MASTER ELECTRICIANS AUSTRALIA

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Response Productivity Commission Draft into the Workplace Relations Framework

Master Electricians Australia

Introduction

Master Electricians Australia Ltd (MEA) is a not-for-profit industry association representing electrical contractors. Originating as the Electrical Contractors Association in 1937, MEA has been representing electrical contractors for more than 76 years, making it one of the longest-standing industry associations of its kind. MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate.

MEA currently has a membership base of approximately 3000 electrical contractors Australia-wide, the vast majority of which are small businesses with fewer than 20 employees.

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Response to Recommendations

Chapter 3 – Institutions

Number	Recommendation	MEA Response
3.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to establish a Minimum Standards Division as part of the Fair Work Commission. This Division would have responsibility for minimum wages and modern awards. All other functions of the Fair Work Commission should remain in a Tribunal Division.	MEA submits that the wage decisions of the FMW panel have not been problematic or ineffective. There is insufficient detail on the functions or make up of the panel to comment more comprehensively. MEA submits that there is uncertainty about the jurisdiction for the Minimum Standards Division. In particular, with regard to the creation or amendment of modern awards.

3.2	The Australian Government should amend s. 629 of the Fair Work Act 2009 (Cth) to stipulate that new appointments of the President, Vice Presidents, Deputy Presidents and Commissioners of the Fair Work Commission be for periods of five years, with the possibility of reappointment at the end of this period, subject to a merit-based performance review undertaken jointly by an independent expert appointment panel and (excepting with regard to their own appointment) the President.	MEA supports a change to the system for appointing Commissioners. In recent times the performance of various members has resulted in regular successful appeals of decisions. The current arrangements make these members largely untouchable and this is damaging the effectiveness of the FWC. It is unclear from the draft recommendation whether there would be a limit to the appointment of 10 years.

	Current non-judicial Members should also be subject to a performance review based on the duration of their current appointment. Existing Members with five or more years of service would be subject to review within three years from the commencement of these appointment processes with reviews to be staggered to reduce disruption. Non-judicial Members with fewer than five years of service would be reviewed at between three to five years, depending on the date of their appointment.	A merit based selection process would be appropriate however political barriers, perceived or otherwise, may result in a reluctance to candidates applying based on the government of the day.

3.3	The Australian Government should amend the Fair Work Act 2009 (Cth) to change the appointment processes for Members of the Fair Work Commission. The amendments would stipulate that:	
	• an independent expert appointment panel should be established by the Australian Government and state and territory governments	MEA supports this recommendation.
	• members of the appointment panel should not have had previous direct roles in industrial representation or advocacy	It would be appropriate for at least one member of the panel to have some experience in representation or advocacy in order to assist the panel assess the credentials of the candidate.
	• the panel should make a shortlist of suitable candidates for Members of the Fair Work Commission against the criteria in draft recommendation 3.4	Current Members are perceived as being predominately from employer or employee organisations. Each change of government results in a process of 'balancing the ledger'. Greater transparency is needed in the appointment to address this imbalance.
	• the Commonwealth Minister for Employment should select Members of the Fair Work Commission from the panel's shortlist, with appointments then made by the Governor General.	

3.4	The Australian Government should amend the Fair Work Act 2009 (Cth) to establish separate eligibility criteria for members of the two Divisions of the Fair Work Commission outlined in draft recommendation 3.1.	

	Members of the Minimum Standards Division should have well-developed analytical capabilities and experience in economics, social science, commerce or equivalent disciplines.	MEA supports this recommendation.
	Members of the Tribunal Division Membership should have a broad experience, and be drawn from a range of professions, including (for example) from ombudsman's offices, commercial dispute resolution, law, economics and other relevant professions.	MEA supports this recommendation.
	A requirement for the Panel and the Minister for Employment respectively is that they be satisfied that a person recommended for appointment would be widely seen as having an unbiased and credible framework for reaching conclusions and determinations in relation to workplace relation matters or other relevant areas.	A track record of integrity is paramount to the appointment of a Member.

3.5	The Australian Government should require that the Fair Work Commission publish more detailed information about conciliation outcomes and processes. In the medium term, it should also commission an independent performance review of the Fair Work Commission's conciliation processes, and the outcomes that result from these processes.	

Chapter 4 – National Employment Standards

Number	Recommendation	MEA Response
4.1	The Fair Work Commission should, as a part of the current four yearly review of modern awards, give effect to s. 115(3) of the Fair Work Act 2009 (Cth) by incorporating terms that permit an employer and an employee to agree to substitute a public holiday for an alternative day into all modern awards.	MEA supports that this provision should be a consistent term across all modern awards.
4.2	The Australian Government should amend the National Employment Standards so that employers are not required to pay for leave or any additional penalty rates for any newly designated state and territory public holidays.	MEA supports such an amendment as it is the case that largely the setting of additional public holidays is outside the control of the national system.
4.3	Periodically, the Australian, state and territory governments should jointly examine whether there are any grounds for extending the existing 20 days of paid annual leave in the National Employment Standards, with a cash out option for any additional leave where that suits the employer and employee. Such an extension should not be implemented in the near future, and if ultimately implemented, should be achieved through a negotiated trade-off between wage increases and extra paid leave.	Leave accruals are a costly burden on business and these accruals compound in value each year as wage rates increase. In addition, the time spent away from the business results in a permanent loss of productivity for small business in particular. There is already a significant amount of leave that employers must contend with including RDO systems, public holidays and sick and annual leave. If this recommendation was enacted many employers would likely have to opt to pay the additional time as part of wages in order to gain some productivity back. This type of arrangement for additional leave should be left to enterprise bargaining.

