QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for a general ruling

The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Ors (No. B1206 of 1999)

VICE PRESIDENT LINANNE
COMMISSIONERS BECHLY AND BROWN 5 May 2000

Application for a General Ruling – replacement of flat rate for shift work with percentage allowance – review of history of shift allowances in Queensland – statement of policy made – percentage shift allowance granted – graduated implementation of policy

DECISION

This matter arises from an application by The Australian Workers' Union of Employees, Queensland (AWU) for a General Ruling in respect of a percentage afternoon and night shift allowance. The application seeks to vary the flat afternoon and night shift allowances prescribed in various awards of this Commission by replacing the flat allowance of $9.70 per shift with a percentage allowance of 15% loading for afternoon shifts and a 20% loading in respect of night shifts.

On 15 September, 1999 that part of matter B465 of 1999 which dealt with afternoon and night shift allowances, was joined to the AWU application. The relevant part of B465/99 was an application by the Queensland Council of Unions (QCU) seeking to establish a methodology to be used for calculating periodic monetary adjustments to the flat afternoon and night shift allowances. In *Re Flat Afternoon/Night Shift Allowance* (1999) 161 QGIG 785 at 788, the Full Bench commented as follows:–

> *"In our considered view it would be unwise of the Commission to consider adopting the proposed Principle 2 in the absence of detailed consideration of the likely ramifications of adjusting the shift allowance to a flat hourly rate.*
>
> *The aspect of the application, and the limited submissions on the point, nonetheless raise the whole question of the continued appropriateness of a flat daily monetary shift allowance when circumstances since that concept was originally introduced have so obviously changed. In our view, the comment expressed by the Full Bench in 1996 (above at 154 QGIG 51) seems to have increased relevance and that the time may have come 'to entirely reassess (the) allowance so that it is relevant to current circumstances and properly compensates employees in the manner intended'.*
>
> *Accordingly, having regard to AWU's foreshadowed application for the creation of a percentage shift allowance, in lieu of the current flat monetary allowance, it seems to us that it is opportune to use the opportunity occasioned by that foreshadowed application as well as QCU's current application to conduct a wholesale review of the entire matter of payments which might be made to employees who work shiftwork so that any shift payments are relevant to current circumstances.*
>
> *Indeed, we believe that such step is totally justified and necessary having regard to recent history and to the enactment of the Industrial Relations Act 1999, especially ss. 3 and 126.*
>
> *In the circumstances we have decided as follows:–*
> *…*
>
> (2) *To defer consideration of the proposed Principle 2 and Principle 3 of QCU's application until the Commission considers the proposed AWU application for a percentage to apply in lieu of the current flat monetary afternoon and night shift allowance."*.

Subsequently the QCU withdrew that part of its application in B 465 of 1999 that dealt with afternoon and night shift allowance. The hearing proceeded with the QCU supporting the AWU's application.

A. Relevant History of Afternoon and Night Shift Allowances in Queensland

The matter of an additional payment to employees performing afternoon and night shift work first came before the then Industrial Court in 1949. Until that year few awards of the Queensland Commission contained any provision for payment of an allowance for shift work with the notable exceptions being the *Mechanical Engineering Award – State* and the *Railway Award – State*. On that occasion the Court refused the AWU's application for a general ruling on shift allowances: see *Re Weekend and Shift Work Penalty Rates* (1949) 172 QGIG 1333.

Subsequent to that decision the Commission inserted a shift allowance of 2/- per day or shift in various awards. In 1952 the Commission dealt with a number of AWU applications which sought the deletion of the flat rate and the insertion of

a 10 per cent allowance for work performed on afternoon and night shifts. Whilst the allowance was increased to 4/- per day or shift the Commission rejected the application for a percentage payment.

In 1965 a Full Bench of this Commission again refused to depart from the principle of fixing a shift allowance on the basis of a flat rate. On this occasion the Full Bench, in a Declaration of a General Ruling, increased the flat shift allowance to 6/- per shift for afternoon and night shift but rejected the AWU's application for a percentage rate: see *Re Afternoon and Night Shift Allowances* (1965) 58 QGIG 577. It is to be noted that the Full Bench in this decision commented that most Commonwealth awards provided for percentage allowances.

In 1969 a Full Bench of this Commission decided to further increase the flat rate of the allowance: *Re Afternoon and Night Shift Allowances* (1969) 72 QGIG 3.

In 1972 a Full Bench had reason to again look at whether afternoon and night shift allowances should be a flat amount or a percentage rate. The Full Bench on that occasion said:–

> *"However, it is our opinion that most authorities agree, and we believe with good reason, that those disabilities encountered in working shift work represent a common fact which does not vary according to the rate of wages which the worker receives. We are well aware, of course, that some employers have, for diverse reasons, agreed to pay shift penalties on a percentage basis.*
>
> *Nevertheless, this Commission holds firmly the opinion that the interests of equity and industrial justice, to all those concerned, will best be served by the retention of a flat rate allowance for afternoon and night shift work performed.*
>
> *Several simple examples serve to illustrate the differentials which would result between lower and higher wage categories of employees under certain Awards which come quickly to mind if the 15 per cent basis were to be adopted."*
>
> *The examples set out hereunder clearly illustrate not only the unfairness of the differential which would result to higher and lower paid workers from the adoption of the 15 per cent. (sic) basis of payment, but also the fact that many lower paid employees would not be receiving under such system, the amount which will now be payable as a result of the new rate awarded by this Commission.".* See: *Afternoon and Night Shift Allowances* (1972) 80 QGIG 125 at 126.

