

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Tranche 1 Exposure Drafts

20 September 2019

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS TRANCHE 1 EXPOSURE DRAFTS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the following first tranche of exposure drafts published by the Commission on 2 September 2019:
 - (a) *Aluminium Industry Award* (**Aluminium Award**);
 - (b) *Banking, Finance and Insurance Award* (**Banking Award**);
 - (c) *Cement, Lime and Quarrying Award*;
 - (d) *Corrections and Detention (Private Sector) Award* (**Corrections Award**);
 - (e) *Cotton Ginning Award*;
 - (f) *Electrical Power Industry Award* (**Electrical Power Award**);
 - (g) *Legal Services Award*;
 - (h) *Mining Industry Award* (**Mining Award**);
 - (i) *Oil Refining and Manufacturing Award* (**Oil Award**);
 - (j) *Premixed Concrete Award*;
 - (k) *Salt Industry Award* (**Salt Award**);
 - (l) *Water Industry Award* (**Water Award**); and
 - (m) *Wool Storage, Sampling and Testing Award* (**Wool Award**).
2. The submission is filed in response to the directions issued by the Fair Work Commission (**Commission**) in its decision of the same date.¹

¹ 4 yearly review of modern awards [2019] FWCFB 6077 at [35].

Date of operation of varied awards

3. The draft determinations issued by the Commission do not identify or propose a date upon which the determination would come into operation. Ai Group respectfully submits that it should be granted an opportunity to be heard before the Commission determines when the draft determinations will come into operation. We foreshadow that in our submission, the awards as varied should commence operation not less than three months after the final determination is issued.
4. The variations to be made to the award are significant and some are substantive in nature. Employers should be granted a sufficient period of time to familiarise themselves with the varied awards and, where relevant, to implement the necessary changes to their systems, operations and/or arrangements.
5. Furthermore, industrial associations representing employers and employees should also be afforded adequate time to ensure that they are in a position to assist their members with understanding and implementing the new instruments. This may include, for example, the preparation of new resources.
6. We anticipate that this issue may also be relevant to other stakeholders, such as the Fair Work Ombudsman.

2. ALUMINIUM AWARD

7. Ai Group makes the following submissions in relation to the exposure draft of the Aluminium Award. At **Annexure A** we enclose a copy of the exposure draft of the Aluminium Award with proposed changes that would, in our submission, address the matters raised below.

Various clauses: Definition and use of the term ‘ordinary hourly rate of pay’ and ‘ordinary hourly rate’

8. The exposure draft defines the ‘ordinary hourly rate of pay’ at clause 2.
9. The exposure draft variously uses the terms ‘ordinary hourly rate of pay’ and ‘ordinary hourly rate’. It is our understanding that in each instance, the intention is for both phrases to have the same meaning; that being, the meaning attributed by clause 2 to the phrase ‘ordinary hourly rate of pay’.
10. We suggest that the exposure draft be varied to consistently use the term ‘ordinary hourly rate’. This will ensure consistency with the terminology adopted in other exposure drafts. In our submission it will also better clarify the entitlements afforded by the relevant provisions, thereby making the award simpler and easier to understand.

Clause 2: Definition of ordinary hourly rate of pay

11. The word “the” should be inserted before “work”.

Clause 2: Definition of ‘roster’

12. We are concerned that a calendar identifying the days/shifts on which multiple employees are required to work would not meet the definition of “roster” at clause 2. This may have substantive implications, for example, for the operation of clauses 14.4 – 14.6 of the instrument.
13. By contrast, the Aluminium Award presently defines ‘roster’ as:

“a calendar of days identifying the days / shifts on which an employee is (or employees are) required to work”.

14. The definition of 'roster' should be varied to reflect the above.

Clause 7.2: Facilitative provisions

15. The reference to clause 17 should instead be to clause 17.1. Clause 17 contains various provisions, the remainder of which are not facilitative provisions. Our suggested amendment will more particularly identify the relevant provision, thereby improving the clarity of the clause.

Clause 14.1(f): Ordinary hours of work

16. Clause 14.1(f) provides that any time worked outside the ordinary hours of any shift or outside the span of hours in clause 14.1(d) is overtime. This neglects to contemplate the operation of clause 14.1(e), which provides that an employer may agree with an employee or with the majority of affected employees, to alter the span of hours.

