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Dear Award Modernisation Team

AM2021/72: Application by Menulog Pty Ltd for a new On Demand Delivery Services Industry Award

Further to Menulog's previous undertakings to file a copy of its exposure draft *On Demand Delivery Services Industry Award* following initial discussions with the Transport Workers Union, please find attached with this correspondence a copy of Menulog's exposure draft to complete its 24 June 2021 Application for the making of this new modern award.

Menulog and the Transport Workers Union have engaged in positive and constructive discussions about establishing a fair and sustainable framework under which employee couriers in the on demand delivery services industry may be employed.

That this proposed exposure draft *On Demand Delivery Services Industry Award* does not identify those parts of the proposed award about which there is consensus, and those parts about which there is not yet consensus, should not be viewed as inconsistent with these assertions of positive and constructive discussions – we're just not there yet.

Menulog looks forward to engaging further with the Commission, the TWU and the other interested parties to this Application about the threshold questions that are currently before the Commission and the broader question of whether its proposed new *On Demand Delivery Services Industry Award* will meet the modern awards objective.

Yours sincerely



**Katie Sweatman
Partner**

On Demand Delivery Services Industry Award 2022

Exposure Draft – [**to be determined**] 2022

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Part 1—Application and Operation of this Award

1. Title and commencement

- 1.1 This award is the *On Demand Delivery Services Industry Award 2022*.
- 1.2 This modern award commenced operation on [*** date to be determined by the Fair Work Commission ***].

2. Definitions

In this award, unless the contrary intention appears:

Act means the *Fair Work Act 2009* (Cth).

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

default fund employee means an employee who has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

defined benefit member has the meaning given by the *Superannuation Guarantee (Administration) Act 1992* (Cth).

employee means a national system employee as defined by section 13 of the Act.

employer means a national system employer as defined by section 14 of the Act.

NES means the National Employment Standards as contained in sections 59 to 131 of the Act.

on-demand delivery services industry has the meaning given in clause 4.2 .

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

3. The National Employment Standards and this award

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

4. Coverage

- 4.1** This industry award covers employers throughout Australia in the on demand delivery services industry and their employees in the classifications listed in clause 12 to the exclusion of any other modern award.
- 4.2** The **on demand delivery services industry** means the collection and delivery of food, beverages, goods or any other item, that are ordered by a consumer from third party businesses that offer food, goods and other items for immediate collection and delivery on an online or application-based platform, provided that:
- (a) the collection and delivery is not of the employer's own food, beverages, goods or other items offered by it for sale; and
 - (b) the employer is not in the primary business of providing general transport or delivery services at large of food, beverages, goods or any other item that has not been purchased on its online platform.
- 4.3** This award covers any employer which supplies labour on an on-hire basis in the on demand delivery services industry 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. Clause 4.2(a) operates subject to the exclusions from coverage in this award.
- 4.4** This award does not cover:
- (a) employees excluded from award coverage by the Act;
 - (b) 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; or
 - (c) 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.
- 4.5** Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

5. Individual flexibility arrangements

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

On Demand Delivery Services Industry Award 2022

- (a) arrangements for when work is performed; or
 - (b) overtime rates; or
 - (c) penalty rates; or
 - (d) allowances; or
 - (e) annual leave loading.
- 5.2** An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress.
- 5.3** An agreement may only be made after the individual employee has commenced employment with the employer.
- 5.4** An employer who wishes to initiate the making of an agreement must:
- (a) give the employee a written proposal; and
 - (b) if the employer is aware that the employee has, or reasonably should be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.
- 5.5** An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.
- 5.6** An agreement must do all of the following:
- (a) state the names of the employer and the employee; and
 - (b) identify the award term, or award terms, the application of which is to be varied; and
 - (c) set out how the application of the award term, or each award term, is varied; and
 - (d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and
 - (e) state the date the agreement is to start.
- 5.7** An agreement must be:
- (a) in writing; and
 - (b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- 5.8** Except as provided in clause 5.7(b), an agreement must not require the approval or consent of a person other than the employer and the employee.
- 5.9** The employer must keep the agreement as a time and wages record and give a copy to the employee.
- 5.10** The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement.

5.11 An agreement may be terminated:

- (a) at any time, by written agreement between the employer and the employee; or
- (b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013).

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

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

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

6. Requests for flexible working arrangements

6.1 Employee may request change in working arrangements

Clause 6 applies where an employee has made a request for a change in working arrangements under section 65 of the Act.

NOTE 1: Section 65 of the Act provides for certain employees to request a change in their working arrangements because of their circumstances, as set out in section 65(1A). Clause 6 supplements or deals with matters incidental to the NES provisions.