		Shift Allowance	
	Award Rate	15 percent. Per Week	$1.80 Per Shift Per Week
Award No. 1 –			
Adult Males –			
Base Rate	$44.94	$6.75	$9.00
Top Rate	$60.30	$9.05	$9.00
Adult Females –			
Base Rate	$35.41	$5.35	$9.00
Top Rate	$43.14	$6.48	$9.00
Juniors – Male (19)	$33.71	$5.06	$9.00
Juniors – Female (19)	$26.56	$3.99	$9.00
Award No. 2 –			
Adult Males –			
Base Rate	$53.07	$7.96	$9.00
Top Rate	$71.19	$10.67	$9.00

It is evident from that decision that the Full Bench was concerned that a change to a percentage increase would unfairly disadvantage some workers as they would receive less under a 15% allowance than under the then flat amount. The Full Bench did however acknowledge that by 1972 there was an "apparent trend towards percentage shift penalties in other States and to some extent by agreement within the State".

The flat rate was regularly increased during the period 1972 to 1995 in accordance with the Wage Fixing Principles established by various Full Benches of the Queensland Commission. In 1995 the ACTUQ (as it then was) and the AWU sought to have the Commission establish some basis for future adjustment of shift allowances. The Full Bench commented as follows in indicating that they were not prepared to do so:–

> *"… We cannot bind any future Full Bench, but also cannot stop any future Full Bench giving such consideration it sees fit to what is said in this and other decisions of the Commission.*
>
> *…*
>
> *[W]ith one exception the last 10 increases in the relevant shift allowance have reflected either identically, or reasonably closely, the percentage increase applied to the [Guaranteed Minimum Wage]. In our view, there is a*

lack of material to persuade us to deviate from such past practice and adopt some new basis for the setting of the rate of shift allowance.": see *Re Afternoon and Night Shift Allowances* (1995) 149 QGIG 933 at 933.

In 1996 the ACTUQ and the AWU sought to have the shift allowance increased by the percentage increase in the Guaranteed Minimum Wage. The Full Bench was urged by the Australian Sugar Milling Association, Queensland, Union of Employers (ASMA), to deviate from the manner of adjusting the allowance. The Commission declined to make a change in the method of adjustment "at this time" saying:–

"Furthermore, we are satisfied that the quantum of the relevant allowance achieved in the manner advocated by the applicants is reasonable under the existing circumstances.

In relation to the concern expressed by Mr Cullen that future increases granted in accordance with our decision will result in increases, which are in excess of those applied to other allowances, we would only comment that the continued granting of percentage increases to any allowance may result in a distortion of the relevant allowance so that the allowance no longer truly compensates for the factors as originally intended. The allowance may ultimately become either too high or too low. In that situation we suggest occasions will arise when it becomes necessary to entirely reassess an allowance so that it is relevant to current circumstances and properly compensates employees in the manner intended.": see *Re Afternoon and Night Shift Allowances* (1997) 154 QGIG 51 at 51.

In 1997 a Full Bench of the Commission when considering an application to increase the shift allowance said:–

"This Commission has, in an earlier decision, determined that the adjustment of certain other allowances should be linked to movement in the C10 rate in the Engineering Award – State. Had this Commission in its 1995 decision adopted the C10 rate as a basis for adjustment of the afternoon and night shift allowance, the current rate would be somewhat higher than it presently is. In her submission, at page 31 of the transcript, Ms King submitted that 'over the next 12 months the parties are really going to have to sit down and look at this type of issue in particular, giving consideration to what has happened in the past and to what is actually happening within the statutory framework of the new legislation'.

In our view there is merit in a reconsideration of this issue in due course based upon a specific formal application. In our view, if this Commission is to establish a policy for future adjustments of the relevant shift allowances, all interested parties should be given an appropriate opportunity to make submissions on the issue in the light of current legislation. In the current 'transitional' environment in industrial relations, we consider it inappropriate to make any determination as to the future adjustment of this allowance upon the material presently before us, and before there is a greater appreciation of the possible impact on award provisions by new legislation.": see *Re Afternoon and Night Shift Allowances* (1997) 156 QGIG 569 at 570.

Again in 1998 when a Full Bench was considering adjusting the shift allowance the following commentary was made:–

"*The submissions … in the matter now before us indicated a desire of the parties to discuss proposals which might be put to the Commission by way of a formal application to determine the methodology appropriate for use for future adjustments.*

Although the legislation is again in a transitional phrase there would appear to be no bar to the parties adopting that course during the next twelve months. In our view it is desirable that the parties address this matter before a further application is made to adjust the allowance.

On this occasion however, unlike the last occasion that the matter was before the Commission, we do not intend to rely on any particular formula even on an interim basis, to adjust the allowance.": see *Re Afternoon and Night Shift Allowances* (1998) 159 QGIG 241.

It is in the context of that history together with the comments of the 1999 Full Bench referred to earlier, that this Full Bench dealt with the matter before it.

