



**2014 Modern Award Review Manufacturing and
Associated Industries and Occupations Award
2010**

AM2014/75

Applicable Hourly Rate

31 October 2016

COVER SHEET

NAME:	Sally Taylor
ORGANISATION:	Australian Manufacturing Workers Union
ADDRESS:	
Street Address 1:	133 Parramatta Road
Street Address 2:	Granville NSW 2142
Suburb/City:	
CONTACT DETAILS:	
Telephone:	0417 491 836
Email:	sally.taylor@amwu.asn.au

1. INTRODUCTION

1. The AMWU makes this submission in response to the Fair Work Commission's Directions of 9 September, 2016 (the Directions). The Directions relate to the inclusion of the term "applicable hourly rate" determined by the Commission's 23 October 2015 decision¹ (the Decision). The term was included to overcome the unintended consequences of reduced employee entitlements arising from the redrafting of modern awards to include the term "ordinary hourly rate" and related definition.
2. The AMWU had drawn the diminution to the attention of relevant employer parties, including the Australian Industry Group (AIG) during numerous negotiations and conferences regarding the 2014 review of the Manufacturing and Associated Industries and Occupations Award 2010 (the Award). The AIG's position was that there was no problem with the proposed exposure draft wording.² This continued to be the AIG's position during 2015 despite many conferences between the parties including those under the Commission's auspice.
3. Following the Decision further conferences failed to resolve the issue. Directions were issued to progress the impasse. The AIG and AMWU held further discussions and pursuant to Direction 5, the AMWU can advise the Commission that the AIG and Unions (AWU, CEPU, CFMEU) parties have resolved the rate to be paid in the majority of matters identified at paragraph 4 of the Directions. The status between the parties of award matters contained at paragraph 4 of the Directions is attached and marked "A".
4. The outcomes proposed for the agreed matters are consistent with the modern award objective, deal with the unintended consequences of replacing the term "ordinary time"

¹ [2015] FWCFB 7236 commencing @ paragraph 95

² AIG Submission In reply 12 November 2014 commencing @ 167

with the term “ordinary hourly rate”³ in the exposure drafts and do not interfere with any clause common across multiple awards as required by paragraph 6 of the Directions.

5. The agreed matters are reached in settlement of the issues and preserve existing entitlements and responsibilities. The settlement is reached by consent and cannot be relied on in any future contest regarding award interpretation of the subject clauses.
6. Two matters remain outstanding, they are (referenced to the Commission’s exposure draft of 30 May, 2016):
 1. Clause 34.5(a)(i)- Rostered day off falling on a public holiday; and
 2. Clause 39.3- Transfer to Lower Paid Duties.
7. The following submissions address the two matters.

2. Principles of Award Interpretation

8. Principles of instrument construction were discussed in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*⁴ :

[19] The general approach to the construction of instruments of the kind at issue here is set out in the judgment of French J, as he then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* 16 (Wanneroo):

“The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be

³ Refer to the AMWU submissions of

⁴ [2014] FWCFB 7447

construed. It may extend to ‘...the entire document of which it is a part or to other documents with which there is an association’. It may also include ‘... ideas that gave rise to an expression in a document from which it has been taken’ - Short v FW Hercus Pty Ltd (1993) 40 FCR 511 at 518 (Burchett J); Australian Municipal, Clerical and Services union v Treasurer of the Commonwealth of Australia (1998) 80 IR 345 (Marshall J). (emphasis added)

[20] To this we add the oft-quoted observations of Madgwick J in Kucks v CSR Limited 18 that a narrow pedantic approach to interpretation should be avoided, a search of the evident purpose is permissible and meanings which avoid inconvenience or injustice may reasonably be strained for, but:

“... the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.” (emphasis added)

9. The Commission’s task of determining the ordinary meaning of “ordinary time” in the context of the Manufacturing Award is complicated as demonstrated by the agreed matters at Attachment A. In some of the provisions, for example Meal Breaks⁵ it is agreed that the term “*ordinary time rate*” in the current provision is understood as including any applicable shift , weekend penalty or other payment received by an employee. This was the common sense determination reflected in the Commission’s October decision. In other provisions for example *Extra Rates Not Cumulative*⁶ it is agreed that the expression

⁵ Clause 38.1(b) of the current award and Clause 14.1(b) of the exposure draft

⁶ Clause 33 of the current award and Clause 23 of the exposure draft

“ordinary time rates” does not include shift and weekend penalties and includes payments with the definition of *“ordinary hourly rate”* at Schedule I of the exposure draft.