NOTE 2: An employer may only refuse a section 65 request for a change in working arrangements on 'reasonable business grounds' (see section 65(5) and (5A)).

NOTE 3: Clause 6 is an addition to section 65.

6.2 Responding to the request

Before responding to a request made under section 65, the employer must discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

- (a) the needs of the employee arising from their circumstances;
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

NOTE 1: The employer must give the employee a written response to an employee's section 65 request within 21 days, stating whether the employer grants or refuses the request (section 65(4)).

NOTE 2: If the employer refuses the request, then the written response must include details of the reasons for the refusal (section 65(6)).

6.3 What the written response must include if the employer refuses the request

- (a) Clause 6.3 applies if the employer refuses the request and has not reached an agreement with the employee under clause 5.1.
- (b) The written response under section 65(4) must include details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.
- (c) If the employer and employee could not agree on a change in working arrangements under clause 5.1, then the written response under section 65(4) must:
 - (i) state whether or not there are any changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances; and
 - (ii) if the employer can offer the employee such changes in working arrangements, set out those changes in working arrangements.

6.4 What the written response must include if a different change in working arrangements is agreed

If the employer and the employee reached an agreement under clause 5.1 on a change in working arrangements that differs from that initially requested by the employee, then the employer must provide the employee with a written response to their request setting out the agreed change(s) in working arrangements.

6.5 Dispute resolution

Disputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause 6, can be dealt with under clause 29 - Dispute resolution.

7. Facilitative provisions

7.1 Agreement to vary award provisions

- (a) This award contains facilitative provisions that allow agreement between an employer and employees on how specific award provisions are to apply at the workplace or enterprise level.
- (b) The specific award provisions establish both the standard award conditions and the framework within which agreement can be reached as to how the particular provisions should be applied in practice. Facilitative provisions are not to be used as a device to avoid award obligations nor should they result in unfairness to an employee or employees covered by this award.

7.2 Facilitation by individual agreement

(a) The following clauses have facilitative provisions:

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
16.1(d)	Payment of wages	an individual employee
19.2	Time off instead of payment for overtime	an individual employee
21.5	Annual leave in advance	an individual employee
21.6	Cashing out of annual leave	an individual employee

(b) The agreement reached must be recorded in writing and kept as a time and wages record.

Part 2—Types of Employment and Classifications

8. Types of employment

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

- (a) a full-time employee; or
- (b) a part-time employee; or
- (c) a casual employee.

9. Full-time employees

The ordinary hours of full-time employees are an average of 38 per week.

10. Part-time employees

10.1 An employee who is engaged to work for fewer than 38 ordinary hours per week and whose hours of work are reasonably predictable, is a part-time employee.

10.2 An employer may employ part-time employees in any classification defined in clause 12—Classifications.

10.3 This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.

10.4 A part-time employee is entitled to payments in respect of annual leave and personal/carer's leave on a proportionate basis.

10.5 Regular pattern of work

- (a) At the time of engaging a part-time employee, the employer must agree in writing with the employee on a regular pattern of work that must include all of the following:
 - (i) the number of hours to be worked on each particular day of the week (the guaranteed hours); and
 - (ii) the times at which the employee will start and finish work each particular day; and
 - (iii) when meal breaks may be taken and their duration.

NOTE: An agreement under clause 10.5 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

- (b) For the purposes of a part-time employee's guaranteed hours, the minimum daily engagement for a part-time employee is 30 minutes.
- (c) An employee's regular pattern of work may be changed by the employer giving the employee 7 days written notice of the change, or at any time by agreement between the employer and the employee in accordance with clause 10.6.

10.6 Changes to regular pattern of work by agreement

The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

- (a) if the agreement is to vary the employee's regular pattern of work for a particular rostered shift – before the end of the affected shift; and
- (b) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.6 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

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

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

EXAMPLE: Simon's guaranteed hours include 4 hours on Fridays. Simon is allocated a delivery job which is unable to be completed before the end of his rostered shift end time. Simon is happy to complete the order and confirms by message or through his employer's app that that he has collected the order from the restaurant or retailer. The variation is agreed, and Simon's regular pattern of work has been temporarily varied

under clause 10.6 for the extra time it takes him to complete delivery of the order. He is not entitled to overtime rates for the additional time.

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

10.8 For any time worked in excess of their guaranteed hours agreed under clause 10.5 or as varied under clause 10.6, the part-time employee must be paid at the overtime rate specified at clause 19—Overtime.

11. Casual employees

11.1 Casual loading

(a) For each ordinary hour worked, a casual employee must be paid:

(i) the minimum hourly rate in clause 15 for the classification in which they are employed; and

(ii) a loading of **25%** of the minimum hourly rate.

(b) The casual loading will not be paid for overtime hours worked.

