



BACKGROUND PAPER

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Mining Industry Award 2010* (AM2019/17)

MELBOURNE, 25 NOVEMBER 2019

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

Introduction

[1] The Fair Work Commission (Commission) has produced this background paper in order to facilitate discussions at the conference scheduled by providing background information about the contested casual overtime issue in the *Mining Industry Award 2010* (the Mining Award).

[2] In a decision issued on 24 October 2019 (*the October 2019 Decision*)¹ the Mining Award was identified as an award where casual overtime rates are contested. The Full Bench decided to delay issuing a variation determination in respect of the award and a conference of interested parties is to take place at **12:30pm on Tuesday 26 November 2019**, to discuss how to proceed.

[3] Interested parties are asked to consider the material contained in this background paper and be prepared to advance a proposed resolution at the conference.

[4] A comparison table of relevant provisions from the Mining Award and the Mining Award—ED (the ED) has been provided at Attachment A.

AM2019/17 – Final stage proceedings

[5] During the Conference on [11 October 2019](#) for Final stage proceedings (AM2019/17) Ai Group submitted that in the *Mining Industry Award 2010* (the Mining Award), although the casual loading is expressed as being part of the all-purpose rate:

‘there are subsequent provisions of the award that we say deal with the calculation of overtime rates and say that those rates are payable in substitution for any other loading. We say that includes the casual loading.’²

¹ [\[2019\]FWCFB 7173](#)

² [Transcript](#), 11 October 2019, at PN202.

[6] The relevant clauses of the exposure draft state as follows:

‘11.3 A casual employee will be paid:

- (a) the ordinary hourly rate for the classification in which they are employed; plus
- (b) a casual loading of 25%.

11.4 The casual loading constitutes part of the employee’s all-purpose rate.’

[7] No other submissions were made on this matter as part of AM2019/17.

AM2014/79 – Mining Award – Award stage proceedings

[8] Clause 20.4(b) of the Exposure Draft states as follows:

‘(b) Overtime payments under clause 20 are in substitution for any other loadings or penalty rates.’

[9] During AM2014/79 proceedings Ai Group submitted that this clause contemplates casual loading, and as a result, casual loading is not payable on overtime, shiftwork penalties, weekend penalties or public holidays. They submitted the table in ED clause B.2.3 should be amended accordingly.³

[10] The AWU disagreed with Ai Group, submitting that ED clause 6.4(d) (now clause 11.4) clearly states that casual loading forms part of the ‘all-purpose rate’ and therefore:

‘It is inconceivable that the casual loading would not be included in penalty rate and overtime calculations when it is specifically required to be part of the “all purpose rate”. The precise purpose of those words is to require the casual loading to be included when overtime and penalty rates calculations are undertaken.’⁴

[11] The AWU further submitted that the outcome of not applying the loading would mean that a casual worker, working night shift would receive a 15% loading while a casual worker on day shift would receive the 25% casual loading. The CFMEU supported the AWU’s position.⁵

[12] In a Decision issued on 28 June 2018 (the *June 2018 Decision*), the Full Bench agreed with the AWU, observing that the ED and the Mining Award state that ‘casual loading constitutes part of the employee’s all purpose rate’. As such, the Full Bench resolved not to amend the rates in clause B.2.3.⁶

³ [Ai Group submission](#), 23 November 2015 at [262]-[265].

⁴ [AWU submission](#), 4 December 2015, at [9]-[14].

⁵ [CFMEU reply submission](#), 21 December 2015, p. 1.

⁶ [\[2018\] FWCFB 3802](#) at [252]-[253].

[13] The Mining Award was referred to the Overtime for casuals (AM2017/51) Full Bench by the June 2018 Decision.⁷

AM2017/51 – Overtime for casuals

[14] A statement issued on 4 December 2017 by the Full Bench identified the Mining Award as ambiguous in relation to whether overtime is payable to casuals, when overtime commences and at what rate overtime is payable.⁸

[15] A subsequent statement issued on 14 October 2019 identified the Mining Award as the subject of discussion between the parties. Parties were directed to continue discussions and report back to VP Hatcher at **9am on 26 November 2019**.⁹

[16] The Full Bench expressed an expectation parties would be in a position to identify either that there is an agreement as to the meaning and effect of the current casual overtime provisions or that there is a dispute about a specified issues at the report back. The Full Bench indicated that any disputed issue in an award shall be added to the matters to be resolved at the hearing on 16 and 17 December 2019.¹⁰

[17] The Commission published an issues paper on 5 February 2019 which observed the following:

‘Clause 10.3(b) provides that casual employees are to be paid no less than 1/38th of the minimum weekly rate of pay for their classification for each hour worked, plus a casual loading of 25%. The loading constitutes part of the casual employee’s all purpose rate. Clauses 20.1(a)(i)-(iii) express overtime rates as “50%”, “100%” and “150%” of the ordinary hourly base rate of pay for employees other than shiftworkers. Clause 20.3 expressly states that casual employees who work overtime are not to receive other loadings for the period worked.’¹¹

[18] In a submission dated 11 July 2019, the AWU submitted that, as clause 10.3(b) of the award states that casual loading forms part of the casual employee’s all-purpose rate, the loading is included in overtime calculations on a compounding basis.¹²

[19] In a submission dated 5 July 2019, ABI and NSWBC submit that the 25% casual loading is not applied when calculating overtime for casual employees in the Mining Award.¹³

⁷ [\[2018\] FWCFB 3802](#) at [18].

⁸ [\[2017\] FWCFB 6417](#) at Attachment A.

⁹ [\[2019\] FWCFB 7087](#) at [11] and [Notice of Listing – 26 November 2019 – further amended](#), 21 November 2019.

¹⁰ [\[2019\] FWCFB 7087](#) at [12].

¹¹ [Issues paper](#), 5 February 2019 at 26.

¹² [AWU submission](#), 11 July 2019 at [47]-[48].

¹³ [ABI and NSWBC submission](#), 5 July 2019 in Attachment—Overtime for Casual Summary Table.

Attachment A — Comparison Table

<i>Mining Industry Award 2010 – current award</i>	<i>Mining Industry Award—exposure draft</i>										
<p>10.3 Casual employment</p> <p>...</p> <p>(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 13—Classifications and minimum wage rates, plus a casual loading of 25%. The loading constitutes part of the casual employee’s all purpose rate.</p>	<p>11.3 A casual employee will be paid:</p> <p>(a) the ordinary hourly rate for the classification in which they are employed; plus</p> <p>(b) a casual loading of 25%.</p> <p>11.4 The casual loading constitutes part of the employee’s all-purpose rate.</p>										
<p>20.1 Overtime payments—employees other than continuous shiftworkers</p> <p>(a) Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work done in addition to their ordinary hours:</p> <p>(i) 50% of the ordinary hourly base rate of pay for the first three hours and 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until noon Saturday;</p> <p>(ii) 100% of the ordinary hourly base rate of pay for overtime worked after noon on a Saturday or at any time on a Sunday; and</p> <p>(iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.</p>	<p>20.1 Overtime payments—employees other than continuous shiftworkers</p> <p>Except where provided otherwise in clause 20, an employee who is not a continuous shiftworker will be paid for all work done in addition to their ordinary hours at the following rates:</p> <table border="1" data-bbox="1211 906 2042 1251"> <thead> <tr> <th>For overtime worked on:</th> <th>% of ordinary hourly rate</th> </tr> </thead> <tbody> <tr> <td>Monday to 12 noon on Saturday – first 3 hours</td> <td>150%</td> </tr> <tr> <td>Monday to 12 noon on Saturday – after 3 hours</td> <td>200%</td> </tr> <tr> <td>After 12 noon on Saturday and all hours on Sunday</td> <td>200%</td> </tr> <tr> <td>Public holiday</td> <td>250%</td> </tr> </tbody> </table>	For overtime worked on:	% of ordinary hourly rate	Monday to 12 noon on Saturday – first 3 hours	150%	Monday to 12 noon on Saturday – after 3 hours	200%	After 12 noon on Saturday and all hours on Sunday	200%	Public holiday	250%
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<i>Mining Industry Award 2010 – current award</i>	<i>Mining Industry Award—exposure draft</i>
<p>20.1 Method of calculation</p> <p>(a) When computing overtime payments, each day or shift worked will stand alone.</p> <p>(b) Any payments under this clause are in substitution of any other loadings or penalty rates.</p>	<p>20.4 Method of calculation</p> <p>(a) When calculating overtime payments, each day or shift worked will stand alone.</p> <p>(b) Overtime payments under clause 20 are in substitution for any other loadings or penalty rates.</p>
<p>3. Definitions and interpretation</p> <p>base rate of pay has the meaning in the NES</p>	<p>3. Definitions</p> <p>casual ordinary hourly rate means the hourly rate for a casual employee for the employee’s classification specified in clause 15—Minimum rates and classifications plus the casual loading and the industry allowance. Where an employee is entitled to an additional all-purpose allowance, this allowance also forms part of that employee’s ordinary hourly rate.</p> <p>ordinary hourly rate means the hourly rate for an employee’s classification specified in clause 15—Minimum rates and classifications plus the industry allowance. Where an employee is entitled to an additional all-purpose allowance, this allowance also forms part of that employee’s ordinary hourly rate.</p>