10. The issues arising from the replacement of the term *“ordinary time”* in the Manufacturing Award establish that there is no *“ordinary or usual meaning”* ascribed to their use in the Manufacturing Award. The meaning of the current term therefore must be determined by its placement in context.

Rostered day off falling on a public holiday- Clause 34.5(a)(i)

11. The award provision (current Clause 44.3(a)) provides for an employer to elect one of 3 payment options where a full –time employee’s ordinary hours of work are structured to include a day off and such a day off falls on a public holiday. This clause does not relate to the situation where an employee has worked additional hours at ordinary rates to accumulate credits for a Rostered Day Off (RDO) under an averaging system. Exposure Draft Clauses 34.5(b),(c) and (d) make this clear.
12. Clause 34.5(a) applies to the situation where an employee’s regular roster or pattern of hours results in them being rostered off during one, or part of one, of the 5 week days Monday to Friday. For example an employee working 4 x 9.5 ordinary hour shifts Monday to Thursday has a roster structured to include every Friday off. Clause 34.5(a) has application in the example where Friday is a Public Holiday e.g. Good Friday.
13. Employees not working *“standard hours”*, as in the above example, do not forfeit the benefit of public holidays. This principle was established in the 1995 public holiday decision relating to workers whose hours are *“non-standard”*.⁷
14. In the context of Clause 34.5(a) the employer has the right to choose the form of public holiday entitlement the employee will be provided. That is:
 - i. 7.6 hours of pay at the applicable rate of pay⁸; or

⁷ Public Holiday Decision Non Standard Workers Print L9178

- ii. 7.6 hours of extra annual leave; or
- iii. a substitute day off on an alternative week day.

15. Option (ii) above if chosen by the employer includes a payment of the higher of the annual leave loading or the shift or weekend penalty pursuant to Clause 31.4 which prescribes that during a period of annual leave the higher of the annual leave loading of 17.5% or the shift or weekend loading will apply.

31.4 Annual leave loading (exposure draft)

- a. During a period of annual leave an employee must also be paid a loading
- b. calculated on the wages prescribed in clause 31.3.
- c. The loading must be as follows:
 - (i) Day work

An employee who would have worked on day work only had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 31.3 or the relevant weekend penalty rates, whichever is the greater but not both.

- (ii) Shiftwork

An employee who would have worked on shiftwork had they not been on leave must be paid a loading equal to 17.5% of the wages prescribed in clause 31.3 or the shift loading including relevant weekend penalty rates,

⁸ This is the exposure raft wording. Current wording provides for 7.6 hours at “the ordinary time rate”.

whichever is the greater but not both.

16. Option (iii) if chosen by an employer as the public holiday benefit also results in the employee receiving their shift loading on the substitute day off on an alternative working week day.
17. The context of Clause 34.5(a)(i) is that the public holiday entitlement includes relevant shift loadings. It would be inconsistent and unjust (refer *re Kucks* above) if one of the three employer choice options excluded shift loadings and the other two options included the shift loading.
18. The AMWU proposes that the 34.5(a)(i) be reworded as follows:
 - (i) 7.6 hours of pay at the employee’s rate for working ordinary hours including applicable shift or weekend allowances.
19. This is consistent with the 1994 public holiday decision⁹ which provided for the 3 options expressed as:
 - An alternative “day off”;
 - An addition of one day to annual leave; or
 - *An additional day’s wages* (emphasis added).
20. The text provided at paragraph 18 above is consistent with both the public holiday formula of “ an additional day’s wages” and the outcomes provided for at 34.5(a)(ii) and (iii).

Transfer to a Lower Paid Job- Clause 39.4

21. This clause is a standard clause and it is agreed that the wording is best determined through the plain language redrafting process. The AMWU will argue during that process that the

⁹ Ibid @ paragraph 2

payment for the Notice Period referred to at 39.4 includes applicable shift or weekend penalties. This is consistent with shift and weekend penalties being payable during the Notice Period for Termination prior to a redundancy where payment in lieu of notice is payable at the Full Rate of Pay¹⁰.

