stage, stand alone nurseries from the general retail award to enable those types of operations to be considered as part of the meat and agriculture industries respectively. The position regarding real estate agencies and motor vehicle related retailing will also be considered in subsequent stages.
>
> [285] In reaching this decision we have placed significant reliance on the objective of not disadvantaging employees or leading to additional costs. We note that such an approach will not lead to additional awards applying to a particular employer or employee.

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[111] Ai Group submission dated 25 November 2020 at [74].

[112] AWU reply submission dated 9 December 2020 at [43]; SDA reply submission dated 9 December 2020 at [43].

[113] [2008] AIRCFB 1000.

> [286] The contents of the four awards we publish with this decision are derived from the existing awards and NAPSAs applying to the different sectors. Although the scope of the awards is obviously reduced, this did not eliminate the variations in terms and conditions within each part of the industry. We have generally followed the main federal industry awards where possible and had regard to all other applicable instruments. In this regard we note in particular the significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the industry.'

[197] When the *Hair and Beauty Industry Award 2010* was first made by the AIRC on 19 December 2008[114] only clause 31—Annual leave contained provisions relating to shiftworkers. Those provisions have been renumbered as clause 33 in the current award and are in the same terms as the current terms. There were no other provisions in the award that relate to shift work. Of the predecessor awards,[115] only the *Hairdressers' Industry Award – State 2003* (AN140140) contained shift work loadings and defined 'afternoon' and 'night' shift, at clause 6.5. That provision was not included in the *Hair and Beauty Industry Award 2010*. The *Hairdressers' Industry Award – State 2003* also contained, at clause 7.1.1, provision for an extra week's leave for shiftworkers and, at clause 7.1.5, provision for the calculation of annual leave pay for shiftworkers. This causes us to conclude that an error was made in carrying over a provision of this nature into the modern award.

[198] Clause 33.2 of the current award has no practical function because the award does not provide for any employee to be rostered in a way that meets the definition in that provision. Clause 24.2 of the PLED likewise has no practical function. The deletion of the clause would not be a substantive change since it has no practical effect.

[199] It is therefore our *provisional* view that clause 24.2 should be deleted from the PLED. In light of this *provisional* view, it is unnecessary to deal with item 57. It is our *provisional* view that this resolves items 57 and 58.

Item 59 – clause 24.3—Annual leave loading

[200] Item 59 relates to concerns about the drafting of clause 24.3 of the PLED, the provision for payment made to employees during a period of annual leave.[116]

[201] It is necessary to set out some relevant background before turning to the issues in contention.

[202] During the review of Group 3 awards, Ai Group made submissions regarding unresolved concerns, one of which was the manner in which premiums are expressed in exposure drafts and the impact on certain entitlements. Ai Group submitted:

> '4. Our second concern relates to the **manner in which premiums are expressed in exposure drafts**. Numerous exposure drafts state, for example, that a shift worker is to

[114] PR985115.

[115] AN120088; AN120242; AN140026; AN140140; AN150062; AN160153; AN170042; AP783495; AP818691; AP806816.

[116] Ai Group submission dated 25 November 2020 at [75]–[79]; SDA reply submission dated 9 December 2020 at [45]–[46]; AWU reply submission dated 9 December 2020 at [45]; Ai Group further submission dated 19 March 2021 at [44]–[55]; AWU reply submission dated 6 April 2021 at [12]; SDA reply submission dated 7 April 2021 at [56]–[69].

be paid 130% of the relevant rate, rather than a 30% loading. This has implications for the calculation of other award entitlements which still refer to loadings (e.g. annual leave payments).'[117]

[203] In a decision dated 30 October 2017,[118] the Group 3 Full Bench expressed the view that there may be issues with the interaction between the penalty rates clause and annual leave loading and that some exposure drafts may be ambiguous because the annual leave loading clause isolates the loading component of the shiftwork [or penalty rate] provision and compares it to annual leave loading. As certain re-drafted penalty rates clauses no longer identify the loading component of the shiftwork [or other] penalty separately, the annual leave loading clause is no longer comparing like with like.

[204] The *Hair and Beauty Industry Award 2010* was identified at Attachment B of that decision as an exposure draft in which there may be an issue with the interaction between the annual leave loading and the penalty rates provisions. The issue of ambiguity and terminology in annual leave clauses was then referred to the Plain Language Full Bench.