INF REQ	The Productivity Commission seeks information on whether it would be practical for casual workers to be able to exchange part of their loading for additional entitlements (for example personal or carer's leave) if they so wish, and whether such a mechanism would be worthwhile.	Significant administrative burden on employers. This would create issues around the nature of the employment relationship. The Productivity Commission would be better served providing for greater flexibility in part-time arrangements under awards.

Chapter 5 – Unfair Dismissal Claims

Number	Recommendation	MEA Response
5.1	The Australian Government should either provide the Fair Work Commission with greater discretion to consider unfair dismissal applications 'on the papers', prior to commencement of conciliation; or alternatively, introduce more merit focused conciliation processes.	MEA supports this recommendation. A statement of prospects would be helpful to the parties particularly in jurisdictional type matters.

5.2	The Australian Government should change the penalty regime for unfair dismissal cases so that:	
	• an employee can only receive compensation when they have been dismissed without reasonable evidence of persistent underperformance or serious misconduct	MEA supports this recommendation; too much emphasis is placed on procedural issues when there are clearly valid reasons for termination. While procedural elements of a termination are important for the consideration of 'harshness' MEA submits that the decisions of the FWC have found fault with procedurals matters so readily that it is the perception of employers that they will always be considered to have dismissed an employee harshly. This perception flows to employers unnecessarily paying 'go away money'. Other organisations would likely see this recommendation as discouraging procedural fairness. However, it will still remain the best way for an employer to confirm that they have a valid reason to dismiss an employee. However, an employer who terminates an employee with an unequivocally valid reason should not be penalised as a matter of course. It will be difficult for the FWC to determine a procedural failure that has not led to 'harshness' without further guidance from the Act. MEA suggests that an appropriate test would be to consider the gravity of the valid reason against the procedural harshness.
	• procedural errors by an employer should not result in reinstatement or compensation for a former employee, but can, at the discretion of the Fair Work Commission, lead to either counselling and education of the employer, or financial penalties.	

5.3	The Australian Government should remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions in the Fair Work Act 2009 (Cth).	MEA submits that reinstatement as a remedy is not a 'broken' provision and that the decisions of the FWC have been largely appropriate to date. Removing reinstatement would further increase the likelihood of go away money being paid unless this change was coupled with the above provision to remove payment for procedural issues.

5.4	Conditional on implementation of the other recommended changes to the unfair dismissal system within this report, the Australian Government should remove the (partial) reliance on the Small Business Fair Dismissal Code within the Fair Work Act 2009 (Cth).	The Small Business Fair Dismissal Code is not helpful to small businesses; it either needs to be strengthened or removed. It has been the experience of MEA advocates when assisting members in unfair dismissal matters that FWC conciliators do not, by default, consider how a dismissal has been applied against the code.

INF REQ	The Productivity Commission seeks further views on possible changes to lodgement fees for unfair dismissal claims.	MEA submits that there should not be a recommendation to reduce the cost to applicants.

Chapter 6 – General Protections

Number	Recommendation	MEA Response
6.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to formally align the discovery processes used in general protection cases with those provided in the Federal Court's Rules and Practice Note 5 CM5.	
6.2	The Australian Government should modify s. 341 of the Fair Work Act 2009 (Cth), which deals with the meaning and application of a workplace right.	
	• Modified provisions should more clearly define how the exercise of a workplace right applies in instances where the complaint or inquiry is indirectly related to the person's employment.	
	• The FW Act should also require that complaints are made in good faith; and that the Fair Work Commission must decide this via a preliminary interview with the complainant before the action can proceed and prior to the convening of any conference involving both parties.	MEA does not support this recommendation. A mechanism where an interview of a complainant only will not give the FWC sufficient evidence to make a determination as to whether the complaint is being made in good faith. It is too easy, by omission commonly, for the matter to be expressed in such a way that the employer's conduct appears unreasonable.
6.3	The Australian Government should amend Part 3-1 of the Fair Work Act 2009 (Cth) to introduce exclusions for complaints that are frivolous and vexatious.	
6.4	The Australian Government should introduce a cap on compensation for claims lodged under Part 3-1 of the Fair Work Act 2009 (Cth).	MEA supports this recommendation; there should be no prospect for advantage when an applicant makes one claim in favour of another. In particular, the compensation for a termination based on a general

		protections claim should be the same as a UFD.

6.5	The Australian Government should amend Schedule 5.2 of the Fair Work Regulations 2009 (Cth) to require the Fair Work Commission to report more information about general protections matters. Adequate resourcing should be provided to the Fair Work Commission to improve its data collection and reporting processes in this area.	

Chapters 8 - 10 – Federal Minimum Wage Matters

Number	Recommendation	MEA Response
8.1	In making its annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and the living standards of the low paid.	

9.1	The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Fair Work Commission is empowered to make temporary variations in awards in exceptional circumstances after an annual wage review has been completed.	In general terms this idea has merits but the practicality of such an application and the considerations that the industry would have to make would be prohibitive. Particularly given the timeframe the FWC would likely take to reach such a decision; after submissions and hearings etc. the damage would be done. The FWC would need strong guidance on how to make these decisions.

9.2	The Australian Government should commission a comprehensive review into Australia's apprenticeship and traineeship arrangements. The review should include, but not be limited to, an assessment of:	The Australian apprentice system hasn't changed fundamentally in 70 years despite numerous reviews. There are a number of major stakeholders in the apprenticeship area of employment; Federal and State governments, employers, apprentices, RTOs, Union and employer associations, skills councils and schools. Meaningful change with competing agendas and priorities reform in this area has been difficult to achieve. This change is also impeded by a lack of bipartisan support.
	• the role of the current system within the broader set of arrangements for skill formation	

	• the structure of awards for apprentices and trainees, including junior and adult training wages and the adoption of competency-based pay progression	In 2012 the FWC conducted a review of wages and conditions of apprentices, and while the outcome was not correct in the view of most employers, a significant amount of evidence and material has been put to the FWC. Competency based progression has been an area of reform that has been difficult for parties to develop. The best results have been achieved where the major stakeholders have been free to develop their own terms.
	• the factors that affect the supply and demand for apprenticeships and traineeships, including the appropriate design and level of government, employer and employee incentives.	