B. Evidence before the Commission

The current application seeks a general ruling applicable to awards which are presently subject to the General Ruling in the 1999 State Wage Case i.e. those awards listed in Exhibit 1. The application seeks to replace the present flat $9.70 per shift allowance with a 15% shift loading for afternoon shifts and a 20% loading for night shifts.

In support of its application the AWU adduced evidence from the following persons:–

Brian Richards, a leading hand toll collector employed by Group 4 Securitas on the Logan Tollway;
Murray Keith McLeod, a compounder employed by Bandag;
Ernest John McDonald, a machine operator employed by Claypave;
Robert Paul Boyle, a theatre assistant employed by the Mater Misericordiae Hospital;
Helen Alena Young, a Food Service Operator employed by the Mater Private Hospital and;
Russell Lee Hammond, a storeman employed by Fridgemobile.

The QCU adduced evidence from the following persons in support of the application:–

George Cameron Wilson, the Queensland Secretary of the Printing Division of the Australian Manufacturing Workers Union and Assistant State Secretary of the Australian Manufacturing Workers Union;
Christopher Rowland Price, the Assistant State Secretary of the Federated Engine Drivers' and Fireman's Association Queensland Branch, Union of Employees and;
Michael Robinson, a Machine Operator employed by Arnott's Biscuits.

Generally the evidence of both the AWU and QCU witnesses went to the disabilities associated with shift work and the inconsistencies that arise when workers receiving the flat $9.70 per shift work alongside employees receiving a percentage allowance. The fact that shift workers did experience disabilities associated with such work was not challenged by those organisations opposing the application. Those organisations did however have a different perspective on how those disabilities should be compensated arguing strongly that such disabilities did not increase with the amount of remuneration an employee received for performing shift work.

As to the disabilities associated with shift work, the AWU drew the Commission's attention to material contained in the 1972 New South Wales Industrial Commission in Court Session's review of shift work (see *In Re Shift Workers Case* [1972] AR 633 at 648) where the social and domestic difficulties associated with shift work were said to:–

"vary with the types of shift being worked (fixed, rotating or alternating) and the method of rotation or alternation. Social and domestic inconvenience also vary greatly according to the tastes, habits and patterns of life of the shift workers concerned. That this is so becomes apparent when the evidence is examined. References were frequently made in the evidence of shift workers in this case to restrictions caused by shift work on sporting and general social, private and group activities including family outings. Particular emphasis was also placed on the difficulties created in family relationships both as between husband and wife and with children. As to children, not only was it stated that the pleasure of their company is often unduly restricted, but also that the opportunity for proper supervision and help in their development is lessened. As to wives, the evidence was that problems can arise through more frequent separation causing loneliness and a feeling of neglect. Both the social and sexual relationship between husband and wife can be disturbed and rendered less satisfactory. As to the shift worker himself, it was claimed that there is often a requirement to adapt and adjust himself to changes in the hours at which he is required to work and this again varies greatly in its effects with the type of shift system being worked. Many witnesses claimed that they had real problems associated with endeavouring to sleep in daylight hours (night shift) or through going to bed late (afternoon shift) and these problems were particularly aggravated in summer and where the home is in a noisy area. Irregular meal times were also mentioned as an unattractive feature of shift work. A few witnesses spoke of additional expense due to additional meal times within the family circle and the need to travel when public transport facilities are limited. But no attempt was made to quantify this inconvenience.

We are satisfied that this evidence is substantially true. Many persons cannot adapt themselves physically or socially to shift work at all. In general they tend to drift away from it as the opportunity offers. But the process of natural selection is far from absolute. There are many who through economic necessity or the nature of their skills or aptitudes or the job opportunities in the area in which they live (e.g. Newcastle or Wollongong) remain shift workers although not suited to shift work. On the other hand, there are some compensations for many in shift work particularly for young people without family responsibilities and sometimes for married people without children. Some like it because it makes easier the transaction of personal business, e.g. banking, seeing doctors and dentists and shopping and in many cases longer periods of days off in sequence are possible. Shift work also often gives a greater opportunity to pursue personal hobbies. Hence a balanced view must be taken. Overall, however, we are satisfied that shift work has disabilities which require special remuneration. This was not disputed. Probably where shift work is found attractive, in most cases it is because of the financial rewards. If it was not paid at a higher rate, there is little doubt that shift work would be acceptable only to a distinct minority.".

The health problems associated with shift work were also identified in that case with the New South Wales Commission in Court Session stating at p. 649:–

"…it was established that it causes minor health problems in some workers largely arising from fatigue and changes in the normal patterns and physiological rhythms of life. One aspect particularly stressed was (sic) the

problems relating to sleep and their consequences. A sleep debt can be created in some shift workers which must be made up later often on the rostered day off and during the turn on day shift. It would appear that the

problems relating to sleep and certain other factors arising from the disturbance of the normal patterns and rhythms of life sometimes produce stress in the shift worker which has an adverse effect on his personal, domestic and social life. Physiological effects can produce psychological effects. This stress is often temporary pending adaptation. Minor physical consequences for some shift workers manifest themselves in headaches, nervous complaints, loss of appetite, gastro-intestinal disturbances and irritability. Effects of this kind on individuals, where they occur, are of course very variable but in most cases they are clearly of a minor order. The distinction must also be drawn between problems created by shift work and cases where it has an oblique influence on problems which would exist in any event. The medical evidence on those questions is inconclusive and case studies (mainly overseas) have produced suprisingly inconsistent results, but we think it can be said safely that regular shift work is more likely to lead to minor health problems in their domestic and social consequences than regular day work."."