11.2 Offers and requests for casual conversion

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

NOTE: Disputes about offers and requests for casual conversion under the NES are to be dealt with under clause 29—Dispute resolution.

12. Classifications

A description of the classifications under this award is set out below.

12.1 Level 1 Courier

An employee at this level is an employee employed as a courier, driver or rider (howsoever described).

12.2 Level 2 Courier

An employee at this level an employee employed as a courier, driver or rider (howsoever described) who has delegated responsibility for the supervision of at least two employees.

Part 3—Hours of Work

13. Ordinary hours of work and rostering

13.1 Ordinary hours of work and roster cycles—full-time employees

- (a) Ordinary hours may be worked on any day of the week.
- (b) Full-time employees work an average of 38 ordinary hours per week in one of the following ways:
 - (i) working 5 days of 7.6 hours each per week; or
 - (ii) working 152 hours per 4 week cycle in workplaces at which employees work on a rostered day off basis in accordance with clause 13.2; or
 - (iii) working 19 days of 8 hours each per month; or
 - (iv) working up to 10 hours on any day or days by agreement between the employer and the majority of employees concerned (therefore enabling a weekday to be taken off more frequently than would otherwise apply).
- (c) An employee who works on a rostered day off basis over a 4 week cycle is entitled to up to 12 rostered days off over each 12 month period.
- (d) Subject to clause 28.1 (Consultation about changes to rosters or hours of work), an arrangement agreed by the employer and employee under clause 13.1(b) may be changed at any time by agreement.

13.2 Ordinary hours of work and roster cycles—part-time and casual employees

- (a) A part-time or casual employee may work their ordinary hours by working periods of duty of up to 10 ordinary hours per day on up to 5 days per week.
- (b) Ordinary hours may be worked on any day of the week.

13.3 An employee may be rostered to work a broken shift on any day provided that:

- (a) except in the case of an employee flex shift, the shift is not broken into more than 2 parts;
- (b) the total length of the shift is not less than 1 hour, exclusive of meal breaks; and
- (c) the span of hours from the start of the first part of the shift to the end of the second part of the shift is not more than 12 hours.

13.4 Employee flex shifts

- (a) The employer may advertise to its employees extra shifts for which it seeks employees to perform work to respond to unexpected customer demand (employee flex shift).
- (b) A part-time or casual employee may elect to perform any number of employee flex shifts provided always that the span of hours from the start of the first part

of the shift to the end of the last part of the shift on any given day is not more than 12 hours.

- (c) An employer may not direct an employee to perform an employee flex shift.
- (d) An employee who elects to perform an employee flex shift will be taken to have agreed to a variation to their regular pattern of work pursuant to clause 10.6.

14. Breaks

14.1 Unpaid meal breaks

- (a) An employee is entitled to an unpaid meal break of not less than 30 minutes and cannot be required to work for more than 5 hours without a meal break.
- (b) An unpaid meal break provided in clause 14.1 14.1 does not count as time worked for the employee.

14.2 Breaks between shifts

- (a) An employee must have a minimum break of 8 consecutive hours between finishing work on one day (including any overtime worked immediately after it) and starting work on the next shift of ordinary hours on the following day (including any overtime worked immediately before it).
- (b) The employer must pay an employee who is required by the employer to start work without having had at least 8 consecutive hours off duty at the overtime rate mentioned in clause 19.1 until the employee is released from duty for at least 8 consecutive hours.
- (c) The employee must not suffer any loss of pay for ordinary working time hours not worked during the period of a release from duty mentioned in clause 14.2(b).

Part 4—Wages and Allowances

15. Minimum rates

- 15.1** An employer must pay an employee the rate applicable to the employee’s classification specified in **Column** of **Table 2 – Minimum rates** for ordinary hours of work.

Table 2 – Minimum rates

Column 1 Employee classification	Column 2 Minimum weekly rate (full-time employee)	Column 3 Minimum hourly rate
	\$	\$
Level 1 Courier	772.65	20.33
Level 2 Courier	825.23	21.72

NOTE 1: Provisions for calculating rates for part-time employees are at clause 10 (Part-time employees) and are based on the minimum hourly rate specified in **Column 3**.

NOTE 2: Provisions for calculating rates for casual employees are at clause 11 (Casual employees) and are based on the minimum hourly rate specified in **Column 3**.

NOTE 3: Schedule X sets out the hourly rates of pay including overtime rates and penalty rates.

15.2 Junior rates

- (a) An employer must pay a junior employee aged as specified in column 1 of Table 3—Junior rates the minimum percentage specified in column 2 of the minimum rate that would otherwise be applicable under Table 2—Minimum rates:

Table 3—Junior rates

Column 1 Age	Column 2 Minimum % of minimum weekly rate
16 years of age and under	50
17 years of age	60
18 years of age	65
19 years of age	75
20 years of age	85

- (b) A minimum weekly rate calculated in accordance with Table 3—Junior rates must be rounded to the nearest \$0.10.