INF REQ	The Productivity Commission seeks information on whether the structure of junior pay rates should be based on a model other than age, such as experience or competency, or some combination of these criteria.	MEA suggests that the current junior pay rates system does not need altering for apprentices as the employer in addition to wages also accepts responsibility for additional costs such as TAFE, tools uniforms travel etc. In some other industries none of the above are required to be paid. MEA would suggest however that experience and or competence may well be an alternative however to combine this with age and whether or not the position is an apprenticeship traineeship or genuinely a junior rate paid for an adult classification is a difficult formula for the commission to determine given the complexities of each of the different groups mentioned above. This topic would need to considered as part of a broader review.

INF REQ	The Productivity Commission invites participants' further input on the feasibility, merits and optimum design on an earned income tax credit in Australia, what its introduction might mean for future minimum wage determinations and employment outcomes, and in what conditions it would be appropriate to implement such a scheme.	If a US model was to be considered the Productivity Commission should consider how such a system would interact with the current Family Tax benefit thresholds.

Chapter 12 – Awards

Number	Recommendation	MEA Response
12.1	The Australian Government should amend the Fair Work Act 2009 (Cth) to:	
	• remove the requirement for the Fair Work Commission to conduct four yearly reviews of modern awards	MEA supports this recommendation. The current process is akin to a union log of claims at bargaining time whereby employer groups spend a number of years battling 'creep' in award conditions. The 4 yearly reviews are a heavy resource drain on participants. Award variations considered on application would spread the load on the FWC and the industry participants. That said, the 4 year review currently being conducted is an appropriate measure given the significant adjustment to a national system.
	• add the requirement that the Minimum Standards Division of the Fair Work Commission review and vary awards as necessary to meet the Modern Awards Objective.	Awards should be varied on application only where there is genuine basis that the modern awards objective is not being met. Such an application could be considered 'common' if it was identified that the application sought to vary an aspect of awards that was deficient against the modern award objectives. However, MEA does not support a recommendation that the MSD should make any decisions without the matter being heard within a Tribunal context.
	To achieve the goal of continuously improving awards' capability to meet the Modern Awards Objective, the legislation should require that the Minimum Standards Division:	MEA would point out that there is no such current modern award objective that requires awards to be 'continuously improved'. The modern award structure is intended to be a safety net.

	• use robust analysis to set issues for assessment, prioritised on the basis of likely high yielding gains	A division that was able to investigate, assess and consider applications in a more meaningful way rather than the vacuum of submissions and hearing sessions alone could result in a more considered outcome.
	• obtain public guidance on reform options.	

12.2	The Australian Government should amend the Fair Work Act 2009 (Cth) so that the Minimum Standards Division of the Fair Work Commission has the same power to adjust minimum wages in an assessment of modern awards as the minimum wage panel currently has in annual wage reviews.	Adjustment of modern awards outside of an annual wage review should be based on a 'work value case'. A MSD could perform this function adequately much in the way that the AFPC did previously.

Chapter 15 – Enterprise Bargaining

Number	Recommendation	MEA Response
15.1	The Australian Government should amend Division 4 of Part 2-4 of the Fair Work Act 2009 (Cth) to:	
	• allow the Fair Work Commission wider discretion to approve an agreement without amendment or undertakings as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of the unmet requirement.	The MEA strongly supports this recommendation.
	• extend the scope of this discretion to include any unmet requirements or defects relating to the issuing or content of a notice of employee representational rights.	The MEA strongly supports this recommendation.

INF REQ	The Productivity Commission seeks feedback on whether there is a mechanism that would only restrain pattern bargaining:	
	• where it is imposed through excessive leverage or is likely to be anticompetitive	Bargaining outcomes have been best served by an appropriate 'watchdog'. Within the construction industry the ABCC was an effective authority that held parties to account in a range of areas including bargaining.
	• while allowing it in circumstances where it is conducive to low transaction cost agreements that parties genuinely consent to.	Any legislative structure that enables pattern bargaining, which has been illegal since 1992, is a step backward. MEA does not support a recommendation that would allow for pattern bargaining to be legalised under any circumstances.

15.2	The Australian Government should amend s. 203 of the Fair Work Act 2009 (Cth) to require enterprise flexibility terms to permit individual flexibility arrangements to deal with all the matters listed in the model flexibility term, along with any additional matters agreed by the parties. Enterprise agreements should not be able to restrict the terms of individual flexibility arrangements.	The MEA strongly supports this recommendation; this recommendation has already been made in another FW Act review.

15.3	The Australian Government should amend s. 186(5) of the Fair Work Act 2009 (Cth) to allow an enterprise agreement to specify a nominal expiry date that:	
	• can be up to five years after the day on which the Fair Work Commission approves the agreement, or	MEA submits that 5 year agreements may be suitable however given that economic conditions can change drastically in that period of time consideration of adjusting agreements to economic and business performance should also be considered.
	• matches the life of a greenfields project. The resulting enterprise agreement could exceed five years, but where so, the business would have to satisfy the Fair Work Commission that the longer period was justified.	MEA submits that this recommendation may be beneficial due to construction projects being less susceptible to economic conditions once construction has commenced usually due to project funding being secured for the construction period.