The application was strongly opposed by the State of Queensland and the following organisations:–

Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI);
Local Government Association of Queensland (LGAQ);
Australian Industry Group, Industrial Organisation of Employers (AIG);
Australian Sugar Milling Association, Queensland, Union of Employers(ASMA);
Queensland Mechanical Cane Harvesters Association, Union of Employers (QMCHA);
Queensland Cane Growers' Association, Union of Employers (QCGA);
Private Hospitals Association of Queensland (PHAQ);
Australian Nursing Homes and Extended Care Association Queensland Limited (ANHECA(Q)).

The Restaurant and Caterer's Employers Association, Queensland, Industrial Organisation of Employers and the National Meat Association of Australia (Queensland Division) Industrial Organisation of employers originally opposed the application but during the course of the proceedings sought, and were granted leave, to withdraw.

The evidence relied upon by those opposing the application came from the following persons:–

Mark Douglas Harrington, the owner of Dougmar Pty. Ltd. trading as Covers Restaurant, gave evidence for and on behalf of the Restaurant and Caterer's Employers Association. Given the withdrawal of that Association from the proceedings we have not relied upon Mr Harrington's evidence in determining this matter.

Laurel McKinnon, Human Resources Coordinator with St. Vincent's Community Services was called by the QCCI. St. Vincent's Community Service provides health and welfare services to the community through its aged care facilities and its Domiciliary, Community, Supported Accommodation, Drug, Alcohol and Rehabilitation, and Community Corrections programs Ms McKinnon was of the opinion that the cost involved in a change to the percentage shift allowances sought in the application would substantially affect the capacity of St. Vncent's Community Services to provide essential services to the community;

Peter John McLean, the Manager and partner in the firm CTT Contract Management which holds the contract to harvest sugar cane for Bundaberg Sugar's ARRIGA Mill on the Atherton Tablelands. Mr McLean was called to give evidence by the QMCHA;

The Australian Sugar Milling Council Pty. Ltd. relied upon the evidence of John Anthony Desmarchelier, its General Manager, Glenn Keith Loveday, a Senior Accountant employed by Bundaberg Sugar Ltd. and Robert Byrom, the Manager Employee Relations at Mackay Sugar Cooperative Association Limited. The evidence adduced on behalf of the sugar industry will be dealt with later in this decision.

C. Inspections

In addition to receiving evidence from the abovenamed persons, the members of the Commission also had the benefit of inspecting various workplaces where shift work is undertaken. Inspections were undertaken at the following establishments:–

Kuraby Toll Plaza (the record of the inspection is found at Exhibit 20);
Claypave Pty. Ltd. (the record of the inspection is found at Exhibit 19);
Mater Misericordiae Hospital and the Mater Private Hospital (the record of the inspection is found at Exhibit 18);
Fridgemobile (the record of the inspection is found at Exhibit 18).

D. Submissions of Parties supporting the Application

(i) Submissions of the AWU

In dealing with various provisions of the *Industrial Relations Act 1999* the AWU submitted that in s. 3 the legislature has placed emphasis on social justice, a balancing of work and family life, setting fair standards and meeting the needs of emerging labour markets and work patterns. Section 273(1)(a) of the Act also requires the Commission to establish and maintain "a system of non-discriminatory awards that provide fair wages and employment conditions". The Commission was also referred to the Minister's Second Reading Speech, where it was said, the Minister stressed "the goals of fairness and equity, together with the maintenance of relevant award system, rather than an award system merely providing a safety net of wages and conditions".

In addition to relying upon the evidence of the AWU and QCU witnesses, the AWU provided the Commission with extensive statistical data. An analysis of AWU membership showed that approximately 33.3% of its membership, or 25,513 members, performed shift work. Of those, 29.81% received the flat $9.70 payment while 70.19% received a percentage allowance of 15% or greater. The Commission was supplied with a breakdown by industry of both groups of members i.e. those on the flat payment and those on the percentage allowance.

The AWU provided the Commission with an analysis of shift work provisions in awards of the Queensland Commission. Of the 306 awards analysed some 150 contained shift work provisions. Of the awards containing shift work provisions, 47.3% contained a flat amount for afternoon and night shifts, 50.7% contained percentage allowances and 2% contained other formulae. Of those awards which contained percentage allowances:–

- where one percentage rate only was contained in the award the allowance was at least 15%;
- where both afternoon and night shift allowances were prescribed in the award, one-third had a 15% loading, one third had less than a 15% loading and one-third had more than 15% loading for afternoon shift work. In so far as the night shift allowance was concerned all provided for at least a 15% allowance.

An analysis of federal award shiftwork provisions was also relied upon by the AWU. An examination was undertaken of 657 federal awards commencing with the B & D Australia (Enterprise Award): B0234 through to the Hydrocarbons and Gas (West Australian) Award: H0117. Of those 657 awards 145 contained shift work provisions. The results of the analysis showed that:–

- only 8% of those awards provided for a flat dollar amount;
- 47% provided for the same percentage allowance regardless of whether it was afternoon or night shift;
- 20% provided for percentage allowance for afternoon shifts with a higher percentage allowance for night shifts; and
- 25% provided for other means of paying for shift work.

