

**Part time and casual employment**

**Common issue**

**AM 2014/196 and 197**

**Outline of final submission**

**Application by United Voice for overtime provisions in the:**

*Hospitality Industry (General) Award 2010;*

*Registered and Licenced Clubs Award 2010; and*

*Restaurant Industry Award 2010.*

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## Part 1

### Background

1. United Voice ('the Applicant') has made claims in the 4 yearly review that overtime provisions applying to casual employees be inserted into the *Hospitality Industry (General) Award 2010* ('the Hospitality Award'), the *Registered and Licenced Clubs Award 2010* ('the Clubs Award') and the *Restaurant Industry Award 2010* ('the Restaurant Award') (collectively: 'the Hospitality Awards'). The Hospitality Awards currently contain no entitlement to overtime for casual employees.
2. On 2 March 2015, the Applicant wrote to his Honour the President, Justice Ross, in the context of the award stage review of each of the Hospitality Awards indicating that the absence of any entitlement to overtime for casual employees engaged under the Hospitality Awards was a matter that required attention in this 4 yearly review. The amendment of the *Fair Work Act 2009* (Cth) ('the Act') modern awards objective by the *Fair Work Amendment Act 2013*(Cth) was noted. On 1 January 2014, the *Fair Work Amendment Act 2013* (Cth) inserted subparagraph 134(1)(da) into the Act's modern awards objective. This change in the modern awards objective occurred after the 2 yearly review and well prior to the current 4 yearly review.
3. On 14 December 2015, at a directions hearing for the stage 3 and 4 award reviews, the President indicated that the claims concerning overtime for casual employees under the Hospitality Awards would be transferred to the part time and casual common issue proceedings (AM2014/196 and 197).
4. On 15 January 2016, draft Variations were filed by the Applicant in relation to each of the Hospitality Awards.
5. On 29 February 2016, the Applicant filed evidence and a written submission in support of the proposed Variations.
6. On 3 March 2016, the Applicant filed amended Variations in relation to the claims.
7. On 24 June 2016, a submission was filed on behalf of the Australian Hotels Association, Clubs Australia Industrial and the Restaurant and Catering Industrial (collectively: 'the Respondents') in reply.
8. On 16 August 2016, the Full Bench heard evidence lead by the Applicant in support of the proposed Variations. No other evidence by any other party was presented seeking to dispute the claim.

## The hospitality industry and casualisation

9. The industries covered by the Hospitality Awards are consistently found to contain the lowest paid work in Australia.<sup>1</sup> In May 2016, those employed in the Mining industry had the highest full-time adult average weekly ordinary time earnings in Australia at \$2,597.30. The industry with the lowest level of full-time adult average weekly ordinary time earnings was the accommodation and food services industry (\$1,069.80).<sup>2</sup>
10. In the *Annual Wage Review 2015–16* (the ‘Review’), the Expert Panel noted, as it has previously observed, that award-reliant employees who receive a rate of pay that (as a full-time equivalent) would place them below two-thirds of median (adult) ordinary time earnings provides a suitable and operational benchmark for identifying who is low paid.<sup>3</sup> The 2015-16 Review decision used data from the previous year due to an absence of current statistical material. The measure of being low paid is roughly equivalent to the range between the C7 and C8 rate (\$854.60 to \$897.90) in the *Manufacturing and Associated Industries and Occupations Award 2010*.<sup>4</sup> The C8 rate is higher than all Hospitality Awards minimum wages, except the Clubs Award employees at Level 8 and above.<sup>5</sup> These classifications are for managers. The average weekly incomes cited above suggest a significant proportion of employees covered by the Hospitality Awards fall below this benchmark even with the payment of other monetary entitlements, such as penalty rates and overtime.
11. The Household, Income, Labour and Dynamics Australia (‘HILDA’) survey found that the median weekly earnings in 2013 for casual employees was \$326.00, for part time employees it was \$435.00 and for full time employees its was \$960.00.<sup>6</sup> This is a gross amount and denotes the income from the respondent’s main job. On 1 July 2013, a level 5 employee, the highest general trade classification under the Hospitality Award, received a minimum weekly wage of \$769.90. While this material is dated, it clearly indicates that casual employees are poorly paid and full time employees real earnings are heavily supplemented by working additional hours, penalty rates and overtime payments.
12. These low wages are reflected in the apparent disjuncture between the percentage of the Australian working population employed in accommodation and food services and the