17. This deficiency could be addressed by amending clause 14.1(f) to provide as follows:

(f) Any time worked outside the ordinary hours of any shift or outside the span of hours in clause 14.1(d) (or as agreed in accordance with clause 14.1(e)) is overtime. An employee will be advised in writing if which hours in the roster cycle are ordinary hours and which hours are overtime.

Clause 20.3(b): Method of calculation of overtime rate

18. The clause refers to "shift penalties". It should instead refer to "shift loadings" consistent with clause 21.1.

Clause 20.8: Make-up time

19. Clause 20.8 appears to unnecessarily repeat the substance of clause 14.9.

20. In our submission, make-up time is more appropriately dealt with alongside other provisions dealing with ordinary hours. Therefore, clause 20.8 should be deleted and clause 14.9 should be retained.

21. We note that clause 21.9 of the award presently deals with make-up time. In our submission, clause 20.8 and clause 14.9 appropriately reflect the extant clause.

Clause 22.7: Excessive leave accruals

22. Note 1 should be amended to refer to “clause 22.7(d)” instead of “clause 22.7(b)”.
This appears to be a typographical error.

Schedule B: Summary of hourly rates of pay

23. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

3. BANKING AWARD

24. Ai Group makes the following submissions in relation to the exposure draft of the Banking Award. At **Annexure B** we enclose a copy of the exposure draft of the Banking Award with proposed changes that would, in our submission, address the matters raised below.

Clause 7.2: Facilitative provisions

25. The reference to clause 16 should instead be to clause 16.1. Clause 16 contains various provisions, the remainder of which are not facilitative provisions. Our suggested amendment will more particularly identify the relevant provision, thereby improving the clarity of the clause.

Clause 13.7(d): Shiftwork penalties

26. We are concerned that the amendments made to clause 13.7(d) do not adequately address the concerns we have previously raised about the characterisation of shift loadings / penalties. Specifically, the clause purportedly requires the payment of a penalty. The clause, however, prescribes a rate that is payable for such time worked; the amount prescribed is not a penalty that is payable in addition to the base rate of pay.
27. We suggest minor amendments to this clause at Annexure B to deal with this issue. We note that the Commission has foreshadowed that it will issue a decision shortly in relation to the annual leave loading clauses of various awards, which give rise to similar considerations. Clause 13.7(d) may require further consideration once that decision has been issued.

Clause 15.4: National Training Wage

28. The references to “2010” may require updating.

Clause 17.1(a)(i) Annualised salaries

29. The word “rates” should be inserted after “Minimum”.

Clause 27.2: Public holidays

30. The reference to “clause 27.2” should be replaced with “clause 27.4”.

Schedule B: Summary of hourly rates of pay

31. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

4. CEMENT, LIME AND QUARRYING AWARD

32. Ai Group makes the following submissions in relation to the exposure draft of the Cement, Lime and Quarrying Award. At **Annexure C** we enclose a copy of the exposure draft of the Cement, Lime and Quarrying Award with proposed changes that would, in our submission, address the matters raised below.

Clause 2: definition of ‘ordinary hourly rate’

33. We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the employee’s ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.

Clause 4.1: Coverage

34. The references to Schedules C and D should be replaced with references to Schedules A and B.

Clause 4.5: Coverage

35. We suggest that “industry” be replaced with “industries” to be reflect the coverage of the amalgamation of the two extant awards as a result of which the instrument covers two separately defined industries.

Clause 7.2: Facilitative provisions

36. The reference to clause 17 should instead be to clause 17.1(b). Clause 17 contains various provisions, the remainder of which are not facilitative provisions. Our suggested amendment will more particularly identify the relevant provision, thereby improving the clarity of the clause.

Clause 11.4: Casual conversion

37. We refer to and rely upon our submissions of 19 January 2018 and 11 July 2017 at paragraphs 54 – 71. These issues appear to be outstanding, as acknowledged

in the Commission's recent decision concerning the finalisation of exposure drafts:

[8] There are a number of common issue matters and substantive claims that remain outstanding. The common matters that are yet to be finally determined are:

...

