

Fair Work Commission  
Level 10, Terrace Tower, 80 William Street  
EAST SYDNEY NSW 2011  
Via email: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

29 January 2019

## **AM2018/15 – Airline Operations – Ground Staff Award 2010 – Substantive Issues**

### **BACKGROUND**

1. Directions for parties to file submissions in relation to substantive claims being made regarding the *Airline Operations – Ground Staff Award 2010* (**Award**) were published by Vice President Catanzariti on 13 December 2018.
2. The Australian Workers' Union (**AWU**) has one substantive claim in relation to the Award. The submissions of the AWU in support of this claim are below.
3. The AWU contends that the proposed variations to the Award that are pursued throughout this submission and set out in the Draft Determination attached are self-evident, and as such can be determined with little formality<sup>1</sup>.
4. A Draft Determination containing proposed amendments to the Award is attached to these submissions.

### **SUBMISSIONS**

#### **Rates of Pay for Shiftworkers Performing Overtime – Background**

5. For the AWU, this claim began as a technical and drafting issue concerning the rates of pay expressed in a number of tables in Schedule B of the Exposure Draft<sup>2</sup> for the *Airline Operations – Ground Staff Award 2010* (**Exposure Draft**), specifically in relation to the overtime rates expressed to be payable to non-continuous shiftworkers for performing work on Sundays.

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<sup>1</sup> [2014] FWCFB 1788 at [23]

<sup>2</sup> Tables B.2.4, B.3.4, B.4.4 and B.5.4 of Schedule B

6. The AWU raised the issue in a submission dated 30 June 2016, drawing attention to the absurdity of the Award prescribing a different rate of pay for non-continuous shiftworkers than to those prescribed for other types of employees performing work on Sundays. The issue became Item 48 of the Summary of Technical and Drafting Submissions for the Award.
7. Currently, consistent with the interpretation adopted in the Exposure Draft, the Award prescribes the following rates of pay for the following types of employee for work performed on Sundays:
  - 7.1. Day workers – 200% for ordinary hours and 200% for overtime hours<sup>3</sup>;
  - 7.2. Continuous shiftworkers – 200% for ordinary hours<sup>4</sup> and 200% for overtime hours<sup>5</sup>; and
  - 7.3. Non-continuous shiftworkers – 200% for ordinary hours<sup>6</sup> and **150% for the first two overtime hours** and 200% for any overtime hours thereafter<sup>7</sup>.
8. Two issues with this outcome are immediately apparent. Firstly, the modern awards objective<sup>8</sup> explicitly recognises a need to provide additional remuneration for employees working overtime<sup>9</sup>. An award that makes provision for an employee to receive a *lesser* rate of pay on commencing overtime compared to the rate he or she was receiving immediately prior to such overtime is clearly inconsistent with this principle.
9. Secondly, the rate of pay prescribed by the Award for all three types of employee performing work during ordinary hours on Sundays is the same – 200%. Therefore, such work is considered to be of the same value. It is a strange outcome then that the Award values overtime performed on Sundays differently according to the type of employee who performs the overtime.
10. This difference in remuneration for the performance of overtime on Sunday based on the type of employee performing the overtime is without justification. There is no basis to conclude that the work performed by non-continuous shiftworkers during overtime is worth less than the work they perform during non-overtime hours, or

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<sup>3</sup> *Airline Operations – Ground Staff Award 2010, cl. 33.2*

<sup>4</sup> *Airline Operations – Ground Staff Award 2010, cl. 30.7(a)*

<sup>5</sup> *Airline Operations – Ground Staff Award 2010, cl. 32.1(a)*

<sup>6</sup> *Airline Operations – Ground Staff Award 2010, cl. 30.7(a)*

<sup>7</sup> *Airline Operations – Ground Staff Award 2010, cl. 32.1(a)*

<sup>8</sup> *Fair Work Act 2009, s.134*

<sup>9</sup> *Fair Work Act 2009, s.134(1)(da)(i)*

worth less than the work performed by continuous shiftworkers and day workers during overtime (but of the same value during non-overtime hours).