15.3 Higher duties

- (a) An employer must pay an employee who performs for more than 4 hours on any particular day duties of a classification higher than the employee’s ordinary classification the minimum hourly rate specified in **Column 3** of **Table 2 – Minimum rates** for that higher classification for the whole of that day.
- (b) An employer must pay an employee who performs for less than 4 hours on any particular day duties of a classification higher than the employee’s ordinary classification the minimum hourly rate specified in **Column 3** of **Table 2 – Minimum rates** for that higher classification for the time during which those duties were performed.

16. Payment of wages

NOTE: Regulations 3.33(3) and 3.46(1)(g) of *Fair Work Regulations 2009* set out the requirements for pay records and the content of payslips including the requirement to separately identify any allowance paid.

16.1 Frequency and method of payment

- (a) Wages will be paid at least monthly.
- (b) Wages may be paid by cash or electronic funds transfer into a bank account nominated by the employee. However, the employer and an employee may agree that wages must be paid by cash.
- (c) An employee paid by cash or cheque who has to wait at the workplace to be paid is entitled to be paid at the employee's minimum hourly rate for any time spent waiting.
- (d) If the normal pay day or the day following the normal pay is a public holiday, the employee is entitled to be paid on the last ordinary working day immediately before the normal pay day, or on another day that is agreed between the employer and the employee.

16.2 Payment on termination of employment

- (a) The employer must pay an employee no later than 7 days after the day on which the employee's employment terminates:
 - (i) the employee's wages under this award for any complete or incomplete pay period up to the end of the day of termination; and
 - (ii) all other amounts that are due to the employee under this award and the NES.
- (b) The requirement to pay wages and other amounts under clause 16.2(a) is subject to further order of the Commission and the employer making deductions authorised by this award or the Act.

NOTE 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

NOTE 2: Clause 16.2(b) allows the Commission to make an order delaying the requirement to make a payment under clause 16.2. For example, the Commission could make an order delaying the requirement to pay redundancy pay if an employer makes an application under section 120 of the Act for the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES.

NOTE 3: State and Territory long service leave laws or long service leave entitlements under section 113 of the Act, may require an employer to pay an employee for accrued long service leave on the day on which the employee's employment terminates or shortly after.

17. Allowances

NOTE: Regulations 3.33(3) and 3.46(1)(g) of *Fair Work Regulations 2009* set out the requirements for pay records and the content of payslips including the requirement to separately identify any allowance paid.

17.1 Clause 17 gives employees an entitlement to monetary allowances of specified kinds in specified circumstances.

NOTE: Schedule X contains a summary of monetary allowances and methods of adjustment.

17.2 Vehicle allowance

(a) Subject to clause 17.2(c), an employer must pay an employee who, by agreement with the employer, uses their own motor vehicle in performing their duties an allowance of:

- (i) for a car, \$0.16 per driven kilometre during a shift;
- (ii) for a motorcycle or scooter, \$0.14 per kilometre; and
- (iii) for a bicycle or ebike, \$0.07 per kilometre.

(b) For the purposes of distance travelled, the distance estimated by the GPS system integrated into the employer's on demand delivery platform may be used, provided at all times that the distance records are stored as an employee record.

(c) Provided at all times that the employee is better off overall taking into account distance recorded pursuant to clause 17.2(b) averaged over a 12 month period, an employer may, at its discretion, provide payment for the vehicle allowance by way of an additional hourly allowance.

17.3 Clothing reimbursement

An employee required to provide special clothing or a uniform must be reimbursed by the employer for the cost of such clothing.

18. Superannuation

18.1 Superannuation legislation, including the *Superannuation Guarantee (Administration) Act 1992* (Cth), the *Superannuation Guarantee Charge Act 1992* (Cth), the *Superannuation Industry (Supervision) Act 1993* (Cth) and the *Superannuation (Resolution of Complaints) Act 1993* (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund.

18.2 Superannuation contributions for defined benefit members

An employer is permitted to make superannuation contributions to a superannuation fund or scheme in relation to a default fund employee who is a defined benefit member of the fund or scheme.

Part 5—Overtime and Penalty Rates

19. Overtime

19.1 Overtime

All time worked in excess of an average of 38 hours per week, or the daily hours prescribed in clause 13 is overtime and must be paid at the rate of **150%** of the relevant minimum rate for the first 3 hours and **200%** of the relevant minimum rate after 3 hours.