Clearly the most common shift allowance in the category which provided the same percentage allowance regardless of whether it was afternoon or night shift was 15%. In the category which provided for different afternoon and night shift allowances generally the allowance was set at a 15% loading for afternoon shift and a 20% or higher loading for night shifts.

An analysis of 539 agreements certified by the Queensland Commission in 1998 was also undertaken by the AWU. Of those, some 230 agreements were identified as containing shift work provisions. Of those 230 agreements an analysis was undertaken of 86 agreements. Those 86 agreements covered at least 9,476 employees. Of those employees covered by the 86 agreements, 36% were entitled to a flat rate for working afternoon or night shift, 52.1% were entitled to a percentage shift allowance, 10.5% referred back to the award to determine shift penalties and 1.4% contained other provisions. Of those agreements containing a single percentage allowance for shift work the majority by far received a 15% loading. Where an agreement provided for separate afternoon and night shift allowances a substantial majority received at least a 15% loading for afternoon shift work and a 20% loading for night shift work.

In summarising the statistical data provided by the AWU it is obvious that the majority of employees in Queensland who work shift work are in receipt of a percentage allowance and that a majority are in receipt of a shift allowance of at least 15%.

(ii) Submissions of the QCU

The QCU adopted the submissions of the AWU and further submitted that a flat allowance was becoming irrelevant given the incidence of percentage shift allowances was now widespread. The QCU submitted that the quantum of $9.70 did not adequately compensate employees for the disabilities associated with shift work. The QCU provided the Commission with a comparison between ordinary award rates, if the current claim were to succeed, and the current standard of $9.70 per shift. Such a comparison was said to highlight the inadequacy of the current payment. In its

comparison the QCU used the current C10 rate in the *Engineering Award – State*, the Queensland Minimum Wage and the 19 year old Junior (EAS) rate:–

C10 (15%)	$14.31 per Afternoon Shift
C10 (20%)	$19.08 per Night Shift
Minimum Wage (15%)	$11.56 per Afternoon Shift
Minimum Wage (20%)	$15.41 per Night Shift
Junior (19) (EAS) (15%)	$10.82 per Afternoon Shift
Junior (19) (EAS) (20%)	$14.44 per Night Shift

The QCU also drew the Commission's attention to the fact that, with increased incidence of shifts being extended from 8 hours per day to 10 or 12 hours per day, workers were losing income where a flat per shift allowance is paid i.e. it was now only being paid on 9 shifts per fortnight or 4 shifts per week whereas previously it had been paid on 10 shifts per fortnight or 5 shifts per week.

The QCU also dealt with the concerns of the Full Bench of the Queensland Commission in its 1972 decision that a change to a percentage increase would unfairly disadvantage some workers as they would receive less under a 15% allowance than under the then flat amount. The QCU referred to the tabular comparison found in the 1972 decision and included the shaded column below to illustrate the relative value of the flat allowance (as it then was) expressed as a percentage:–

		Shift Allowance		
	Award Rate	15 percent. Per Week	$1.80 Per Shift Per Week	**$9.00 per week as %**
Award No. 1 –				
Adult Males –				
Base Rate	$44.94	$6.75	$9.00	**20.02%**
Top Rate	$60.30	$9.05	$9.00	**14.92%**
Adult Females –				
Base Rate	$35.41	$5.35	$9.00	**25.41%**
Top Rate	$43.14	$6.48	$9.00	**20.86%**
Juniors – Male (19)	$33.71	$5.06	$9.00	**26.70%**
Juniors – Female (19)	$26.56	$3.99	$9.00	**33.88%**
Award No. 2 –				
Adult Males –				
Base Rate	$53.07	$7.96	$9.00	**16.96%**
Top Rate	$71.19	$10.67	$9.00	**12.64%**

In attempting to address the concerns of the 1972 Full Bench, the QCU provided the Commission with the following table showing January 2000 award comparisons:–

Classification	**Award Rate**	**15% Per Week**	**15% Per Shift**	**$9.70 per shift per week**	**$9.70 as %**
Fitter C10	$477.20	$71.58	$14.31	$48.50	10.16%
Production Worker C12	$424.60	$63.69	$12.74	$48.50	11.42%
QMW	$385.40	$57.81	$11.56	$48.50	12.58%
Junior(19) (EAS)	$360.90	$54.13	$10.83	$48.50	13.44%

It was further submitted by the QCU that any decision we might make contain a savings provision so that no employee would be worse off as a result of a change from a flat amount allowance to a percentage allowance.

F. Submissions of the Parties opposing the Application

(i) State of Queensland

The State of Queensland strongly urged the Commission to continue to provide for a flat afternoon/night shift allowance. Such flat afternoon/night shift allowance should, according to the Crown's submission be adjusted by the percentage equivalent that each arbitrated Safety Net Adjustment bears to the C10 *Engineering Award – State* total rate

at the time each arbitration Safety Net Adjustment was made available. In other words it was contended that the *status quo* should remain unchanged.

It was further submitted that matters of concern such as adequacy of compensation should be addressed on an award by award basis using either the review of awards process or the enterprise bargaining process.

The State of Queensland provided the Commission with extensive statistical data including an analysis of the movement of the flat afternoon and night shift allowance. Such data showed that the flat shift allowance had generally kept pace with the C10/Fitter Rate during the period 1972 to mid 1999.