[205] In a statement dated 21 March 2018[119] it was confirmed that the Plain Language Full Bench would deal with the issue previously raised by Ai Group, along with similar queries received form the Fair Work Ombudsman about calculating annual leave loading.

[206] In a statement dated 13 December 2019[120] relating to 11 awards in Tranche 1 of the final stage proceedings,[121] it was generally accepted that an award-by-award approach would be appropriate as there was no consensus as to how the ambiguity was to be addressed.

[207] We now turn to the issues in dispute.

[208] The relevant provision in the current award, clause 33.3, states:

'**33.3 Annual leave loading**

(a) During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17 of this award. Annual leave loading payment is payable on leave accrued.

(b) The loading will be as follows:

(i) Day work

Employees who would have worked on day work only had they not been on leave—17.5% or the relevant weekend penalty rates, whichever is the greater but not both.

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[117] Ai Group general issues submission dated 31 August 2016 at [4].

[118] [2017] FWCFB 5536 at [583]-[591]; see also [2017] FWCFB 3433 at [363]–[379].

[119] [2018] FWC 1544 at [8]–[12].

[120] [2019] FWC 8468; Conference transcript dated 19 December 2019; [2019] FWC 8582.

[121] [2019] FWC 8468; Conference transcript dated 19 December 2019; [2019] FWC 8582.

(ii) Shiftwork

Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including relevant weekend penalty rates), whichever is the greater but not both.'

[209] Clause 24.3 of the PLED states:

'**24.3 Annual leave loading**

(a) An employee is entitled to an additional payment for accrued annual leave, calculated on the minimum hourly rate specified in clause 17—Minimum rates or clause 18—Apprentice, trainee and graduate rates, as applicable, for the classification in which they are employed.

(b) The additional payment for the employee's ordinary hours of work when taking paid annual leave is as follows:

(i) Dayworkers

An employee who would have worked on day work only had they not been on leave must be paid the greater of either:

- the minimum hourly rate plus a loading of **17.5%** of the minimum hourly rate; or
- the relevant weekend penalty rate specified in clause 23.1.

(ii) Shiftworkers

An employee who would have worked on shift work had they not been on leave must be paid the greater of either:

- the minimum hourly rate plus a loading of **17.5%** of the minimum hourly rate; or
- the relevant penalty rate specified in clause 23.1, including relevant weekend penalty rates.

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

[210] Ai Group, the SDA and the AWU raised a number of concerns about the drafting of the clause and, at the February 2021 conference, the parties sought the opportunity to provide further submissions. As part of their further submissions, Ai Group raised an additional drafting concern.

[211] The concerns contained within item 59 are:

- the operation of the 'additional payment'—the effect of the drafting is that the amounts prescribed by clauses 24.3(b)(i) and (ii) are paid in addition to the employee's base rate of pay, meaning that the employee would receive a loading of 217.5%, 233% or 300% of the minimum hourly rate of pay plus the employee's base rate of pay;

- shiftwork—it may be appropriate to delete PLED clause 24.3(b)(ii), given the absence of provisions contemplating shiftwork in the current award;

- the term 'additional payment'—retaining the current award wording would resolve the ambiguity in the clause;

- period of leave—the PLED currently appears to require an hour-by-hour comparison to calculate the annual leave loading, which is a substantive change, and should be amended to make clear that the amounts referenced at clauses 24.3(b)(i) and (ii) are to be calculated by reference to the entire period of leave taken by an employee, consistent with the current award.

[212] Ai Group, in its initial submission, submitted that clauses 24.3(a) and (b) of the PLED both state that an employee is entitled to an additional payment for accrued annual leave and clauses 24.3(b)(i) and (ii) set out the additional amounts payable. It submits that, although it is not abundantly clear what the amounts are to be paid in addition to, when read alongside the NES, the effect of the proposed drafting would be to require the payment of the prescribed amounts in addition to the employee's base rate of pay prescribed by the NES. Read this way, for example, under proposed clause 24.3(b)(i) an employee whose base rate of pay equates to the minimum rates prescribed by the PLED would be entitled to 217.5%, 233% or 300% of the minimum hourly rate of pay and a similar outcome would flow from proposed clause 24.3(b)(ii). Ai Group submits that, whilst the current award clause 33.3(b) is somewhat unclear and potentially anomalous, the clause is not intended to operate in the manner reflected at clause 24.3(b) of the PLED.