19.2 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 19.2.
- (c) An agreement must state each of the following:
 - (i) the number of overtime hours to which it applies and when those hours were worked;
 - (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
 - (iv) that any payment mentioned in clause 19.2(c)(iii) must be made in the next pay period following the request.

NOTE: An example of the type of agreement required by clause 19.2 is set out at **Schedule A—Agreement for Time Off Instead of Payment for Overtime**. There is no requirement to use the form of agreement set out at **Schedule A—Agreement for Time Off Instead of Payment for Overtime**. An agreement under clause 19.2 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

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

EXAMPLE: By making an agreement under clause 19.2 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

- (e) Time off must be taken:
 - (i) within the period of 6 months after the overtime is worked; and

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- (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 19.2 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in clause 19.2(e)(i), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (h) The employer must keep a copy of any agreement under clause 19.2 as an employee record.
- (i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 19.2 will apply, including the requirement for separate written agreements under clause 19.2(b) for overtime that has been worked.

NOTE: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 19.2 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

NOTE: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 19.2.

20. Penalty rates

All work performed by an employee outside of ordinary hours, which is not overtime will be paid at the following rates:

	Full-time and part-time employees	Casual employees
	% of minimum hourly rate	
Monday to Saturday— outside 6.00 am – 11.00 pm	110	135

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	Full-time and part-time employees	Casual employees
	% of minimum hourly rate	
Sunday—all day	110	135
Public holidays—all day	150	150

NOTE: Schedule X sets out hourly rates of pay including penalty rates.

Part 6—Leave and Public Holidays

21. Annual leave

21.1 Annual leave is provided for in the NES.

21.2 Definition of a shiftworker

For the purpose of the additional week of annual leave provided for in section 87(1)(b) of the Act, a **shiftworker** is an employee who works ordinary hours over 7 days of the week and is regularly rostered to work on Sundays and public holidays.

21.3 Annual leave loading

When taking a period of paid annual leave an employee must be paid a loading of **17.5%** in addition to the payment required by the NES or the ordinary pay they would have received for the period of the leave, whichever is the greater.

NOTE: Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under this award, the employee is entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

21.4 Annual close down

- (a) Where an employer intends to temporarily close (or reduce to nucleus) the place of employment or a section of it for the purpose, amongst others, of allowing annual leave to the employees concerned or a majority of them, the employer must give those employees one month's notice in writing of an intention to apply the provisions of clause 21.4.
- (b) In the case of any employee engaged after notice has been given, notice must be given to that employee on the date of their engagement.
- (c) Where an employee has been given notice pursuant to clause 21.4(a) and the employee has:
 - (i) accrued sufficient annual leave to cover the full period of closing, the employee must take paid annual leave for the full period of closing;

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- (ii) insufficient accrued annual leave to cover the full period of closing, the employee must take paid annual leave to the full amount accrued and leave without pay for the remaining period of the closing; or
 - (iii) no accrued annual leave, the employee must take leave without pay for the full period of closing.
- (d) Public holidays that fall within the period of close down will be paid as provided for in this award and will not count as a day of annual leave or leave without pay.

21.5 Annual leave in advance

- (a) An employer and employee may agree in writing to the employee taking a period of paid annual leave before the employee has accrued an entitlement to the leave.
- (b) An agreement must:
 - (i) state the amount of leave to be taken in advance and the date on which leave is to commence; and
 - (ii) be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.

NOTE: An example of the type of agreement required by clause 21.5 is set out at **Schedule B**. There is no requirement to use the form of agreement set out at **Schedule B**.

- (c) The employer must keep a copy of any agreement under clause 21.5 as an employee record.
- (d) If, on the termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken in accordance with an agreement under clause 21.5, the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

21.6 Cashing out of annual leave

- (a) Paid annual leave must not be cashed out except in accordance with an agreement under clause 21.6.
- (b) Each cashing out of a particular amount of paid annual leave must be the subject of a separate agreement under clause 21.6.
- (c) An employer and an employee may agree in writing to the cashing out of a particular amount of accrued paid annual leave by the employee.
- (d) An agreement under clause 21.6 must state:
 - (i) the amount of leave to be cashed out and the payment to be made to the employee for it; and
 - (ii) the date on which the payment is to be made.

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- (e) An agreement under clause 21.6 must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian.
- (f) The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made.
- (g) An agreement must not result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.
- (h) The maximum amount of accrued paid annual leave that may be cashed out in any period of 12 months is 2 weeks.
- (i) The employer must keep a copy of any agreement under clause 21.6 as an employee record.

NOTE 1: Under section 344 of the Act, an employer must not exert undue influence or undue pressure on an employee to make, or not make, an agreement under clause 21.6.

NOTE 2: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 21.6.