The Crown also provided an analysis of shift work provisions contained in Queensland awards. The figures produced indicated that the number of Queensland awards containing a flat monetary allowance was similar to the number that provided for a percentage allowance. This generally reflected the data provided by the AWU. Of the 72 awards containing percentage shift allowances the Crown submitted that only 22% prescribe percentage shift allowances that are equal to or greater than the claim currently before the Commission.

In referring to past decisions on shift work the Crown asked the Commission to draw the following conclusions:–

- the shift allowance is traditionally a disability allowance where the major considerations to be taken into account in remunerating shift work are the social and domestic inconvenience involved;
- the overall implementation of a percentage shift allowance system would be unfair and inequitable to large numbers of employees given that those disabilities encountered in working shift work represent a common factor which does not vary according to the rate of wages that the worker receives;
- in determining the appropriate method of recompense for shift work, it should be left to the parties or the tribunal dealing with each award as it is reviewed and that in this process the previous history of the award will be a significant, although not decisive, consideration;
- in considering what compensation is appropriate in each case, the shift systems being worked have to be examined, and, on occasions, the nature and quality of work actually performed will need to be considered; and
- each case should be examined in the light of all its circumstances including other relevant provisions of the award.

The State of Queensland acknowledged that in the federal jurisdiction shift work is predominantly compensated by way of a percentage shift allowance.

The Crown also provided the Commission with the cost implications to the Queensland Government as an employer. It anticipated that an additional $5.4 million per annum would be required to meet the additional direct cost to the Queensland Government (excluding Government Owned Corporations) should the application be granted.

(ii) Submissions of the QCCI, the LGAQ, the Queensland Road Transport Association, the Fast Food Chain of Australia and the Queensland Cane Growers Council (QCCI submission)

The Commission was urged in the QCCI submission to consider the various decisions of this Commission dating from 1949 that had rejected percentage shift allowances. The basis of the QCCI submission was directed to the additional costs to employers should the application be granted. The increases to base trades persons would, according to the QCCI, far exceed the approximate 2% granted in the most recent State Wage Case and the current enterprise bargaining activity of approximately 4% per annum. The QCCI urged the Commission not to make comparisons with the minimum wage but rather to look at the award standard for a tradesperson. In that regard it was submitted that a 15% loading would result in a $22.30 per week increase for a tradesperson while a 20% loading would give an increase of $45.96 per week. The QCCI argued strongly that the most appropriate mechanisms to address any unfairness in shift allowances was either through enterprise bargaining or through the award review process.

The QCCI also submitted that if a percentage shift allowance were to be granted the Commission would need to consider each industrial instrument separately because of the impact of various award/agreement overtime provisions. In particular the QCCI referred the Commission to s. 9 of the *Industrial Relation Act 1999* which prescribes a statutory minimum where overtime is worked. In a calling in which more than one shift is worked in a day, employees must be paid overtime at the rate of double time i.e. irrespective of whether there are continuous or non-continuous shifts being worked. Thus the impact on each industrial instrument would need to be considered separately when making comparisons with federal award provisions.

(iii) Submissions of the AIG

The AIG also urged the Full Bench to consider the history of rejection of applications by this Commission for percentage wage increases. The AIG further submitted that the most appropriate mechanism to address the issue of shift allowances was through enterprise bargaining and that if shift provisions in awards were to be varied then it should

be done on an award by award basis. According to the AIG this would enable the Commission to hear industry specific arguments.

The AIG provided the Commission with an analysis of the *Transport Courier and Distribution Industry Award – Southern Division* outlining the effect of the current application on employers and employees bound by that award. As a result of the analysis the AIG sought to show the following:–

- there would be a wage increase for all adults ranging from $14.38 per week to $30.15 per week for afternoon shifts and an increase of $35.34 to $56.36 per week if a 20% night shift loading were granted;
- the range of wage outcomes for adults would not deliver wage justice across classification levels but would deliver substantial and unsustainable wage increases;
- juniors would generally be worse off under the 15% regime by between $1.34 and $19.18 per week and under the 20% regime, two classifications would be worse off by between 71 cents and $9.40 per week, whereas the remaining four classifications would gain increases of between $7.98 and $22.76 per week.

In submitting that increases to afternoon and night shift allowances of the order sought in the application were unwarranted, the AIG argued that:–

- the work value of shift work had not increased; and
- there was no evidence before the Commission to show that the disabilities of shift work had increased over the years. According to the AIG such difficulties have been somewhat mitigated in recent years with the introduction of more flexible trading hours enabling shift workers to access a broader range of services and products at times appropriate to their non-working life.

The AIG also submitted a summary of statistics arising from a survey of its members who were said to be affected by the current application. The AIG received a 15% response to its survey and of those 65% were of the view that the application, if successful, would result in a significant cost impact to them and 35% responded that the application would have a moderate cost impact on their business.

(iv) Submissions of the PHAQ

The PHAQ argued for the preservation of the *status quo*. A number of issues of concern to members of the PHAQ were identified in its submission. These concerns included:–

- the impact of the MBF Network which could result in 15 private hospitals closing within the next twelve months or so;
- the potential for the Department of Veterans Affairs and Medibank Private to follow MBF's lead;
- the impact of other applications currently before the Queensland Commission; and
- the impact of claims currently being faced by members of the PHAQ as part of enterprise bargaining negotiations.