- Drafting of casual conversion clause (in the 28 modern awards that had such clauses prior to the Review)

...²

38. In our submission, clause 11.4 of the exposure draft is in substantively different terms from the current casual conversion clause in the relevant awards. Given the nature of our concerns, the proposed draft determination to vary the *Cement and Lime Award 2010* and revoke the *Quarrying Award 2010* should not become operative until these matters are resolved.

Clause 16.5: National Training Wage Schedule

39. The references to "2010" may require updating. The title of the award also requires amendment.

² 4 yearly review of modern awards [2019] FWCFB 6077 at [8].

5. CORRECTIONS AWARD

Schedule B: Summary of hourly rates of pay

40. The 'note' has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.
41. The following 'note' should be inserted under the heading for Schedule B:

NOTE: Employers who meet their obligations under this schedule are meeting their obligations under the award.

6. COTTON GINNING AWARD

42. Ai Group makes the following submissions in relation to the exposure draft of the Cotton Ginning Award. At **Annexure D** we enclose a copy of the exposure draft of the Cotton Ginning Award with proposed changes that would, in our submission, address the matters raised below.

Clause 2: Definitions – all purposes

43. There should be a space between “clause” and “19”. Also, a ‘close bracket’ should be inserted at the end of the sentence.

Clause 2: Definitions – ordinary hourly rate

44. *First*, the reference to the “industry allowance” should be replaced with “disability allowance”. The award (and by extension, the exposure draft) does not prescribe an industry allowance. It is the disability allowance that is payable to all employees for all purposes.
45. *Second*, we suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the disability allowance, they are to be included in the employee’s ordinary hourly rate in addition to the disability allowance, consistent with the current award. The current definition could be read to suggest that such allowances are to be so included in lieu of the disability allowance.

Clause 4.2: Coverage

46. Unlike most industry awards, the coverage of the Cotton Ginning Award is not expressed by reference to an industry, the scope of which is defined by the award. Rather, the award is simply expressed to apply to employers operating cotton ginneries and their employees in the classification structure of the award.
47. As a result, the reference to the “cotton ginning industry” in clause 4.2 is potentially confusing and ambiguous. In our submission, the changes proposed to the first sentence of clause 4.2 should not be made.

Clause 4.3: Coverage

48. Unlike most industry awards, the coverage of the Cotton Ginning Award is not expressed by reference to an industry, the scope of which is defined by the award. Rather, the award is simply expressed to apply to employers operating cotton ginneries and their employees in the classification structure of the award.
49. As a result, the reference to the “cotton ginning industry” in clause 4.3 is potentially confusing and ambiguous. In our submission, the changes proposed to the first sentence of clause 4.3 should not be made.

Clause 7.2: Facilitative provisions

50. The reference to clause 18 should instead be to clause 18.1. Clause 18 contains various provisions, the remainder of which are not facilitative provisions. Our suggested amendment will more particularly identify the relevant provision, thereby improving the clarity of the clause.

Clause 11.5: Casual conversion

51. We refer to and rely upon our submissions of 19 January 2018 and 11 July 2017 at paragraphs 152 – 168. These issues appear to be outstanding, as acknowledged in the Commission’s recent decision concerning the finalisation of exposure drafts:

[8] There are a number of common issue matters and substantive claims that remain outstanding. The common matters that are yet to be finally determined are:

...

- Drafting of casual conversion clause (in the 28 modern awards that had such clauses prior to the Review)

...³

52. In our submission, clause 11.5 of the exposure draft is in substantively different terms from the current casual conversion clause in the relevant awards. Given the nature of our concerns, the proposed draft determination to vary the *Cotton*

³ 4 *yearly review of modern awards* [2019] FWCFB 6077 at [8].

Ginning Award 2010 should not become operative until these matters are resolved.

Clause 17.4: National Training Wage

53. The references to “2010” may require updating.

Schedule A: Summary of hourly rates of pay

54. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

Schedule A: Summary of hourly rates of pay – footnotes

55. Each of the footnotes refer to an industry allowance. Consistent with our submission regarding the definition of ‘ordinary hourly rate’, the footnotes should be amended to instead refer to the disability allowance.