[213] Ai Group also submits that, given the absence of provisions contemplating shiftwork in the Award, it may be appropriate to delete clause 24.3(b)(ii) of the PLED. [122]

[214] The SDA submits that the ambiguity arising from the wording of the proposed clause could be resolved by reverting to the wording of the current award. It also objects to Ai Group's suggestion that clause 24.3(b)(ii) of the PLED be deleted, submitting that it would amount to a substantive change to the current award.[123]

[215] The AWU submits in response that the PLED should revert to the comparatively simpler wording of the current award to avoid potential confusion arising from the wording of the proposed clause.[124]

[216] After the February 2021 conference Ai Group made further submissions and raised a new issue concerning 'period of leave'. It contends that clause 24.3 of the PLED deviates from

[122] Ai Group submission dated 25 November 2020 at [75]–[79].

[123] SDA reply submission dated 9 December 2020 at [45]–[46].

[124] AWU reply submission dated 9 December 2020 at [45].

the current award because it appears to require that the comparative exercise required by clause 24.3(b)(i) and 24.3(b)(ii) is undertaken on an hourly basis rather than by reference to the entire period of leave.

[217] Ai Group submits that clause 33.3 of the current award requires that an employee must be paid 'a loading', one additional amount, in relation to a 'period of leave'. In clause 33.3(b)(i), if an employee would have worked on day work had they not been on leave 'the loading' payable for the 'period of leave' will equate to either 17.5% of the minimum weekly wage or the relevant weekend penalty, whichever is the higher but not both, with the same applying for clause 33.3(b)(ii) (noting that the current award does not prescribe shift loadings, with the effect being that the clause is inherently unclear). The higher of the two amounts will constitute 'the loading' payable 'during a period of leave' and the relevant calculations for the loading are made by reference to the entire period of leave taken.

[218] Ai Group submits that clause 24.3 of the PLED deviates from the extant provision by prescribing the amounts payable pursuant to it as hourly rates and that the clause does not state that the amounts described at, for example, clause 24.3(b)(i) are to be calculated by reference to the amounts that would be payable to the employee for the entire duration of the leave. It submits that the clause appears to require an hour-by-hour comparison and calculation and that this amounts to a substantive variation to the terms of the award. Ai Group suggests that the PLED should be amended to make it clear that the amounts referenced at clause 24.3(b) are to be calculated by reference to the entire period of leave taken by an employee.

[219] Finally, Ai Group submits that the AWU and SDA's suggestion of replacing the proposed provision with the current award provision would alleviate some concerns relating to the drafting but would not address all the issues raised. It submits that the proposed wording at clause 24.3 of the PLED should be replaced with the following (noting that their proposal does not include a provision applying to 'employees who would have worked on shiftwork had they not been on leave' on the basis that the current award does not provide for the performance of shiftwork):

> **'24.3 Annual leave loading**
>
> **(a)** During a period of annual leave an employee will receive a loading on annual leave accrued, in accordance with clause 24.3.
>
> **(b)** The loading will be the higher of the following two amounts, but not both:
>
> **(i)** 17.5% of the minimum hourly rate prescribed by clause 17, multiplied by the number of ordinary hours of work that the employee would have been required to perform had the employee not taken leave.
>
> **(ii)** The relevant weekend penalties that would have been payable to the employee for ordinary hours of work had the employee not taken leave.
>
> **(c)** For the purposes of clause 24.3(b), the amounts described by clauses 24.3(b)(i) and 24.3(b)(ii) are to be calculated in relation to the entire period of leave taken by the employee.

(d) For the purposes of clause 24.3(b)(ii), the relevant weekend penalty is the applicable weekend penalty rate prescribed by clause 23.1, less the minimum hourly rate prescribed by clause 17.'[125]

[220] The AWU, in response to Ai Group's further submission and proposed drafting, considers that replicating the current award wording in the PLED is a simpler and preferable approach to Ai Group's proposal.[126]

[221] The SDA, in response to Ai Group's further submission and proposed drafting, submits that Ai Group's further submissions deal with an understanding of annual leave loading as being judged in total at the end of the period. It submits that Ai Group's approach seems to presume that annual leave can only be taken as a specific period, when no such requirement appears in the current award or in the FW Act, which provides at s.88(1) that paid annual leave may be taken for a period agreed between the employee and the employer and at s.88(2) that the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

[222] The SDA submits that the approach at s.88 of the FW Act is not novel, as s.236(2) of the *Workplace Relations Act 1996* (Cth) states: 'To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that any employer may authorise an employee to take.' They state that annual leave may be taken in any period agreed between the employer and employee, with annual leave often being granted in hourly components. Consequently, any loadings should also accrue hourly.