The Commission was informed that all members of the PHAQ were parties to certified agreements and we were strongly urged not to impose any additional cost implications on members of the Association during the currency of any certified agreement. The PHAQ also raised the difficulties associated with a general ruling outcome identifying various award provisions that would need to be individually examined before any general change from a flat rate allowance to a percentage allowance could be made.

(v) Submissions of ANHECA(Q)

ANHECA(Q) submitted that a change to a percentage allowance of 15% for afternoon shifts and 20% for night shifts would have a significant impact upon the viability of members of the Association. According to the ANHECA(Q) submission, aged care facilities in Queensland receive the lowest per capita funding from the Australian Government of any of the Australian States. There is no capacity in the current funding mechanism to enable employers in the aged care industry to claim any extra employment costs so that any rise in labour costs associated with the current claim, if granted, would have to be met by aged care employers.

ANHECA(Q) also identified problems with a general ruling citing difficulties associated with the spread of hours award provision as an example.

(vi) Submissions of the ASMA

The evidence given on behalf of the ASMA can be summarised as follows:–

(i) Evidence from Mr Desmarchelier, the General Manager of the Australian Sugar Milling Council Pty. Limited, who has responsibility to the owners and operators of Queensland raw sugar mills for assisting in the

development of sugar industry policy and direction. Mr Desmarchelier's evidence went to the importance of raw sugar to the Queensland and Australian economy. He summarised the economic state of the industry in the following terms:–

"- The Queensland raw sugar industry is facing its most severe economic downturn in at least fifteen years.
- The situation is expected to worsen in the season 2000/01.
- The industry is market dependent. Returns to producers for sugar exported, as well as sugar sold on the domestic market, depend on the world market price.
- Market prices reached a fourteen-year low in 1999 and are half the value of world prices in the years 1994 to 1997.
- The sugar pool price will fall from $357 a tonne in the 1998 season to about $255 a tonne in the 1999 season.
- The extremely depressed prices reflect the impact of the most recent "Asian economic crisis" on buying patterns, production increases in the EU, India, Thailand, USA – and the surge in sugar exports from Brazil, creating a heavy global over-supply of sugar.
- Surplus sugar stocks will continue to keep prices depressed, and a global price recovery in 2000/01 is remote. The sugar pool price could fall to $230 a tonne in the 2000 season.
- Some producing regions in Queensland have suffered heavy cane and sugar losses from extremely adverse weather conditions in 1998 and 1999.
- Gross incomes have fallen, and production costs have increased in many areas of the Queensland sugar milling industry. This has been due to lost time caused by wet weather delays to harvesting, reduced cane supply, lower CCS in cane and higher levels of extraneous matter.
- The severe reduction in growers' and millers' incomes will impact on regional communities."."

Given this economic state of the sugar industry, Mr Desmarchelier was strongly of the opinion that all sugar mills in Queensland would make a loss in the 2000 season i.e. for the twelve month period commencing May/June 2000.

(ii) Evidence from Mr Loveday and Mr Byrom which generally went to the cost implications of the AWU application, if granted, for the two employers that they represented.

It was submitted by the ASMA that the sugar milling industry was the single private sector employer most affected by the current application. There are 26 sugar factories in Queensland employing approximately 3,500 employees during the crushing season. All Queensland sugar mills have Certified Agreements or Queensland Workplace Agreements in place and the industry has been so regulated since 1993/4. Each of the CA's and QWA's provide total packages of wages and conditions and each contain a "no extra claims" clause. The cost impact on the industry would be in excess of $2 million per annum in direct costs.

Given the evidence of Mr Desmarchelier that all sugar mills in Queensland would make a loss in the 2000 season, employers have no ability to absorb the extra $2 million per annum that the application would cost the industry. In those circumstances it was submitted that there is a likelihood of job losses if the application were successful. The ASMA submitted that such a result would run counter to the object in s. 3(k) of the Act i.e. the Commission would not be performing its functions in a way that promoted and facilitated job growth.

(vii) Submission of QMCHA

The QMCHA submitted that the fact that shift work was a seasonal occurrence for the sugar industry field sector should set it apart from other awards and industrial agreements and therefore commonality with other jurisdictions was not sustainable. The QMCHA drew the Commission's attention to the state of the sugar industry in general and in that regard relied upon the evidence of Mr Desmarchelier i.e. that the industry is facing the most severe economic downturn in the last 15 years.

The QMCHA points out that harvesting prices have remained static over the last six years and this has meant that with increasing costs harvesting owners are now facing a viability crisis.

It was further submitted that as the current claim is not linked to any productivity increases the claim should be refused.

E. Conclusion

(i) Appropriate Mechanism for dealing with Shift Allowance

The application before us seeks to facilitate any decision by way of a General Ruling that would automatically apply to the Awards listed in Exhibit 1. We have considered whether that would be the most appropriate manner of addressing the application. We have concluded that the difficulties associated with such a course far outweigh any benefits to be gained. Many of the awards contained in Exhibit 1 have quite different and distinct provisions dealing with shift work

and the payments associated with such work. We are of the view that it would be essential for the Commission to give consideration to the existing award provisions and the industry in question before flowing on any change to a percentage allowance. The Commission has therefore determined that it will not make a General Ruling but we are satisfied that we should declare a policy establishing standards which may be transposed into awards on application. In any such application the parties have the right to be heard as to whether there is good reason to modify the provisions to meet the particular exigencies of the award in question.