	DRAFT FINDING 15.1	
	The case for imposing statutory requirements for employers and employees to discuss productivity improvements as part of the bargaining process, or for the mandatory inclusion of productivity clauses in agreements, is not strong. Voluntary agreements that promote productivity are highly desirable, but such agreements, and the gains they deliver, should arise from better management, not from a regulated requirement, which is likely to have perverse effects.	MEA agrees with this finding that productivity improvements should arise from better management and negotiations.

15.4	The Australian Government should amend the Fair Work Act 2009 (Cth) to replace the better off overall test for approval of enterprise agreements with a new no-disadvantage test. The test against which a new agreement is judged should be applied across a like class (or series of classes) of employees for an enterprise agreement. The Fair Work Commission should provide its members with guidelines on how the new test should be applied.	There has long been some ambiguity as to how the BOOT is applied; line by line or some other measure of 'overall'. MEA supports clearer guidelines as to what aspects of the agreement are being tested and how.

INF REQ	What should be the basis for the revised form of the no-disadvantage test, including whether, and to what extent past forms of the no-disadvantage test provide a suitable model and would be workable within the current legislative framework?	Appendix 1 (NDT spreadsheet)

15.5	The Australian Government should amend the Fair Work Act 2009 (Cth) so that:	
	• a bargaining notice specifies a reasonable period in which nominations to be a bargaining representative must be submitted	MEA supports this recommendation in principle; however, the Productivity Commission needs to consider how disputes will be treated. It would not be a worthwhile change if it was the case that one area of disputation was closed off simply to open another.
	• a person could only be a bargaining representative if they represent a registered trade union with at least one member covered by the proposed agreement, or if they were able to indicate that at least 5 per cent of the employees to be covered by the agreement nominated them as a representative.	

15.6	The Australian Government should amend the rules around greenfields agreements in the Fair Work Act 2009 (Cth) so that bargaining representatives for greenfields agreements are subject to the good faith bargaining requirements.	MEA supports this recommendation.

15.7	The Australian Government should amend the Fair Work Act 2009 (Cth) so that if an employer and union have not reached a negotiated outcome for a greenfields agreement after three months, the employer may (as illustrated in figure 15.5):	
	• continue negotiating with the union	
	• request that the Fair Work Commission undertake 'last offer' arbitration of an outcome by choosing between the last offers made by the employer and the union	The FWC will typically seek to reach a deal that is usually the midway point between the parties. This is often helpful but if expected to be the outcome the goal posts will simply be adjusted accordingly resulting in no real benefit to the process. For example, if an employer's last offer was 3% and the Union 5% the FWC will commonly order 4% as between the two parties. However, given this predictability, if the Union is seeking an outcome of 5%; knowing the employer's best offer of 3% the union also know that FWC outcomes are typically distributive will simply seek wages outcomes of 7%. The mid-way outcome of the FWC will result in 5% being ordered. FWC should be bound to look at the local labour market when determining the appropriateness of latest offers when making a determination.
	• submit the employer's proposed greenfields arrangement for approval with a 12 month nominal expiry date.	MEA submits that a situation where protected industrial action can be taken 12 months into a major project will do more damage than good.
	Regardless of the agreement-making process chosen by the employer, the ensuing greenfields arrangement must pass the proposed no-disadvantage test.	MEA supports this recommendation. It would result in a situation where an agreement that meets the statutory tests it could then be implemented. This would allow for genuine bargaining between parties.

Chapter 16, 17 – Individual Agreements

Number	Recommendation	MEA Response
16.1	The Australian Government should amend the Fair Work Act 2009 (Cth) so that the flexibility term in a modern award or enterprise agreement can permit written notice of termination of an individual flexibility arrangement by either party to be a maximum of 1 year. The Act should specify that the default termination notice period should be 13 weeks, but in the negotiation of an agreement, employers and employees could agree to extend this up to the new maximum.	MEA supports this recommendation in principle as it can see the benefit of such an arrangement; provided that the IFA actually provided some genuine flexibility.

16.2	The Australian Government should amend the Fair Work Act 2009 (Cth) to introduce a new 'no-disadvantage test' (NDT) to replace the better off overall test for assessment of individual flexibility arrangements. The guidance in implementing the new NDT should also extend to collective agreements (as recommended in draft recommendation 15.4).	The 'tests' should be consistent if there is an NDT at EBA level then an NDT at IFA would be appropriate.
	To encourage compliance the Fair Work Ombudsman should:	
	• provide more detailed guidance for employees and employers on the characteristics of an individual flexibility arrangement that satisfies the new NDT, including template arrangements	Guidance has to be clear about the ability for IFA's to allow for some other 'non-monetary' benefit as the explanatory memorandum outlines. Extensive or at least award specific examples would assist with the appropriate implementation of these agreements.
	• examine the feasibility, benefits and costs of upgrading its website to provide a platform to assist employers and employees to assess whether the terms proposed in an individual flexibility arrangement satisfy a NDT.	Access to appropriate terms for IFAs would be a meaningful and achievable tool to ensure that the IFA is lawful and enforceable. However, attempting to develop a tool to allow parties to 'test' their IFA requires extensive IR knowledge on the part of the business or employee user. And a strong understanding of the application of the award to different scenarios.

16.3	The Fair Work Ombudsman should develop an information package on individual flexibility arrangements and distribute it to employers, particularly small businesses, with the objective of increasing employer and employee awareness of individual flexibility arrangements. It should also distribute the package to the proposed Australian Small Business and Family Enterprise Ombudsman, the various state government offices of small business, major industry associations and employee representatives.	Associations would certainly be well placed to deliver material and training to small businesses. This could only be meaningful if the parameters of the IFAs were clear and that the small business would be protected if they had genuinely sought to be compliant when entering into the arrangements.