[223] The SDA disagrees with Ai Group's further submission that clause 24.3 of the PLED is a substantive variation to the terms of the award. It contends that the provision the subject of Ai Group's challenge is also found in the General Retail Award and that provision remains unchanged from the initial plain language exposure draft published in 2017. The SDA submits that that provision was not challenged by any party and does not appear to have been raised in any of the Commission's summary documents, which can only mean that the Commission rightly decided in its favour in respect of the retail industry and should conclude the same regarding the hair and beauty industry.

[224] The SDA submits that s.235(1) of the *Workplace Relation Act 1996* (Cth) provided that if any employee takes annual leave, they must be paid a rate for each hour (pro-rated for part hours) of annual leave that is no less than the rate that, immediately before the period begins, in the employee's basic periodic rate of pay (expressed as an hourly rate). It submits that Ai Group is effectively seeking to make late submissions regarding a settled matter for a substantive change to the way annual leave loading is applied in the hair and beauty industry and this should be rejected.

[225] The SDA submits that annual leave loading was initially conceived as a mechanism to ensure that employees did not suffer a financial detriment while on leave and, in this context, it becomes clear that the purpose of the provision providing that either the weekend penalty rates or the 17.5% loading applies is to ensure that employees do not suffer a detriment in respect of their weekend penalty rates. However, to exclude the 17.5% from other days or hours taken

[125] Ai Group submission dated 19 March 2021 at [44]–[55].

[126] AWU reply submission dated 6 April 2021 at [12].

may result in an employee suffering a detriment on those days. It submits that, as such, the submissions of Ai Group, together with their proposed wording, should be rejected.

[226] Finally, the SDA submits that it favours the retention of the current PLED wording and suggests that retaining the wording 'loading' rather than 'additional payment' would go some way to ameliorating the concerns of Ai Group. [127]

Additional payment

[227] In relation to the term 'additional payment' used in PLED clause 24.3, we agree that renaming the clause 'annual leave payment' may give rise to an ambiguity or uncertainty. We have decided to revert to the existing terminology of 'annual leave loading' to maintain consistency with the Act.

[228] We also agree that the current drafting creates ambiguity in the calculation of the relevant loading which needs to be addressed. Both the current award and the PLED refer to 'relevant weekend penalty rates' and because the penalty rates clause in the PLED no longer identify the loading component of the penalty rate separately, the annual leave loading clause is no longer comparing like with like.

[229] The current award wording at clause 33.3(b)(i), for example, provides that the annual leave loading is '17.5% or the relevant weekend penalty rates, whichever is the greater but not both.' The relevant weekend penalty rate in clause 23.1 of the PLED is either 133% or 200% of the minimum hourly rate. If the current award wording replaced the wording at clause 24.3(b)(i) of the PLED, the loading to be added to the employee's base rate of pay would be calculated as the greater of either 17.5% or the relevant weekend penalty rate of 133% or 200%.

[230] Further, the additional payment is calculated in accordance with clause 24.3(b) and added to the employee's base rate of pay. We agree with Ai Group that, assuming the employee's base rate of pay equates to the minimum hourly rate, an employee may be entitled to 217.5% (the base rate of pay plus the minimum hourly rate plus 17.5% of the minimum hourly rate), 233% or 300% (the base rate of pay plus the relevant weekend penalty rate).

[231] We deal with our proposed redrafting of the PLED clause to address this issue below.

Shiftwork

[232] As we have earlier found, the Hair and Beauty Award does not currently provide any substantive shiftwork provisions. Accordingly, we consider clause 24.3(b)(ii) has no practical work to do, and its inclusion may lead to confusion and uncertainty. We agree with Ai Group's submission, the clause should be deleted.