NOTE 3: An example of the type of agreement required by clause 21.6 is set out at **Schedule C**. There is no requirement to use the form of agreement set out at **Schedule C**.

21.7 Excessive leave accruals: general provision

NOTE: Clauses 21.7 to 21.9 contain provisions, additional to the National Employment Standards, about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Act.

- (a) An employee has an **excessive leave accrual** if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 21.2).
- (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual.
- (c) Clause 21.8 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave.
- (d) Clause 21.9 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee.

21.8 Excessive leave accruals: direction by employer that leave be taken

- (a) If an employer has genuinely tried to reach agreement with an employee under clause 21.7(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave.

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- (b) However, a direction by the employer under clause 21.8(a):
 - (i) is of no effect if it would result at any time in the employee's remaining accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 21.7, 21.8 or 21.9 or otherwise agreed by the employer and employee) are taken into account; and
 - (ii) must not require the employee to take any period of paid annual leave of less than one week; and
 - (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and
 - (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee.
- (c) The employee must take paid annual leave in accordance with a direction under clause 21.8(a) that is in effect.
- (d) An employee to whom a direction has been given under clause 21.8(a) may request to take a period of paid annual leave as if the direction had not been given.

NOTE 1: Paid annual leave arising from a request mentioned in clause 21.8(d) may result in the direction ceasing to have effect. See clause 21.8(b)(i).

NOTE 2: Under section 88(2) of the Act, the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

21.9 Excessive leave accruals: request by employee for leave

- (a) If an employee has genuinely tried to reach agreement with an employer under clause 21.7(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave.
- (b) However, an employee may only give a notice to the employer under clause 21.9(a) if:
 - (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and
 - (ii) the employee has not been given a direction under clause 21.8(a) that, when any other paid annual leave arrangements (whether made under clause 21.7, 21.8 or 21.9 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual.
- (c) A notice given by an employee under clause 21.9(a) must not:
 - (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 21.7, 21.8 or 21.9

or otherwise agreed by the employer and employee) are taken into account;
or

- (ii) provide for the employee to take any period of paid annual leave of less than one week; or
 - (iii) provide for the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the notice is given; or
 - (iv) be inconsistent with any leave arrangement agreed by the employer and employee.
- (d) An employee is not entitled to request by a notice under clause 21.9(a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 21.2) in any period of 12 months.
- (e) The employer must grant paid annual leave requested by a notice under clause 21.9(a).

22. Personal/carer's leave and compassionate leave

Personal/carer's leave and compassionate leave are provided for in the NES.

23. Parental leave and related entitlements

Parental leave and related entitlements are provided for in the NES.

24. Community service leave

Community service leave is provided for in the NES.

25. Unpaid family and domestic violence leave

Unpaid family and domestic violence leave is provided for in the NES.

NOTE 1: Information concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. Employers should consult with such employees regarding the handling of this information.

NOTE 2: Depending upon the circumstances, evidence that would satisfy a reasonable person of the employee's need to take family and domestic violence leave may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

26. Public holidays

26.1 Public holiday entitlements are provided for in the NES.

26.2 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 part-day public holiday under the NES.

26.3 Part-day public holiday

For provisions relating to part-day public holidays see **Schedule D—Part-day Public Holidays**.

Part 7—Consultation and Dispute Resolution

27. Consultation about major workplace change

27.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must:

- (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and
- (b) discuss with affected employees and their representatives (if any):
 - (i) the introduction of the changes; and
 - (ii) their likely effect on employees; and
 - (iii) measures to avoid or reduce the adverse effects of the changes on employees; and
- (c) commence discussions as soon as practicable after a definite decision has been made.

27.2 For the purposes of the discussion under clause 27.1(b), the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including:

- (a) their nature; and
- (b) their expected effect on employees; and
- (c) any other matters likely to affect employees.

27.3 Clause 27.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests.

27.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 27.1(b).

- 27.5** In clause 27 **significant effects**, on employees, includes any of the following:
- (a) termination of employment; or
 - (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or
 - (c) loss of, or reduction in, job or promotion opportunities; or
 - (d) loss of, or reduction in, job tenure; or
 - (e) alteration of hours of work; or
 - (f) the need for employees to be retrained or transferred to other work or locations; or
 - (g) job restructuring.
- 27.6** Where this award makes provision for alteration of any of the matters defined at clause 27.5, such alteration is taken not to have significant effect.

28. Consultation about changes to rosters or hours of work

- 28.1** Clause 28 applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.
- 28.2** The employer must consult with any employees affected by the proposed change and their representatives (if any).
- 28.3** For the purpose of the consultation, the employer must:
- (a) provide to the employees and representatives mentioned in clause 28.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and
 - (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact.
- 28.4** The employer must consider any views given under clause 28.3(b).
- 28.5** Clause 28 is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.