7. ELECTRICAL POWER AWARD

56. Ai Group makes the following submissions in relation to the exposure draft of the Electrical Power Award. At **Annexure E** we enclose a copy of the exposure draft of the Electrical Power Award with proposed changes that would, in our submission, address the matters raised below.

Clause 15.7: National Training Wage

57. The references to “2010” may require updating.

Clause 20.1: Penalty Rates

58. Clause 20.1 and the subheading “penalty rates” should be deleted. It is unnecessary.

Schedule B: Summary of hourly rates of pay

59. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

8. LEGAL SERVICES AWARD

60. Ai Group makes the following submissions in relation to the exposure draft of the Legal Services Award. At **Annexure F** we enclose a copy of the exposure draft of the Legal Services Award with proposed changes that would, in our submission, address the matters raised below.

Clause 15.5: National Training Wage

61. The references to “2010” may require updating.

Schedule B: Summary of hourly rates of pay

62. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

9. MINING AWARD

63. Ai Group makes the following submissions in relation to the exposure draft of the Mining Award. At **Annexure G** we enclose a copy of the exposure draft of the Mining Award with proposed changes that would, in our submission, address the matters raised below.

Clause 2: definition of ‘casual ordinary hourly rate’

64. We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the casual ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.

Clause 2: definition of ‘ordinary hourly rate’

65. We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.

Clause 15.4(b): National Training Wage

66. The references to “2010” may require updating.

Schedule B: Summary of hourly rates of pay

67. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

10. OIL AWARD

68. Ai Group makes the following submissions in relation to the exposure draft of the Oil Award. At **Annexure H** we enclose a copy of the exposure draft of the Oil Award with proposed changes that would, in our submission, address the matters raised below.

Clause 16.7: National Training Wage

69. The references to “2010” may require updating.

Clause 18.1(a)(i): Annualised salaries – non-clerical employees

70. The purpose (and effect) of the words “(other than clause 18.1)” is unclear. They should be deleted.

Claus 18.2(b)(i): Annualised salaries –clerical employees

71. The purpose (and effect) of the words “(other than clause 18.2)” is unclear. They should be deleted.

Clause 23.3: Shiftwork penalties

72. We are concerned that clause 23.3 does not properly characterise the amounts payable under that clause. Specifically, the heading of the clause suggests that the clause requires the payment of a penalty. The clause, however, prescribes a rate that is payable for such time worked; the amount prescribed is not a penalty that is payable in addition to the base rate of pay.

Schedule B: Summary of hourly rates of pay

73. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

Clause B.3: Casual employees

74. It is our understanding that there is a disagreement between the interested parties regarding the proper approach to calculating various rates contained at

B.3 of the exposure draft, including public holiday rates, shiftwork rates and weekend penalty rates.

75. It is Ai Group’s position that by virtue of clause 24.3(b) of the award, casual employees are not entitled to the casual loading where overtime rates, shiftwork penalties, weekend penalties or public holiday penalties are payable. We understand that this matter has been referred to the Full Bench dealing with AM2017/51 Overtime for Casuals⁴ (although we note that the issues we have raised are not confined to overtime work).
76. In our submission, the award should not be varied to include B.3 until the above matters are resolved.

Schedule C.2.1: Expense-related allowances

77. Consistent with clause 19.3(a), the reference to “per meal” should be replaced with “per occasion”. The allowance is not payable for every meal consumed by an employee. It is payable on each occasion that the employee is entitled to a rest break during overtime work.

⁴ *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [270].

11. PREMIXED CONCRETE AWARD

79. Ai Group makes the following submissions in relation to the exposure draft of the Premixed Concrete Award. At **Annexure I** we enclose a copy of the exposure draft of the Premixed Concrete Award with proposed changes that would, in our submission, address the matters raised below.

Clause 2: Definition of ‘ordinary hourly rate’

80. We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.

Clause 4.4: Coverage

81. The reference to “clause 4.5” should be replaced with “clause 4.4”.

Clause 7.2: Facilitative provisions

82. The reference to clause 17 should instead be to clause 17.1. Clause 17 contains various provisions, the remainder of which are not facilitative provisions. Our suggested amendment will more particularly identify the relevant provision, thereby improving the clarity of the clause.