END

¹⁰ Refer ss. 18 and 117(2) of the Fair Work Act 2009

ATTACHMENT A

25 October 2016

EXPOSURE DRAFT - MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010

1	Clause Number and Topic	Wording
2	<p>1. 14.1(b) - Unpaid meal breaks</p> <p>Agreed</p>	<p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours <u>without a meal break, at the rate of pay applying to the employee immediately prior to the end of the fifth hour of work.</u></p>
2.	<p>14.5(a) – Working through meal breaks</p> <p>Agreed</p>	<p>(a) Subject to clause 14.1, an employee must work during meal breaks <u>at the rate of pay applying to the employee immediately prior to the scheduled meal break</u> whenever instructed to do so for the purpose of making good any breakdown of plant or for routine maintenance of plant which can only be done while the plant is idle.</p>
3.	<p>14.5(b) – Working through meal breaks</p> <p>Agreed</p>	<p>(b) Except as otherwise provided in clause 14—Breaks and except where any alternative arrangement is entered into by agreement between the employer and the employee concerned, employees must be paid <u>as follows</u> for all work done during meal hours and thereafter until a meal break is taken:</p> <p><u>(i) Except in the circumstances referred to in paragraphs (ii), (iii) and (iv) below: 150% of the ordinary hourly rate;</u></p> <p><u>(ii) Where the unpaid meal break is during ordinary time on a Saturday or a Sunday: 200% of the ordinary hourly rate;</u></p> <p><u>(iii) Where the unpaid meal break is during ordinary time on a shift on which the employee is entitled to a 15 per cent loading: 165% of the ordinary hourly rate;</u></p> <p><u>(iv) Where the unpaid meal break is during ordinary time on a shift on which the employee is entitled to a 30% loading: 180% of the ordinary hourly rate of pay.</u></p>
4.	<p>15.4 – Ship trials</p> <p>Agreed</p>	<p>The parties have agreed to retain the current wording in clause 39.4.</p>
5.	<p>23 – Extra rates not cumulative</p> <p>Agreed</p>	<p>The extra rates in this award, except rates prescribed in clause 27.3—Special rates and rates for work on public holidays, are not cumulative so as to exceed the</p>

		maximum of double the <u>ordinary hourly rate</u> .
6.	27.4(e) – Travelling time Agreed	(i) The rate of pay for travelling time on Monday to Saturday is the <u>ordinary hourly rate of pay</u> and on Sundays and public holidays is 150% of the <u>ordinary hourly rate</u> .
7.	Clause 30.10(b) – Rest break during overtime on Saturday, Sunday or public holiday Agreed	(b) Where a day worker is required to work overtime on a Saturday, Sunday or public holiday or on a rostered day off, the first rest break must be paid at the <u>ordinary hourly rate</u> .
8.	Clause 30.10(c) – Rest break before overtime after ordinary hours Agreed	(c) Where overtime is to be worked immediately after the completion of ordinary hours on a day or shift and the period of overtime is to be more than one and a half hours, an employee, before starting the overtime, is entitled to a rest break of 20 minutes to be paid <u>at the rate of pay applying to the employee immediately prior to the scheduled meal break</u>
9.	30.13 – Standing by Agreed	Subject to any custom prevailing at an enterprise, where an employee is required regularly to hold themselves in readiness to work after ordinary hours, the employee must be paid standing by time at the employee’s <u>ordinary hourly rate</u> for the time they are standing by.
10.	34.5(a)(i) – Rostered day off falling on public holiday 3 Not Agreed	(a) Except as provided for in clauses 34.5(b) and (c) and except where the rostered day off falls on a Saturday or a Sunday, where a full-time employee’s ordinary hours of work are structured to include a day off and such day off falls on a public holiday, the employee is entitled, at the discretion of the employer, to either: (i) 7.6 hours of pay at the applicable rate of pay (<u>ordinary hourly rate</u>).
11.	39.3 – Transfer to lower paid duties	This is a standard clause in most awards. It has been agreed that the wording of this clause will be determined through the plain language re-drafting of standard clauses.