29. Dispute resolution

- 29.1** Clause 29 sets out the procedures to be followed if a dispute arises about a matter under this award or in relation to the NES.
- 29.2** The parties to the dispute must first try to resolve the dispute at the workplace through discussion between the employee or employees concerned and the relevant supervisor.

- 29.3** If the dispute is not resolved through discussion as mentioned in clause 29.2, the parties to the dispute must then try to resolve it in a timely manner at the workplace through discussion between the employee or employees concerned and more senior levels of management, as appropriate.
- 29.4** If the dispute is unable to be resolved at the workplace and all appropriate steps have been taken under clauses 29.2 and 29.3, a party to the dispute may refer it to the Fair Work Commission.
- 29.5** The parties may agree on the process to be followed by the Fair Work Commission in dealing with the dispute, including mediation, conciliation and consent arbitration.
- 29.6** If the dispute remains unresolved, the Fair Work Commission may use any method of dispute resolution that it is permitted by the Act to use and that it considers appropriate for resolving the dispute.
- 29.7** A party to the dispute may appoint a person, organisation or association to support and/or represent them in any discussion or process under clause 29.
- 29.8** While procedures are being followed under clause 29 in relation to a dispute:
- (a) work must continue in accordance with this award and the Act; and
 - (b) an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.
- 29.9** Clause 29.8 is subject to any applicable work health and safety legislation.

Part 8—Termination of Employment and Redundancy

30. Termination of employment

NOTE: The NES sets out requirements for notice of termination by an employer. See sections 117 and 123 of the Act.

30.1 Notice of termination by an employee

- (a) Clause 30.1 applies to all employees except those identified in sections 123(1) and 123(3) of the Act.
- (b) An employee must give the employer notice of termination in accordance with **Table 4 – Period of notice** of at least the period specified in **Column 2** according to the period of continuous service of the employee specified in **Column 1**.

Table 4 – Period of notice

Column 1	Column 2
Employee’s period of continuous service with the employer at the end of the day the notice is given	Period of notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

NOTE: The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.

- (c) In clause 30.1(b) continuous service has the same meaning as in section 117 of the Act.
- (d) If an employee who is at least 18 years old does not give the period of notice required under clause 30.1(b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week’s wages for the employee.
- (e) If the employer has agreed to a shorter period of notice than that required under clause 30.1(b), then no deduction can be made under clause 30.1(d).
- (f) Any deduction made under clause 30.1(d) must not be unreasonable in the circumstances.

30.2 Job search entitlement

- (a) Where an employer has given notice of termination to an employee, the employee must be allowed time off without loss of pay of up to one day for the purpose of seeking other employment.
- (b) The time off under clause 30.2 is to be taken at times that are convenient to the employee after consultation with the employer.

31. Redundancy

NOTE: Redundancy pay is provided for in the NES. See sections 119 to 123 of the Act.

31.1 Transfer to lower paid duties on redundancy

- (a) Clause 31.1 applies if, because of redundancy, an employee is transferred to new duties to which a lower ordinary rate of pay applies.
- (b) The employer may:
 - (i) give the employee notice of the transfer of at least the same length as the employee would be entitled to under section 117 of the Act as if it were a notice of termination given by the employer; or

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- (ii) transfer the employee to the new duties without giving notice of transfer or before the expiry of a notice of transfer, provided that the employer pays the employee as set out in clause 31.1(c).
- (c) If the employer acts as mentioned in clause 31.1(b)(ii), the employee is entitled to a payment of an amount equal to the difference between the ordinary rate of pay of the employee (inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) for the hours of work the employee would have worked in the first role, and the ordinary rate of pay (also inclusive of all-purpose allowances, shift rates and penalty rates applicable to ordinary hours) of the employee in the second role for the period for which notice was not given.

31.2 Job search entitlement

- (a) Where an employer has given notice of termination to an employee in circumstances of redundancy, the employee must be allowed time off without loss of pay of up to one day each week of the minimum period of notice prescribed by section 117(3) of the Act for the purpose of seeking other employment.
- (b) If an employee is allowed time off without loss of pay of more than one day under clause 31.2(a), the employee must, at the request of the employer, produce proof of attendance at an interview.
- (c) A statutory declaration is sufficient for the purpose of clause 31.2(b).
- (d) An employee who fails to produce proof when required under clause 31.2(b) is not entitled to be paid for the time off.
- (e) This entitlement applies instead of clause 30.2.

31.3 Employee leaving during redundancy notice period

- (a) An employee given notice of termination in circumstances of redundancy may terminate their employment during the minimum period of notice prescribed by section 117(3) of the Act.
- (b) The employee is entitled to receive the benefits and payments they would have received under clause 30.2 or under sections 119 to 123 of the Act had they remained in employment until the expiry of the notice.
- (c) However, the employee is not entitled to be paid for any part of the period of notice remaining after the employee ceased to be employed.