Clause 9: Full-time employees

83. The words “13 – Ordinary hours of work .” appear to have been included by error. They should be deleted.

Clause 11.3: Casual conversion

84. We refer to and rely upon our submissions of 19 January 2018 and 11 July 2017 at paragraphs 175 – 183. These issues appear to be outstanding, as acknowledged in the Commission’s recent decision concerning the finalisation of exposure drafts:

[8] There are a number of common issue matters and substantive claims that remain outstanding. The common matters that are yet to be finally determined are:

...

- Drafting of casual conversion clause (in the 28 modern awards that had such clauses prior to the Review)

...⁵

85. In our submission, clause 11.3 of the exposure draft is in substantively different terms from the current casual conversion clause in the relevant awards. Given the nature of our concerns, the proposed draft determination to vary the *Premixed Concrete Award 2010* should not become operative until these matters are resolved.

Clause 15.6: Breaks during or after overtime

86. The words “Minimum rates” should be replaced with “Overtime”.

Clause 16.4: National Training Wage

87. The references to “2010” may require updating.

Clause 22.2: Seven day shiftworkers

88. The semicolon at the end of the clause should be replaced with a full stop.

Schedule A: Summary of hourly rates of pay

89. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

⁵ 4 yearly review of modern awards [2019] FWCFB 6077 at [8].

12. SALT AWARD

90. Ai Group makes the following submissions in relation to the exposure draft of the Salt Award. At **Annexure J** we enclose a copy of the exposure draft of the Salt Award with proposed changes that would, in our submission, address the matters raised below.

Clause 4.2(c): Coverage

91. The reference to “(b)” before “4.2” should be deleted.

Clause 4.4: Coverage

92. Consistent with the approach adopted in other exposure drafts, the word “salt” should be inserted before “industry” the first time it appears in the second line.

Clause 16.7: National Training Wage

93. The references to “2010” may require updating.

Clause 22.1: Shiftwork penalties

94. We are concerned that the “shiftwork penalties” at clause 22.2 are inappropriately characterised. Specifically, the heading of the clause suggests that the provision requires the payment of a penalty. The clause, however, prescribes a rate that is payable for such time worked; the amount prescribed is not a penalty that is payable in addition to the base rate of pay.

95. We have proposed a minor amendment to the heading to address this issue.

Clause 23.5: Annual leave loading

96. The reference to “clause 23.6” should be replaced with a reference to “clause 23.3”. This is consistent with the current clause 25.5.

Schedule B: Summary of hourly rates of pay

97. The 'note' has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

Schedule B.2.2 and Schedule B.2.3: Summary of hourly rates – casual employees

98. It is our understanding that the question of whether the casual loading is payable during overtime is contested in the context of this award. We understand that this matter has been referred to the Full Bench constituted to deal with AM2017/51 Overtime for Casuals.⁶

99. It is Ai Group's position that by virtue of clause 23.3(b) of the award, casual employees are not entitled to the casual loading where overtime rates are payable.

100. In our submission, the award should not be varied to include B.2.2 or B.2.3 until the above matters are resolved.

⁶ *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [379] (see reference to 'item 9' and [summary of submissions](#) dated 22 March 2018).

13. WATER AWARD

101. Ai Group makes the following submissions in relation to the exposure draft of the Water Award. At **Annexure K** we enclose a copy of the exposure draft of the Water Award with proposed changes that would, in our submission, address the matters raised below.

Clause 4.5: Coverage

102. Clause 4.5 of the exposure draft should be amended by deleting the number “4.2” in the second line. This appears to be a typographical error.

Clause 15.4 – Higher Duties

103. In respect of the note under the heading; there are no substantive matters before the Commission (see correspondence from United Voice withdrawing its claim).

Clause 15.7: National Training Wage

104. The references to “2010” may require updating.

Clause 17.4: Annualised salaries

105. The reference to “clause 17.4” should be to “clause 17”.

Clause 18.3(c): Transfers, travelling and working away from normal starting point

106. In respect of the note under the heading; there are no substantive matters before the Commission (see correspondence from United Voice withdrawing its claim).