11. In submissions dated 30 June 2016, the AWU offered an alternative interpretation of the Award to resolve the inconsistency of overtime rates for work performed on Sundays – that the penalty rate provided in cl. 30.7(a) of the Award applies for all hours worked by all shiftworkers on Sundays. This would resolve the absurdity inherent in an Award providing that non-continuous shiftworkers receive a lower rate of pay:

11.1. for performing overtime than for working ordinary hours; and

11.2. than both continuous shiftworkers and day workers performing the same overtime.

12. Although the AWU had pursued the amendment as a technical and drafting error – on the basis of an interaction issue between clauses – the item was referred to this substantive Full Bench after a conference before Vice President Catanzariti on 2 February 2017.

13. The AWU made further submissions to the Group 4 Full Bench pursuing amendments to the tables in Schedule B as a technical and drafting matter. However, in the Group 4 Decision published on 7 August 2018<sup>10</sup>, the Full Bench confirmed that the issue would be dealt with by this substantive Full Bench in light of the substantive claim made by the Transport Workers' Union (**TWU**) and the Australian Manufacturing Workers' Union (**AMWU**) to remove the word 'continuous' from cl. 32.1(a).

14. On 12 October 2018, the AWU confirmed an intention to pursue a substantive variation to the Award on the same basis as the TWU and AMWU above. The reasons for the AWU adopting this view in preference of that submitted previously are as follows.

#### **Previous AWU Submissions Regarding Item 48**

15. As noted above, the AWU initially pursued amendments to a number of tables in Schedule B of the Exposure Draft through the technical and drafting portion of the four-yearly review on the basis that it was nonsensical for an employee working on a Sunday to receive a lower rate of pay on the commencement of overtime, and a

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<sup>10</sup> [2018] FWCFB 4175

lower rate of pay than that received by all other types of employee working the same overtime.

16. However, whilst the alternative interpretation offered by the AWU in June 2016 resolves this particular absurdity, it unfortunately does not completely resolve the issue.
17. What is left unresolved if the alternative interpretation is adopted – which the AWU still maintains results in less absurd outcomes than the current interpretation adopted in the Exposure Draft – is the interaction between cl. 32.1(a) and 30.7(a) in relation to continuous shiftworkers.
18. The AWU submits that the correct reading of cl. 30.7(a) is that the rates listed are to apply for all hours worked on those days unless the Award explicitly provides otherwise. As indicated by the heading of cl.30 – ‘Special provisions for shiftworkers’ – the rates of pay in cl. 30.7(a) apply to both continuous and non-continuous shiftworkers covered by the Award. In cl. 32 – the general overtime provision in the Award – continuous shiftworkers are specifically referenced, but non-continuous shiftworkers are not.
19. The issue that arises with the alternative interpretation proffered by the AWU in the technical and drafting stage of the review of this Award is that it requires cl. 30.7(a) to dictate both ordinary and overtime rates for non-continuous shiftworkers, but only ordinary rates for continuous shiftworkers. Clause 30.7(a) provides no indication that this is the outcome intended. This interpretation also requires cl. 32.1(a) to dictate overtime rates for continuous shiftworkers but have no application whatsoever to non-continuous shiftworkers. Although it is arguable that this is the intention of cl. 32.1(a) as non-continuous shiftworkers are not referenced in the clause, it is not conclusive.
20. Although the alternative interpretation resolves the absurd outcomes where some overtime rates are lower than ordinary time rates for only one type of employee as is currently found in the Exposure Draft, it is available to argue that this interpretation is not necessarily a simple one to arrive at and therefore may not be the ideal outcome in terms of simplicity and ease of understanding – consistent with the modern awards objective<sup>11</sup>.
21. An amendment to remove the distinction between continuous and non-continuous shiftworkers in cl. 32.1(a) of the Award however, will result in simple and easy to understand overtime entitlements devoid of absurd outcomes with no need for any

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<sup>11</sup> *Fair Work Act 2009*, s. 134(1)(g)

complex interpretation. Additionally, the same amendment will provide for the correction of an inadvertent error made during the Award Modernisation process, the error being the addition of the word ‘continuous’ itself.