As a matter of policy the provisions set out hereunder, or of a like nature as may be appropriate to meet the circumstances, are provisions to be inserted upon application into those awards (and certified agreements which specifically exempt from the no further claims provision test cases in the Queensland Industrial Relations Commission eg. Arnott's Biscuits Certified Agreement) for which the need can be shown to exist. In so doing we have had regard to the various submissions which encouraged us to find that the most appropriate mechanism for dealing with afternoon and night shift allowance was through either the award review process or the enterprise bargaining process, although we do not agree that either of these processes are the most appropriate mechanisms.

(ii) Quantum and Dates of Operation

Having considered all of the evidence before us and the submissions of all parties we are of the view that a move towards a percentage shift allowance is appropriate. We are however concerned both with the cost implications for employers of any such move and the potential loss to lower paid employees. We have decided not to grant the application as sought i.e. the 15% loading for afternoon shifts and a 20% loading for night shifts. Instead we consider a 12.5% loading for afternoon shifts and a 15% loading for night shifts would adequately recompense shift workers for the disabilities associated with shift work.

As previously stated we are concerned by the cost implications for some employers and therefore suggest that a phasing in of the 12.5% /15% loading should be undertaken. In this regard we believe that the following phasing in period is appropriate:–

Afternoon Shift Allowance

The percentage allowance to be 11% or $9.70 per shift (whichever is the greater) effective as and from 1 November, 2000
The percentage allowance to be 12% or $9.70 per shift (whichever is the greater) effective as and from 1 May, 2001
The percentage allowance to be 12.5% or $9.70 per shift (whichever is the greater) effective as and from 1 November, 2001

Night Shift Allowance

The percentage allowance to be 12.5% or $9.70 per shift (whichever is the greater) effective as and from 1 November, 2000
The percentage allowance to be 14% or $9.70 per shift (whichever is the greater) effective as and from 1 May, 2001
The percentage allowance to be 15% or $9.70 per shift (whichever is the greater) effective as and from 1 November, 2001

(iii) Savings Provision

We are of the view that a savings provision should be inserted in any award (including certified agreement which specifically exempt from the no further claims provision test cases in the Queensland Industrial Relations Commission eg. Arnott's Biscuits Certified Agreement) so that no person who is an employee at the time a variation to the award is made is disadvantaged as a result of the change from the flat increase to a percentage increase.

(iv) Certified Agreements

We see merit in the submissions of various organisations that special consideration should be given to employers who are parties to certified agreements. We have considered the concerns expressed by various organisations that employers, who have entered into certified agreements in the belief that by so doing they were achieving some degree of certainty about their labour costs for the duration of their certified agreement, should continue to have that certainty. We are of the view that the Commission should acknowledge that parties enter into certified agreements to give some certainty of outcome and that we should not impose an additional cost on such employers during the currency of a certified agreement. The operation of this statement of policy should not however extend beyond the nominal expiry date of the certified agreement unless the Commission has good reason to do so.

(v) Sugar Industry

We are of the view that the material before us going to the parlous state of the Queensland sugar industry warrants special consideration. Assuming that the economic state of the sugar industry does not improve in the 2000 season we are of the view that the industry (including members of the ASMA and the QMCHA) should be excluded from the effect of this decision at least until 1 June, 2001. At that time it will be a matter for the Commission, when dealing with any application from the relevant industrial unions for the insertion of this policy into the respective sugar industry awards, to determine the appropriate quantum of any increase and the timing of such increase. Should the economic state of the sugar industry not prove to be as dire as predicted by Mr Desmarchelier in his evidence, the unions are at liberty to seek to have the policy inserted into awards at an earlier time.

We order accordingly.

Dated this twenty-eighth day of April, 2000.

D. M. LINNANE, Vice President.

R.E. BECHLY, Commissioner.

D.K. BROWN, Commissioner.

Mr G. Trost for the Queensland Cane Growers' Association of Employers;
Mr G. Muir of Employer Services Pty Ltd on behalf of the Private Hospitals Association of Queensland;
Mr J. Powell (of Queensland Mechanical Cane Harvesters Association) on behalf of Queensland Mechanical Cane Harvesters Association, Union of Employers;
Ms K. Brown for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (Queensland Division);
Mr L. Gillespie for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees;

Released: 8 May 2000

Appearances:–
Mr D. D'Arcy for The Australian Workers' Union of Employees, Queensland;
Mr J.B. Spreckley for Queensland Council of Unions;
Messrs S. Ross and M. Healy for the Queensland Nurses' Union of Employees;
Mr G. Power, with him Ms C. Doyle, for Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Local Government Association of Queensland and for the Queensland Road Transport Association Industrial Organisation of Employers and the Fast Food Chain of Australia;
Mr C. Lentini for the Crown;
Messrs P. Warren and R.A. Cullan for the Australian Sugar Milling Association, Queensland, Union of Employers and the Queensland Mechanical Cane Harvesters Association, Union of Employers;
Mr R.J. McPherson for the Australian Industry Group Industrial Organisation of Employers;
Mr P. Varendorff (of Miles Witt Partnership) on behalf of the Australian Nursing Homes and Extended Care Association Queensland Limited;