Clause 21.5: Shiftwork

107. The reference to “clause 18.5” should be replaced with “clause 21.5”.

Schedule B: Summary of hourly rates of pay

108. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

Schedule C.1.1: Summary of monetary allowances

109. The reference to clause 18.3(c)(iv) should be replaced with 18.3(c)(v).

14. WOOL AWARD

110. Ai Group makes the following submissions in relation to the exposure draft of the Wool Award. At **Annexure L** we enclose a copy of the exposure draft of the Wool Award with proposed changes that would, in our submission, address the matters raised below.

Clause 14.1(b)(v): Rostering

111. The reference to “clause 29 – Consultation about major workplace change” should be replaced with “clause 30 – Consultation about changes to rosters or hours of work”.

Clause 16.5: National Training Wage

112. The references to “2010” may require updating.

Clause 18.5: Annualised salary arrangements

113. The reference to “clause 18.4” should instead be to “clause 18”.

Clause 22.2: Shiftwork penalties

114. We are concerned that the “shiftwork penalties” at clause 22.2 are inappropriately characterised. Specifically, the clause purportedly requires the payment of a penalty. The clause, however, prescribes a rate that is payable for such time worked; the amount prescribed is not a penalty that is payable in addition to the base rate of pay.

115. We have suggested a minor amendment to the heading of the clause to deal with this issue.

Schedule B: Summary of hourly rates of pay

116. The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.

Schedule B.2: Summary of hourly rates of pay – casual employees

117. The issue of whether the casual loading is payable where weekend penalty rates, public holiday penalty rates or shift penalties are payable remains unresolved.

118. We refer to the following passage from the Commission’s earlier decision concerning this issue:

[324] Clause 14 of the Exposure Draft deals with overtime. Clause 14.2 deals with the overtime rates applicable at various times. Clause 14.4 deals with the method of calculating overtime, it states:

‘(a) When computing overtime payments, each day or shift worked will stand alone.

(b) Any payments under clause 14.2 are in substitution for any other loadings or penalty rates’ (emphasis added)

[325] Ai Group submits that the reference to ‘any payments under clause 14.2’ should be replaced with ‘any payments under clause 13 or clause 14.2’. Clause 13 deals with penalty rates for shiftwork, weekend work and for ordinary hours worked on a public holiday.

[326] The AWU opposes Ai Group proposal. Both parties rely on the terms of the current modern award in support of their respective positions. Clause 25 of the current modern award provides as follows:

...

[329] The resolution of this issue depends on the proper construction of clause 25.4(b) of the current award, which says:

‘Any payments under this clause are in substitution for any other loadings or penalty rates’ (emphasis added)

...

[332] Whatever may be the correct interpretation of ‘Any payments under this clause’ it is clear that such payments are ‘in substitution for’ any ‘other loadings or penalty rates’, that is, they are substitution for the loadings and penalty rates provided elsewhere in the award. In this regard we note that clause 10.3(b) of the current award provides for ‘casual loading of 25%’. It follows that if Ai Group’s proposed amendment is adopted then casual employees working, say, on weekends, would be entitled to the payments for weekend work under clause 25.7 but not the 25% casual loading provided in clause 10.3(b).

[333] The proposed amendment raises the general question of whether the casual loading is applied on top of other loadings or penalties. It seems clear that the current award provides that overtime payments are paid in substitution for the casual loading. However, it is not clear whether weekend and other penalties are paid in substitution for the casual loading or whether the casual loading is applied to the weekend penalty rate.

Given the ambiguity in the current award this is essentially a merit issue and we will refer it to the Casual and Part-time Employment Full Bench in AM2014/197.⁷

119. No interested party pursued the matter through the casual and part-time common issues proceedings.
120. Nonetheless, in our submission, the rates prescribed at B.2 are erroneous and the award should not be varied to include B.2 until the aforementioned issue has been determined.

Schedule C: Summary of monetary allowances

121. The standard rate prescribed at clause C.1.1 appears to be that which applied during the 2018 – 2019 financial year. It has not been updated to reflect the outcome of the Annual Wage Review decision for 2019 – 2020.
122. By extension, the allowances in the table at C.1.1 are also incorrect.

⁷ 4 yearly review of modern awards [2015] FWCFB 7236 at [324] – [333].