### **The Relevant Provisions of the Award**

22. Clause 30.7 of the Award provides for certain penalty rates being payable to shiftworkers for performing work on weekends and public holidays. The clause provides as follows:

#### ***30. Special provisions for shiftworkers***

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##### ***30.7 Shift penalty rates—weekends and public holidays***

*(a) Shiftworkers must be paid the following penalty rates for work on weekends and public holidays:*

<b><i>Shift type</i></b>	<b><i>Penalty rate</i></b>
<i>Saturday</i>	<i>Time and a half</i>
<i>Sunday</i>	<i>Double time</i>
<i>Public holidays (except Christmas Day and Good Friday)</i>	<i>Double time</i>
<i>Christmas Day and Good Friday</i>	<i>Double time and a half</i>

*(b) The rates in this clause are in substitution for and not cumulative upon the shift premiums prescribed in clauses [30.3](#), [30.4](#), [30.5](#) and [30.6](#).*

23. As the clause does not confine the payment of the above penalty rates to ordinary hours, the AWU understands that the penalty rates as expressed in the clause are payable for all hours unless the Award indicates otherwise.

24. We note also that cl. 30 is clearly applicable to all shiftworkers. Relevantly, the clause does not make any distinction between continuous and non-continuous shiftworkers for the purposes of the penalty rates payable in cl. 30.7(a) or, importantly, in terms of payment for overtime.

25. The AWU submits that should an Award provide for different entitlements for different types of shiftwork or shiftworkers in relation to loadings and penalties, the clause that specifically applies to shiftworkers as a whole – which in this case is clause 30 – is the ideal clause to contain such variations. Indeed, the shift loadings

for the different types of shift<sup>12</sup> and the differentiation between rates of pay for continuous and non-continuous shiftworkers who work afternoon and night shifts<sup>13</sup> are all found in clause 30. The absence of any mention in cl. 30 of continuous and non-continuous shiftworkers being subject to different rates of pay for overtime work is notable.

26. Clause 32.1 of the Award provides rates of pay for overtime work for assumedly all workers covered by the Award. The clause provides as follows:

## **32. Overtime**

### **32.1 Payment for working overtime**

*(a) All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time.*

*(b) For the purposes of this clause, **ordinary hours** means the hours worked in an enterprise, fixed in accordance with clause [28.2\(c\)](#).*

*(c) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week.*

27. By this application, the AWU seeks to vary the above clause to remove the distinction that the word 'continuous' in cl. 32.1(a) currently creates. In its simplest terms, this variation takes the form of removing the word 'continuous' from cl. 32.1(a). The AWU submits that the first sentence of cl. 32.1(a) is intended to provide terms and conditions of overtime for day workers, and the second sentence of cl. 32.1(a) is intended to provide terms and conditions of overtime for (all) shiftworkers.
28. As noted above, it is the submission of the AWU that the addition of 'continuous' in cl. 32.1(a) was made inadvertently during the Award Modernisation process. If the word 'continuous' did not appear in cl. 32.1(a), the clause would be simple and easy to understand.
29. However, if we attempt to apply the first sentence of cl. 32.1(a) to non-continuous shiftworkers as well as to day workers, some significant issues appear.
30. Firstly, the first sentence of cl. 32.1(a) applies to all work done outside of *ordinary hours*. Clause 32.1(b) defines *ordinary hours* for the purposes of cl. 32 in general as the hours fixed in accordance with cl. 28.2(c). The AWU notes that cl. 28.2(c) and cl.

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<sup>12</sup> *Airline Operations – Ground Staff Award 2010, cl. 30.3*

<sup>13</sup> *Airline Operations – Ground Staff Award 2010, cll. 30.3, 30.4, 30.5*

28.2 more generally pertain solely to the ordinary hours of *day workers*. The ordinary hours for shiftworkers are located at cl. 28.3. This evinces a clear intention regarding the application of the first sentence of cl. 32.1(a) – it applies to day workers only.

31. Should the first sentence of cl. 32.1(a) be interpreted as having application to non-continuous shiftworkers, it necessarily follows that the Award provides for non-continuous shiftworkers to be paid overtime rates for any time worked outside of the ordinary hours of *day workers*, which is Monday to Friday, 7.00am and 6.00pm. It is not only strange for an award to use the ordinary hours of day workers as a reference to establish when overtime for shiftworkers commences, it is inconsistent with the shift loadings for shiftworkers provided in cl. 30.
32. Should cl. 32.1(a) be amended to remove the distinction between continuous and non-continuous shiftworkers, the result would be that the reference to ordinary hours would apply only to day workers, and the reference to the provision that provides the ordinary hours for day workers would make sense.
33. A distinction between continuous and non-continuous shiftworkers in cl.32.1(a) for the purposes of determining overtime entitlements is arbitrary and also without basis. The word ‘continuous’ in cl. 32.1(a) creates tension between clauses and can be read to result in strange outcomes, which necessarily creates confusion.