17	**Enterprise Contracts**	
INF REQ	The Productivity Commission seeks information on the costs (including compliance costs) and benefits of an enterprise contract to employers, employees and to regulatory agencies. Particular areas that the Commission seeks information on are:	Enterprise contracts appear to simply be another term for a 'common law employment contract' which are already widely utilised. A common law contract allows employers and employees to agree to 'package' up some award entitlements. These contracts are still protected by the minimum safety net of the modern award structure and the National Employment Standards.
	• additional evidence on the potential gap in contract arrangements between individual arrangements (broadly defined) and enterprise agreements	
	• the extent to which the enterprise contract would be a suitable addition to the current suite of employment arrangements, how it could fill the gap identified, and specific examples of where and how it could be utilised	
	• clauses that could be included in the template arrangement	
	• possible periods of operation and termination	
	• the advantages and disadvantages of the proposed opt in and opt out arrangements.	
	In addition, the Productivity Commission invites participants' views on the possible compliance and implementation arrangements suggested in this chapter, such as their impact on employers, employees and regulatory agencies.	

Chapter 19 – Disputes

Number	Recommendation	MEA Response
19.1	The Australian Government should amend s. 443 of the Fair Work Act 2009 (Cth), clarifying that the Fair Work Commission should only grant a protected action ballot order to employees once it is satisfied that enterprise bargaining has commenced, either by mutual consent or by a Majority Support Determination.	MEA supports this recommendation; situations where employees have taken industrial action before the employer was aware that bargaining was being sought is a concerning consequence of poor drafting of the legislation.

INF REQ	The Productivity Commission seeks further input from stakeholders on how protected action ballot procedures may be simplified to reduce compliance costs, while retaining the benefits of secret ballots. Potential simplifications include:	
	• removing the requirement that a protected action ballot specify the types of actions to be voted on by employees, and instead simply requiring a vote in favour of any forms of protected industrial action	MEA would not support this recommendation; employers need to be able to prepare for the impact of the different forms of industrial action. Particularly given that the employer has a right to deduct the portion that the ban results in an operational impact. Employees need to be made aware what portion will be deducted.
	• amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared	MEA submits that the Productivity Commission should consider how 'the action' taking place at anytime would assist the employer to make contingencies for the impact. If anything there should be greater certainty in order to avoid the Qantas lock out type situations.
	• granting the Fair Work Commission the discretion to overlook minor procedural defects when determining if protected industrial action is authorised by a ballot.	If genuine support for the action can be demonstrated then it should be allowed. However, minor administrative errors are not the same as procedural flaws which may result in a determination that does not show genuine support.

INF REQ	The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s. 423 and s. 426 of the Fair Work Act 2009 (Cth).	

19.2	The Australian Government should amend s. 423(2) of the Fair Work Act 2009 (Cth) such that the Fair Work Commission may suspend or terminate industrial action where it is causing, or threatening to cause, significant economic harm to the employer or the employees who will be covered by the agreement, rather than both parties (as is currently the case).	Typically liquidated damages clauses cause too much harm to employers and can result in redundancies as the company loses work. This is not a good outcome for businesses or employees.

INF REQ	The Productivity Commission seeks further input from inquiry participants on whether s. 424 of the Fair Work Act 2009 (Cth) should be amended to allow industrial action to proceed where the Fair Work Commission is satisfied that the risk of a threat to life, personal safety, health or welfare is acceptably low.	MEA submits that this recommendation is fraught with danger. How would the FWC judge the seriousness of the threat? Which party would be accountable if an incident that resulted in harm occurred?

19.3	The Australian Government should amend the Fair Work Act 2009 (Cth) so that where a group of employees have withdrawn notice of industrial action, employers that have implemented a reasonable contingency plan in response to the notice of industrial action may stand down the relevant employees, without pay, for the duration of the employer's contingency response.	MEA supports this recommendation. This would reduce the likelihood of Qantas lockout situations where posturing for industrial action had as much of an impact as actually taking the action.

19.4	The Australian Government should amend the Fair Work Act 2009 (Cth) to grant the Fair Work Commission the discretion to withhold a protected action ballot order for up to 90 days, where it is satisfied that the group of employees has previously used repeated withdrawals of protected action, without the agreement of the employer, as an industrial tactic.	MEA submits that this recommendation would not be required if the above (19.3) was in place. However, as a substitute to the above it would be very subjective for the FWC. How many is repeated? Two? At what point is it being used as an industrial tactic? Does a history of this type of conduct demonstrate a 'tactic'?

19.5	The Australian Government should amend the Fair Work Act 2009 (Cth) so that where employees engage in brief work stoppages that last less than the shortest time increment used by their employer for payroll purposes, the employer should be permitted to choose to either:	
	• deduct the full duration of the increment from employee wages. The maximum permissible deduction under this provision would be 15 minutes per person, or	
	• pay employees for the brief period of industrial action, if the employer is willingly doing so to avoid the administrative costs of complying with prohibitions on strike pay.	Administrative burden is necessary as employees should not be paid for industrial action as a matter of principle; particularly where they are withdrawing their labour. What is to stop strikes of 10 minute intervals every 10 minutes which would not allow for meaningful use of labour and effectively result in the striking parties to be paid for half a day when the cost has been a full day to the employer? This recommendation would not result in a balanced outcome.

	INFORMATION REQUEST	
INF REQ	While the Productivity Commission sees a prima facie case for allowing employers to deduct a minimum of 25 per cent of normal wages for the duration of any partial work ban that impacts on the performance of normal duties, the Commission requests feedback from stakeholders about the risks that such a change may entail.	This would reduce the administrative burden however most likely would result in an inappropriate consideration of the impact of the partial work ban.
	INFORMATION REQUEST	
INF REQ	The Productivity Commission seeks further feedback from inquiry participants on what forms of more graduated employer industrial action should be permitted, and how these should be defined in statute.	Employers should be given the same scope as employees with regard to work bans.