Period of leave

[233] In relation to the period of leave and calculation of annual leave, it may be accepted that paid annual leave may be granted in hourly components and may be taken for a period agreed

[127] SDA reply submission dated 7 April 2021 at [56]–[68].

between the employee and employer. Prescribing amounts payable pursuant to clause 24.3(b) as hourly rates is consistent with the approach taken in other plain language awards and facilitates calculation of payment for period of leave less than a week. However, the draft clause is not consistent with other plain language awards or the current award in that it does not make clear that the amounts referenced at clause 24.3(b) of the PLED are calculated by reference to the period of leave taken.

[234] The rate of pay while on a period of annual leave was discussed in a Review decision dated 13 July 2015[128] (July 2015 decision). The Full Bench in that matter stated:

> '**[76]** Historically awards have provided that an employee will continue to receive their ordinary rate of pay while on leave. A Full Bench decision in 24 January 2006[129] stated:
>
> > "[35] ... We refer in particular to the Commission's principles concerning holiday pay as formulated in the *Annual Leave Cases 1971* [(1972) 144 CAR 528.]. In an announcement made on 7 June 1972 the Commonwealth Conciliation and Arbitration Commission confirmed the view it had earlier expressed that "*an employee taking annual leave…shall be paid the amount of wages (or salary) as he would have received in respect of the ordinary time he would have worked had he not been on leave"* [Ibid].

[235] Consistent with the above principle, the correct method of calculation is that, once the period of leave to be taken is identified, the higher of 17.5% of the employee's minimum hourly rate for all ordinary hours of work in that period, or the amount of the weekend penalty rates which would have been earned if the hours in the period of leave had been worked, is paid. This is a simple calculation which does not require the complex hour-by-hour approach as submitted by the SDA.

Proposed redrafting

[236] As mentioned above, we think that the PLED clause should be redrafted to address the issues raised by the parties.

[237] In relation to Ai Group's draft clause, similar wording to its proposal was considered in a decision dated 20 August 2019[130] (August 2019 decision), determining outstanding plain language project issues. In a statement dated 28 February 2019,[131] we proposed to adopt as a model clause the wording that had been suggested by Ai Group during the plain language re-drafting of the Clerks Award.[132] In proposing the model clause we noted that, although the solution appeared to be relatively straightforward in terms of drafting, it required the reader to deduct the minimum wage from the penalty rates clause and then compare the remainder to the annual leave loading, which may make the award more complex and difficult for users to apply. We decided not to adopt the proposed model clause at that time and noted that the issues should be considered on an award by award basis.

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[128] [2015] FWCFB 4658 at [73]–[94].

[129] PR967812.

[130] [2019] FWCFB 5409 at [146]–[152].

[131] [2019] FWCFB 1255 at [64]–[70].

[132] [2018] FWCFB 5553 at [173].

[238] However, given the nature of the issues raised by the parties in relation to the Fast Food Award, in particular the uncertainty about the percentages to be compared in the clause, we have decided to introduce a definition of 'relevant weekend penalty amount' as follows:

> 'In clause 24.3 the **relevant weekend penalty amount** is the applicable penalty rate prescribed by clause 23—Penalty rates, less the minimum hourly rate.'

[239] We acknowledge that a clause requiring the reader to deduct the minimum hourly rate from the applicable penalty rate and then compare the remainder to the annual leave loading will introduce some complexity into the award, but, on balance, we consider that such a clause is the clearest way to express the entitlement to annual leave loading.

[240] Our proposed redraft of the clause also:

- amends clause 24.3 of the PLED to refer to 'annual leave loading';
- removes clause 24.3(b)(ii) which refers to shiftworkers. We have made a consequential amendment to remove the reference to dayworkers as this is not a defined term in the award; the clause simply refers to 'an employee'.
- amends the comparison required by the clause to more closely reflect the terms of the current award.

[241] It is our *provisional* view that clause 24.3 of the PLED (renumbered as 24.2 as a result of the deletion of current PLED clause 24.2) be amended to read as follows:

> '**24.2 Annual leave loading**
>
> **(a)** In clause 24.2 the **relevant weekend penalty amount** is the applicable penalty rate prescribed by clause 23—Penalty rates for working on weekends, less the minimum hourly rate.
>
> **(b)** During a period of accrued annual leave an employee will receive a loading calculated for the period of leave on the employee's minimum hourly rate specified in clause 17—Minimum rates or clause 18—Apprentice, trainee and graduate rates, as applicable.
>
> **(c)** The loading for a period of annual leave will be the greater of the following 2 amounts:
>
> **(i)** 17.5% of the employee's minimum hourly rate for all ordinary hours the employee would have worked if they were not on leave during the period, or
>
> **(ii)** the relevant weekend penalty amounts payable to the employee for all ordinary hours they would have worked on a weekend if they were not on leave during the period.'