### **Award Modernisation**

34. The word ‘continuous’ at what is now cl. 32.1(a) of the Award was an inadvertent inclusion in the Award Modernisation process, first appearing in a draft award proposed by the Australian Council of Trade Unions (**ACTU**) on behalf of its affiliates on 18 March 2009.
35. The AWU was unable to find any pre-reform awards in the airline operations sector that make a distinction between continuous and non-continuous shiftworkers in reference to rates of pay for performing overtime. To the contrary, the AWU found that the principal pre-reform awards provide for all overtime performed by (all) shiftworkers to attract a rate of 200%<sup>14</sup>.
36. The AWU was also unable to find any submissions made during Award Modernisation for the Award that addressed a potential distinction between

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<sup>14</sup> Please see: *Aircraft Engineers (General Aviation) Award 1999* at cl. 18.3; *The Airline Operations (Transport Workers’) Award 1998* at cl. 28.2; *Airline Operations (Domestic Airlines) Award* at cl. 29.1; *Airline Operations – Clerical and Administrative Award 1999* at cl. 25.1.2; *Overseas Airlines (Interim) Award 1999* at cl. 21.1.12.

continuous and non-continuous shiftworkers in terms of overtime entitlements. Accordingly, the AWU failed to locate any consideration given by the Australian Industrial Relations Commission (**AIRC**) to a reduction in overtime entitlements for non-continuous shiftworkers.

### **Effect of Inclusion**

37. The circumstances surrounding the addition of the word 'continuous' in cl. 32.1(a) of the Award suggest that the addition itself was done in error. This error must now be corrected to resolve the confusion its inclusion has introduced and also restore the entitlements of non-continuous shiftworkers covered by the Award.
38. In terms of the confusion the word 'continuous' has introduced, we note the following.
39. Firstly, the inclusion places cl. 30.7(a) and 32.1(a) in conflict regarding non-continuous overtime entitlements. The Exposure Draft has attempted to resolve this conflict by giving cl. 32.1(a) priority over cl. 30.7(a). However, as discussed above, this has resulted in strange outcomes, including non-continuous shiftworkers being entitled to lower rates of pay for overtime than for ordinary hours when performing work on Sundays and public holidays.
40. Secondly, the Award consistently differentiates between shiftworkers and day workers for the purposes of entitlements<sup>15</sup>, not between continuous shiftworkers and all other types of worker.
41. In terms of correcting an error, we note the following.
42. The only available conclusion to reach concerning the inclusion of the word 'continuous' in cl. 32.1(a) is that it was done so inadvertently and in error. There is nothing to suggest that the AIRC intended to reduce the overtime entitlements of non-continuous shiftworkers, and no parties to the process made submissions such an outcome. To the contrary, it appears that the parties overwhelmingly made submissions to preserve the entitlements that existed in the principal pre-modern awards.
43. One such entitlement is a rate of pay equivalent to 200% for all shiftworkers performing overtime. All the principal pre-modern awards in the airline operations sector provided for this entitlement.

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<sup>15</sup> Such as cl. 28.2 and 28.3 which set out ordinary hours for day workers and shiftworkers respectively, and cl. 11.4(b) and 11.4(c), which set out part-time terms and conditions for day workers and shiftworkers respectively.



44. The entitlement for non-continuous shiftworkers as it stands in the Award is a reduction from all pre-modern awards in the sector. The reduction was *not* the result of application and successful merit argument by a party to the Award Modernisation process. Additionally, the reduction was not the subject of any known consideration by the AIRC in creating the Award.