19.6	The Australian Government should increase the maximum ceiling of penalties for unlawful industrial action to a level that allows federal law courts the discretion to impose penalties that can better reflect the high costs that such actions can inflict on employers and the community.	MEA strongly supports this recommendation; construction unions in particular have been consistently flouting the rule of law knowing that the penalties are disproportionate to the harm they cause to the project owners and participants. There must a greater disincentive to unlawful industrial action which happens alarmingly frequently. Further, greater penalties would give wronged parties greater impetus to challenge the action as their rights will be upheld in a meaningful way; rather than a penalty regime which is little more than a slap on the wrist for wealthy unions.

19.7	The Australian Government should amend s. 505A of the Fair Work Act 2009 (Cth) for determining when the Fair Work Commission may make an order to deal with a dispute about frequency of entry by an employee representative to:	
	• repeal the requirement under s. 505A(4) that the frequency of entry would require an unreasonable diversion of the occupier's critical resources	
	• require the Fair Work Commission to take into account:	
	– the combined impact on an employer's operations of entries onto the premises	
	– the likely benefit to employees of further entries onto the premises	
	– the employee representative's reason(s) for the frequency of entries.	

19.8	The Australian Government should amend the Fair Work Act 2009 (Cth) so that unions that do not have members employed at the workplace and are not covered by (or are not currently negotiating) an agreement at the workplace, would only have a right of entry for discussion purposes on up to two occasions every 90 days.	The union will typically flex their muscle against an employer by instigating a crippling 'safety campaign' designed to harm the employer. Holding general discussions in designated work breaks is not going to cause the kind of disruption that employers seek to be protected from.

Chapter 20 – Alternative Forms of Employment

Number	Recommendation	MEA Response
20.1	Terms that restrict the engagement of independent contractors, labour hire and casual workers, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).	MEA strongly supports this recommendation; construction unions in particular have forced these types of terms into agreements and they provide a standard of third party direction on terms and conditions of employment that no other aspect of competition law or industrial law allows. They should not be enforceable terms in an EBA; further, they should be clearly ruled unlawful by the legislation.

INF REQ	The Productivity Commission seeks feedback on the extent to which unpaid internships have become more commonplace across the economy, whether any growth in such arrangements has led to problems rather than opportunities, as well as the potential remedies to any specific issues.	There needs to be a recognised framework for 'work experience' or internships to bring these types of engagements out of the shadows. It is naive to believe that these arrangements are not being entered into outside of the law, which puts both parties at risk. Parties who wish to genuinely enter into these types of arrangements should be able to do so in a regulated way.

Chapter 21 – Migrant Workers

Number	Recommendation	MEA Response
21.1	The Fair Work Ombudsman should be given additional resources for investigation and audits of employers suspected of underpaying migrant workers (including those in breach of the Migration Act 1958 (Cth)).	MEA would support this if there was a case that the FWO was appropriately skilled to investigate these matters given the interaction between visas and award conditions.
	The Migration Act should be amended so that employers can be fined by at least the value of any unpaid wages and conditions to migrants working in breach of the Migration Act, in addition to the existing penalties under the Act.	A suitable deterrent for employers would be appropriate. If it is the case that the current structure of penalties does not represent an appropriate deterrent then this should be addressed.

Chapter 22 – Transfer of Business

Number	Recommendation	MEA Response
22.1	The Australian Government should amend the Fair Work Act 2009 (Cth) so that an employee's terms and conditions of employment would not transfer to their new employment when the change was at his or her own instigation.	MEA strongly supports this recommendation. Transfer of business provisions should only apply where that transfer occurs at the employer's initiative.