[242] It is our *provisional* view that the amended clause 24.2 set out at [241] above resolves item 59 and other related drafting issues.

Item 61 – clause 24.6(f)—Cashing out of annual leave

[243] Item 61 relates to a typographical error at clause 24.6(f) of the PLED published on 28 October 2020. The error was corrected by inserting a cross-reference to clause 24.3 in the PLED published on 21 January 2021. Item 61 is now resolved.

Items 63 and 64 – clauses 24.7(a) and 24.9(d)—Excessive leave accrual

[244] Item 63 relates to the reference to clause 24.2 at clauses 24.7(a) and 24.9(d) of the PLED. Ai Group submits that if clause 24.2 of the PLED is deleted, as a result of their submission (item 58), then the reference to clause 24.2 in clauses 24.7(a) and 24.9(d) of the PLED should also be deleted.[133] The SDA opposes Ai Group's submission.[134]

[245] We expressed the *provisional* view at [199] above that clause 24.2 of the PLED should be deleted. It is also our *provisional* view that the words '(or 10 weeks' paid annual leave for a shiftworker, as defined by clause 24.2)' should be deleted from clause 24.7(a) and the words '(or 5 weeks' paid annual leave for a shiftworker, as defined by clause 24.2)' should be deleted from clause 24.9(d) of the PLED. It is our *provisional* view that this resolves items 63 and 64.

Items 65 and 66 – clauses 29—Public holidays

[246] Items 65 and 66 both relate to the drafting of clause 29.2—Substitution of public holidays by agreement and clause 29.3—Payment for work on public holiday or substitute day and it is easiest to deal with the items together. Clauses 29.2 and 29.3 of the PLED state:

> '**29.2 Substitution of public holidays by agreement**
>
> An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a public holiday under the NES.
>
> **29.3 Payment for work on public holiday or substitute day**
>
> **(a)** An employer must pay an employee who works on a public holiday, or on a day that is substituted for a public holiday, at the public holiday penalty rate set out in clauses 22—Overtime and 23—Penalty rates.
>
> **(b)** Where an agreement to substitute a part-day under clause 29.2 has been made the following applies:
>
> **(i)** if both part-day public holidays are worked, then the employee must be paid for the public holiday on the part-day elected by employee;
>
> **(ii)** if only the actual part-day public holiday is worked, then the public holiday penalty rate applies; or

[133] Ai Group submission dated 25 November 2020 at [81]–[82].

[134] SDA reply submission dated 9 December 2020 at [48]–[49].

(iii) if only the substituted part-day public holiday is worked, then the public holiday penalty rate applies.'

[247] Ai Group submits that clause 29.2 of the PLED contains drafting errors and should be replaced with wording that reflects clauses 35.2 and 35.3 of the current award. It suggests the following:

'**29.2 Substitution of public holidays by agreement**

(a) An employer and employee may agree to substitute another day for a day that would otherwise be a public holiday under the NES.

(b) An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a public holiday under the NES.'

[248] Ai Group submits that clause 29.3(a) of the PLED is potentially inconsistent with clause 29.3(b) because it states that an employer must pay an employee at public holiday penalty rates if an employee works on a public or substituted public holiday, whereas clause 29.3(b)(i) provides for circumstances in which the employee will not be paid at public holiday penalty rates for working on a public holiday or a substituted public holiday. They submit that clause 29.3(a) should be amended by inserting 'Subject to clause 29.2(b)'.

[249] Ai Group also submits that clause 29.3(b) of the PLED contains drafting errors and should be replaced with wording that reflects clauses 35.2 and 35.3 of the current award. It suggests the following drafting:

'**(b)** Where an agreement to substitute a public holiday or part-day public holiday under clause 29.2 has been made, the following applies:

(i) If both days are worked, then the employee must be paid for the public holiday on the day or part-day elected by the employee;

(ii) If only the actual public holiday or part-day public holiday is worked, then the public holiday penalty rate applies; or

(iii) If only the substitute public holiday or part-day public holiday is worked, the public holiday rate applies.'[135]

[250] The SDA submits that the PLED clauses, as currently drafted, only account for part-day public holidays and agree that they be replaced with the current award clauses wording or be replicated for full-day public holidays.[136]

[135] Ai Group submission dated 25 November 2020 at [83]–[86].