Schedule A—Agreement for Time Off Instead of Payment for Overtime

[Link to PDF copy of Agreement for Time Off Instead of Payment for Overtime.](#)

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee may take time off instead of being paid for the following amount of overtime that has been worked by the employee:

Date and time overtime started: ___/___/20___ ___ am/pm

Date and time overtime ended: ___/___/20___ ___ am/pm

Amount of overtime worked: _____ hours and _____ minutes

The employer and employee further agree that, if requested by the employee at any time, the employer must pay the employee for overtime covered by this agreement but not taken as time off. Payment must be made at the overtime rate applying to the overtime when worked and must be made in the next pay period following the request.

Signature of employee: _____

Date signed: ___/___/20___

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ___/___/20___

Schedule B—Agreement to Take Annual Leave in Advance

Link to PDF copy of Agreement to Take Annual Leave in Advance.

Name of employee: _____

Name of employer: _____

The employer and employee agree that the employee will take a period of paid annual leave before the employee has accrued an entitlement to the leave:

The amount of leave to be taken in advance is: ____ hours/days

The leave in advance will commence on: ____/____/20____

Signature of employee: _____

Date signed: ____/____/20____

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ____/____/20____

[If the employee is under 18 years of age - include:]

I agree that:

if, on termination of the employee's employment, the employee has not accrued an entitlement to all of a period of paid annual leave already taken under this agreement, then the employer may deduct from any money due to the employee on termination an amount equal to the amount that was paid to the employee in respect of any part of the period of annual leave taken in advance to which an entitlement has not been accrued.

Name of parent/guardian: _____

Signature of parent/guardian: _____

Date signed: ____/____/20____

Schedule C—Agreement to Cash Out Annual Leave

[Link to PDF copy of Agreement to Cash Out Annual Leave.](#)

Name of employee: _____

Name of employer: _____

The employer and employee agree to the employee cashing out a particular amount of the employee's accrued paid annual leave:

The amount of leave to be cashed out is: ____ hours/days

The payment to be made to the employee for the leave is: \$_____ subject to deduction of income tax/after deduction of income tax (strike out where not applicable)

The payment will be made to the employee on: ____/____/20__

Signature of employee: _____

Date signed: ____/____/20__

Name of employer representative: _____

Signature of employer representative: _____

Date signed: ____/____/20__

Include if the employee is under 18 years of age:

Name of parent/guardian: _____

Signature of parent/guardian: _____

Date signed: ____/____/20__

Schedule D—Part-day Public Holidays

- D.1** This schedule operates where this award otherwise contains provisions dealing with public holidays that supplement the NES.
- D.2** Where a part-day public holiday is declared or prescribed between 6.00 pm and midnight, or 7.00 pm and midnight on Christmas Eve (24 December in each year) or New Year's Eve (31 December in each year) the following will apply on Christmas Eve and New Year's Eve and will override any provision in this award relating to public holidays to the extent of the inconsistency:
- (a) All employees will have the right to refuse to work on the part-day public holiday if the request to work is not reasonable or the refusal is reasonable as provided for in the NES.
 - (b) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of exercising their right under the NES does not work, they will be paid their ordinary rate of pay for such hours not worked.
 - (c) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday but as a result of being on annual leave does not work, they will be taken not to be on annual leave during the hours of the declared or prescribed part-day public holiday that they would have usually been rostered to work and will be paid their ordinary rate of pay for such hours.
 - (d) Where a part-time or full-time employee is usually rostered to work ordinary hours on the declared or prescribed part-day public holiday, but as a result of having a rostered day off (RDO) provided under this award, does not work, the employee will be taken to be on a public holiday for such hours and paid their ordinary rate of pay for those hours.
 - (e) Excluding annualised salaried employees to whom clause D.2(f) applies, where an employee works any hours on the declared or prescribed part-day public holiday they will be entitled to the appropriate public holiday penalty rate (if any) in this award for those hours worked.
 - (f) Where an employee is paid an annualised salary under the provisions of this award and is entitled under this award to time off in lieu or additional annual leave for work on a public holiday, they will be entitled to time off in lieu or pro-rata annual leave equivalent to the time worked on the declared or prescribed part-day public holiday.
 - (g) An employee not rostered to work on the declared or prescribed part-day public holiday, other than an employee who has exercised their right in accordance with clause D.2(a), will not be entitled to another day off, another day's pay or another day of annual leave as a result of the part-day public holiday.
- D.3** 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.
- D.4** This schedule is not intended to detract from or supplement the NES.