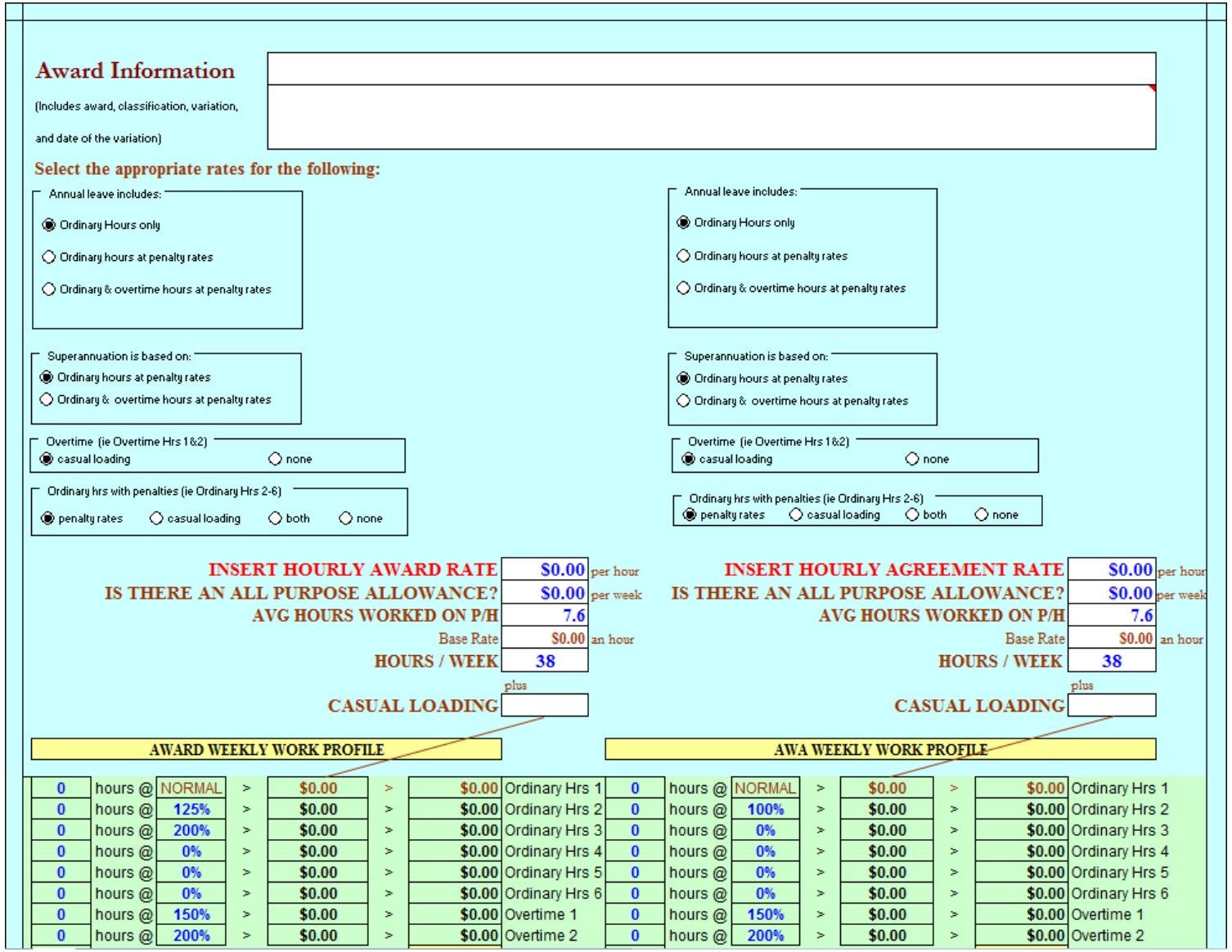
Chapter 24 – Competition Policy

Number	Recommendation	MEA Response
INF REQ	The Productivity Commission seeks further input from inquiry participants on whether the secondary boycott prohibitions in the Competition and Consumer Act 2010 (Cth) should be amended to:	
	• amend or remove s. 45DD(1) and s. 45DD(2)	This is a provision that is clearly being exploited by parties seeking to take an extremely loose view of their role in advocating for the rights of industrial parties. Removal may be a bridge too far but certainly there is scope that such action should not be allowable in periods outside of lawful protected industrial action. The current Boral case against the CFMEU highlights the kind of damage these secondary boycotts can have on business and industry.
	• grant Fair Work Building and Construction a shared jurisdiction to investigate and enforce the secondary boycott prohibitions in the building and construction industry.	The FWBC certainly needs a greater role to investigate and prosecute those organisations that would seek to impose secondary boycotts. The use of secondary boycotts as industrial espionage against employers who don't bend to the will of certain union pressures is thuggery and all measures to reduce it must be taken.

Chapter 25 – Costs

Number	Recommendation	MEA Response
INF REQ	The Productivity Commission seeks data or other information on the extent to which the workplace relations system imposes unnecessary ongoing costs on unions, and how these costs are likely to be affected by draft recommendations proposed in this inquiry.	MEA supports this recommendation. Any cost that relates to the transparency of dealings of an industrial organisation should be considered critical given the material put before the Heydon Royal Commission.

Appendix 1



Award Information

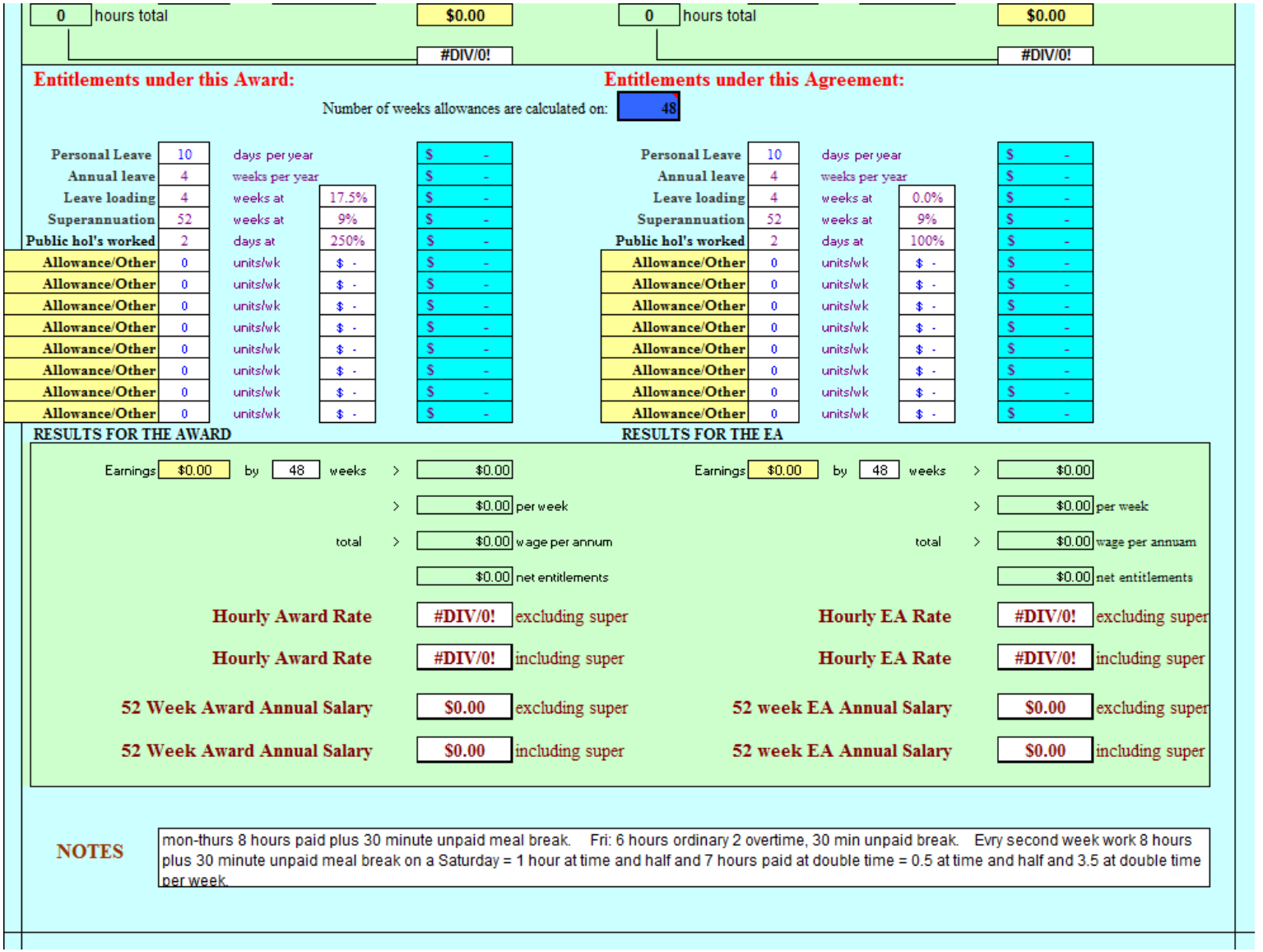
(Includes award, classification, variation, and date of the variation)