[136] SDA reply submission dated 9 December 2020 at [50]–[51].

[251] The AWU suggests that, in relation to clause 29.2, the issues raised by Ai Group should be resolved by reverting to the current award wording. They do not oppose Ai Group's proposed amendment to 29.3(a), but believe the correct cross-reference is to clause 29.3(b). [137]

[252] We agree that clause 29 contains drafting errors and only accounts for part-day public holidays. We will amend clauses 29.2 and 29.3 to include reference to full-day public holidays, as follows:

> **'29.2 Substitution of public holidays by agreement**
>
> ~~An employer and employee may agree to substitute another part-day for a part-day that would otherwise be a part-day public holiday under the NES.~~
>
> **(a)** An employer and employee may agree to substitute another day as the public holiday for the public holiday under the NES.
>
> **(b)** An employer and employee may agree to substitute another part-day as the part-day public holiday for the part-day public holiday under the NES.
>
> **29.3 Payment for work on public holiday or substitute day**
>
> **(a)** ~~An~~ Subject to clause 29.3(b), an employer must pay an employee who works on a public holiday or part-day public holiday, or on a day that is substituted for a public holiday or part-day public holiday, at the public holiday penalty rate set out in clauses 22—Overtime and 23—Penalty rates.
>
> **(b)** Where an agreement to substitute a public holiday or part-day public holiday under clause 29.2 has been made, the following applies:
>
> **(i)** if both ~~part-day public holidays~~ days are worked, then the ~~employee must be paid for the~~ public holiday penalty rate applies on the day or part-day elected by the employee;
>
> **(ii)** if only the actual public holiday or part-day public holiday is worked, then the public holiday penalty rate applies; or
>
> **(iii)** if only the substitute~~d~~ public holiday or part-day public holiday is worked, then the public holiday penalty rate applies.'

[253] Items 65 and 66 are now resolved.

Other matters

Clause 11—Casual employees

[137] AWU reply submission dated 9 December 2020 at [47].

[254] Clause 11.2 (previously clause 11.4)[138] of the PLED contains the following note:

> 'NOTE: The casual loading is paid instead of entitlements from which casuals are excluded by the terms of this award and the NES. See sections 86 to 93 of the Act.'

[255] In a decision [2014] FWCFB 9412[139] a Full Bench decided that it would not include in exposure drafts a clause identifying provisions of awards that do not apply to casuals. For those reasons, we will delete the note at clause 11.2 of the PLED.

Updating of monetary amounts

[256] As a result of the decision ([2021 FWCFB 3500) issued in the Annual Wage Review 2020–21, the variation determination which came into operation in the *Hair and Beauty Industry Award 2010* on 1 November 2021, and the decision ([2022] FWCFB 3500) issued in the Annual Wage Review 2021-22, the monetary amounts in clauses 17.1, 17.4, 18.1, 18.2, 18.3, 18.6, 20.2, 20.3, 20.4, Schedule B and clause C.1.1 of the PLED have been updated to reflect the position to apply on and from 1 July 2022.

[257] As a result of the Supported Wage System variation determination, and the decision ([2022] FWCFB 3500) issued in the Annual Wage Review 2021-22, the monetary amounts in Schedule D of the PLED have been updated.

[258] As a result of the adjustment to expense-related allowances, and the variation determination which came into operation in the *Hair and Beauty Industry Award 2010* on 1 November 2021, the monetary amounts in clauses 20.5, 20.6, 20.8 and C.2.1 of the PLED have been updated.

Casual terms review

[259] A decision and an award variation determination were issued on 27 September 2021,[140] in relation to the Casual terms award review (AM2021/54). The following amendments have been made to the PLED to incorporate the resulting amendments made to the award:

- definitions of 'casual employee' and 'regular casual employee' have been inserted at clause 2;
- the definition of 'long term casual employee' has been deleted from clause 2;
- a reference to the casual conversion arrangements provisions in the Act (Division 4A) has been inserted at clause 3.2;
- clauses 11.1 and 11.2 have been deleted;
- clauses 11.3–11.9 have been renumbered as clauses 11.1–11.7;

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[138] PR733848; [2021] FWCFB 858 at [19].