### **Modern Awards Objective**

45. The AWU notes that the following considerations of the modern awards objective are relevant to this application.

#### **s. 134(1)(da) The need to provide additional remuneration**

46. This application deals with the remuneration payable to employees that work overtime<sup>16</sup>, on weekends<sup>17</sup>, on public holidays<sup>18</sup> and on shifts<sup>19</sup>. The modern awards objective explicitly recognises the need for awards to provide additional remuneration to employees who perform work in such circumstances. Accordingly, this element of the modern awards objective cannot be met if the Award provides for a shiftworker to receive a *lower* rate of pay for commencing overtime on a weekend or public holiday.

#### **s. 134(1)(f) The likely impact on business**

47. This consideration is relevant but not significant. The majority of employers in this sector are both large employers and covered by enterprise agreements. Most of these enterprise agreements already provide for all shiftworkers to be paid 200% for all overtime worked.

48. Additionally, should there be an employer that may actually be directly affected by this application, the employment costs would be very limited – affecting the cost of only non-continuous shiftworkers, only for the first two hours of overtime, and only an increase of 50% of the base rate for those two hours.

#### **s. 134(1)(g) – Simple and easy to understand modern award system**

49. The word ‘continuous’ in cl. 32.1(a) creates confusion regarding entitlements for non-continuous shiftworkers covered by the Award for the reasons explained above.

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<sup>16</sup> *Fair Work Act 2009*, s. 134(1)(da)(i)

<sup>17</sup> *Fair Work Act 2009*, s. 134(1)(da)(ii)

<sup>18</sup> *Fair Work Act 2009*, s. 134(1)(da)(iii)

<sup>19</sup> *Fair Work Act 2009*, s. 134(1)(da)(iv)

The removal of the distinction between continuous and non-continuous shiftworkers in cl. 32.1(a) will result in these entitlements becoming clear and easy to understand and apply for both employers and employees.

50. The other considerations of the modern awards objective are neutral to this application.

### **Outcome Sought**

51. The AWU seeks the removal of the distinction that cl. 32.1(a) currently creates between continuous and non-continuous shiftworkers on the terms provided in the attached Draft Determination.

52. By this application, the AWU seeks that non-continuous shiftworkers covered by the Award are entitled to a rate of 200% for all overtime worked, as continuous shiftworkers are, and as non-continuous shiftworkers used to be prior to the Award being created.

53. In the event that this Full Bench does not award this application on the terms as requested in the Draft Determination attached to these submissions, the AWU seeks in the alternative that amendments are made to the Award to ensure that:

53.1. non-continuous shiftworkers do not receive a lower rate of pay for performing overtime work than for performing work during ordinary hours;

53.2. the overtime entitlements in the Award are clear and easy to understand; and

53.3. the interpretation of overtime entitlements in the Exposure Draft are consistent for all types of worker<sup>20</sup>.

Yours Faithfully,



Zachary Duncalfe  
**NATIONAL LEGAL OFFICER**  
**The Australian Workers' Union**

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<sup>20</sup> For example, the Exposure Draft gives preference to cl. 33.2 over cl. 32.1(a) for day workers but gives preference to cl. 31.2(a) over cl. 30.7(a) for non-continuous shiftworkers.

**DRAFT DETERMINATION**

*Fair Work Act 2009*

Part 2-3 Division 4 – 4 Yearly Review of Modern Awards

s.156(2)(b)(i)

**Airline Operations – Ground Staff Award 2010**

(MA000048)

**4 Yearly Review of Modern Awards**

(AM2018/15)

Airline Industry

[INSERT FULL BENCH MEMBERS]

SYDNEY, X 2019

Review of modern awards to be conducted.

- [1] Further to the decision and reasons for decision <<decision reference>> in <<file\_no.>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the *Airline Operations – Ground Staff Award 2010* be varied as follows.
- [2] Delete the current sub-clause 32.1 and insert the following:

***32.1 Payment for working overtime***

*(a) All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a shiftworker, the rate of working overtime is double time.*

*(b) For the purposes of this clause, **ordinary hours** for a day worker means the hours worked in an enterprise, fixed in accordance with clause 28.2(c). For a shiftworker, **ordinary hours** means hours worked in accordance with clause 28.3(b) and clause 30.2(a).*

*(c) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours per week.*

*(d) In computing overtime each day's work stands alone.*

- [3] This determination will operate on and from .....

[INSERT PRESIDING MEMBER]