Select the appropriate rates for the following:

Award	AWA
Annual leave includes: ◉ Ordinary Hours only ○ Ordinary hours at penalty rates ○ Ordinary & overtime hours at penalty rates	Annual leave includes: ◉ Ordinary Hours only ○ Ordinary hours at penalty rates ○ Ordinary & overtime hours at penalty rates
Superannuation is based on: ◉ Ordinary hours at penalty rates ○ Ordinary & overtime hours at penalty rates	Superannuation is based on: ◉ Ordinary hours at penalty rates ○ Ordinary & overtime hours at penalty rates
Overtime (ie Overtime Hrs 1&2) ◉ casual loading ○ none	Overtime (ie Overtime Hrs 1&2) ◉ casual loading ○ none
Ordinary hrs with penalties (ie Ordinary Hrs 2-6) ◉ penalty rates ○ casual loading ○ both ○ none	Ordinary hrs with penalties (ie Ordinary Hrs 2-6) ◉ penalty rates ○ casual loading ○ both ○ none
INSERT HOURLY AWARD RATE $0.00 per hour	INSERT HOURLY AGREEMENT RATE $0.00 per hour
IS THERE AN ALL PURPOSE ALLOWANCE? $0.00 per week	IS THERE AN ALL PURPOSE ALLOWANCE? $0.00 per week
AVG HOURS WORKED ON P/H 7.6	AVG HOURS WORKED ON P/H 7.6
Base Rate $0.00 an hour	Base Rate $0.00 an hour
HOURS / WEEK 38	HOURS / WEEK 38
plus CASUAL LOADING	plus CASUAL LOADING

AWARD WEEKLY WORK PROFILE

0	hours @	NORMAL	>	$0.00	>	$0.00	Ordinary Hrs 1	0	hours @	NORMAL	>	$0.00	>	$0.00	Ordinary Hrs 1
0	hours @	125%	>	$0.00	>	$0.00	Ordinary Hrs 2	0	hours @	100%	>	$0.00	>	$0.00	Ordinary Hrs 2
0	hours @	200%	>	$0.00	>	$0.00	Ordinary Hrs 3	0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 3
0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 4	0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 4
0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 5	0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 5
0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 6	0	hours @	0%	>	$0.00	>	$0.00	Ordinary Hrs 6
0	hours @	150%	>	$0.00	>	$0.00	Overtime 1	0	hours @	150%	>	$0.00	>	$0.00	Overtime 1
0	hours @	200%	>	$0.00	>	$0.00	Overtime 2	0	hours @	200%	>	$0.00	>	$0.00	Overtime 2


0 hours total
$0.00
#DIV/0!
0 hours total
$0.00
#DIV/0!
Entitlements under this Award:
Entitlements under this Agreement:
Number of weeks allowances are calculated on: 48
Personal Leave 10 days per year $ -
Annual leave 4 weeks per year $ -
Leave loading 4 weeks at 17.5% $ -
Superannuation 52 weeks at 9% $ -
Public hol's worked 2 days at 250% $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Personal Leave 10 days per year $ -
Annual leave 4 weeks per year $ -
Leave loading 4 weeks at 0.0% $ -
Superannuation 52 weeks at 9% $ -
Public hol's worked 2 days at 100% $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
Allowance/Other 0 units/wk $ - $ -
RESULTS FOR THE AWARD
Earnings $0.00 by 48 weeks > $0.00
> $0.00 per week
total > $0.00 wage per annum
$0.00 net entitlements
Hourly Award Rate #DIV/0! excluding super
Hourly Award Rate #DIV/0! including super
52 Week Award Annual Salary $0.00 excluding super
52 Week Award Annual Salary $0.00 including super
RESULTS FOR THE EA
Earnings $0.00 by 48 weeks > $0.00
> $0.00 per week
total > $0.00 wage per annuam
$0.00 net entitlements
Hourly EA Rate #DIV/0! excluding super
Hourly EA Rate #DIV/0! including super
52 week EA Annual Salary $0.00 excluding super
52 week EA Annual Salary $0.00 including super
NOTES
mon-thurs 8 hours paid plus 30 minute unpaid meal break. Fri: 6 hours ordinary 2 overtime, 30 min unpaid break. Evry second week work 8 hours plus 30 minute unpaid meal break on a Saturday = 1 hour at time and half and 7 hours paid at double time = 0.5 at time and half and 3.5 at double time per week.