[139] [2014] FWCFB 9412 at [69]

[140] [2021] FWCFB 6008; PR733848.

- a reference to the definition of 'casual employee' in clause 2 has been inserted at clause 11.1;

- clause 11.7 has been replaced with the new model term;

- the words 'long term' have been deleted and the word 'regular' has been inserted in clause 18.4(c)(ii); and

- The cross-references at clauses 7.2 and 22.5 have been updated.

Common issue – overtime for casual employees – AM2017/51

[260] In the August 2021 HABIA Overtime decision, the Full Bench corrected the decision and award variation determination issued on 30 October 2020,[141] in which a casual employee's entitlement to a penalty rate for ordinary hours worked outside the spread of hours of full-time employees had been inadvertently removed and had clarified terms in the award by reinstating the entitlement and redrafting the overtime and penalty rate provisions. The drafting of the PLED was not affected by either decision as the PLED did not incorporate the variation determination issued on 30 October 2020.

[261] As mentioned at [171] above, in the December 2021 HABIA Overtime decision[142] the Full Bench decided certain issues relating to overtime for full-time and part-time employees which had originally been raised during the plain language redrafting process. The decision outcomes have been incorporated into clause 22—Overtime, as set out at [175] above.

Common issue – penalty rates for casual employees—AM2017/40

[262] As mentioned at [175] and [181] above, a decision was issued on 7 October 2021[143] relating to penalty rates for casual employees in the *Hair and Beauty Industry Award 2010* (AM2017/40). The decision outcomes have been incorporated into the table relating to overtime rates in clause 22—Overtime, as set out at [175] above, and into the new table relating to penalty rates specifically for casual employees, to be inserted in clause 23—Penalty rates, as set out at [181] above.

Schedule B—Summary of Hourly Rates of Pay

[263] Schedule B has been amended to include the following:

- updated percentages in clauses B.2.1 and B.4.1 setting out the phased-in penalty rates for casual adult and casual junior employees, to reflect the decision ([2021] FWCFB 6019) issued in AM2017/40;

- updated column headings in clauses B.1.1, B.2.1, B.3.2, B.4.1, B.5.3, B.5.5, B.5.7 and B.5.9 and an additional column in clauses B.2.1 and B.4.1, to correctly reflect the ordinary and penalty rate spans of hours in the body of the award;

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[141] [2020] FWCFB 5636; PR723908; [2020] FWCFB 4350.

[142] [2021] FWCFB 6071.

[143] [2021] FWCFB 6019; PR734668; see also [2021] FWCFB 5577 and [2020] FWCFB 39.

- new tables in clauses B.2.2 and B.4.2 setting out the overtime hourly rates for casual adult and casual junior employees, to reflect the decision ([2020] FWFB 5636) issued in AM2017/51 and the decision ([2021] FWCFB 6019) issued in AM2017/40;

- additional rows in the tables at clauses B.3.2, B.3.3, B.4.1 and B.4.2 setting out the ordinary, penalty and overtime hourly rates for full-time and part-time junior and casual junior employees paid at levels 4, 5 and 6, to reflect the resolution of item 38 at [133] above;

- adjusted monetary amounts in tables in all clauses to reflect the decision ([2021 FWCFB 3500) issued in the Annual Wage Review 2020–21 (Note: the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after 1 November 2021).

Schedule X—Additional Measures During the COVID-19 Pandemic

[264] Schedule X ceased to operate in the current award on 30 June 2022. No application was made to extend the operation of the schedule. Accordingly, Schedule X has been deleted from the PLED.

Next steps

[265] The parties are invited to comment on the *provisional* views expressed at [199], [241]–[242] and [245] above regarding clause 24—Annual leave of the PLED by **4.00pm** on **Friday 15 July 2022.**

[266] Tracked and clean versions of the PLED, reflecting this decision will be published shortly.

[267] Submissions must be sent electronically to amod@fwc.gov.au. Any contested issues in respect of our provisional views and the finalisation of the variation determination will be determined on the papers by Vice President Hatcher.

PRESIDENT

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