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<sup>1</sup> Exhibit 288, statement of Keith Harvey, 22 February 2016 at para. 28 (hereafter ‘Harvey’).

<sup>2</sup> Australian Bureau of Statistics (‘ABS’), Average Weekly Earnings, Australia, May 2016, Catalogue No. 6302.0

<sup>3</sup> *Annual Wage Review* [2016] FWCFB 3500, paras 358-370 and see Table 5.1; [2015] FWCFB3500 at para. 35; [2014] FWCFB 3500 at para. 310; [2013] FWCFB 4000 at para. 362.

<sup>4</sup> *Annual Wage Review* [2016] FWCFB 3500 at para. 363.

<sup>5</sup> The 2013-2014 C5 rate is still greater than the current (2014-2015) minimum wage for all employees covered by the *Hospitality Awards* except *Clubs Award* employees at Level 8 and above.

<sup>6</sup> Exhibit 289, Statement of Damian Oliver, 24 February 2016, Annexure C – report: *Characteristics of casual and part-time hospitality employees*, p16 to 17, (hereafter ‘Oliver’).

percentage of the total wages paid to those workers. While the sector employs approximately 7 per cent of all workers, it pays approximately 4 per cent of all wages.<sup>7</sup>

13. The industries covered by the Hospitality Awards consistently show the highest rates of casualisation of any sector of the Australian economy. Dr Damian Oliver<sup>8</sup> notes:

*The proportion of employees in Accommodation and Food Services without paid leave entitlements has remained fairly constant at approximately 53% -67% since 2006, with the larger increase occurring between 2000 and 2005, when the proportion of employees without paid leave entitlements increased from 57.4% to 64%.*

14. There is a consistent recent pattern in the hospitality sector where around 60 per cent of the workforce has no paid leave entitlements and is precariously employed. While sectors such as the arts, recreational sciences, agriculture, forestry and fishing have a large proportion of their workforce self-employed and employed casually, the nearest comparable sector is retail in which the proportion of employees engaged casually is consistently 15 to 20 per cent less than the percentage in the hospitality sector. Most recent data from the 2013 HILDA survey and the Australian Bureau of Statistics is produced at annexure marked 'A' to this submission.
15. The number of person employed casually in hospitality is also significant. According to 2014 ABS data 435, 200 persons working in accommodation and food services had no paid leave entitlements.<sup>9</sup>
16. Between 2004 and 2013, the median working hours of casual hospitality employees was consistently 20 hour per week.<sup>10</sup> During the same period between 7.2 per cent and 14.6 per cent of casual employees worked 38 hours or more each week with a consistent recent trend above 14 per cent.<sup>11</sup>
17. There are a large number of casual hospitality employees currently working hours that would normally be considered overtime. Further, these employees are demonstrably low paid. These employees are receiving no additional compensation for work that would elsewhere attract a premium as overtime.

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<sup>7</sup> Workplace and Economic Research Section, Tribunal Services Branch, *Industry profile–Accommodation and food services, Material to assist AM2014/305–Penalty rates case*, December 2015, at p. 4.

<sup>8</sup> Oliver, at p. 9.

<sup>9</sup> Annexure A.

<sup>10</sup> Oliver, at p. 16.

<sup>11</sup> Oliver, at p. 16.

### Overtime within other Modern Awards

18. As noted in our earlier submission at paragraphs [37] to [52], the provision of an entitlement for casual employees to some form of overtime is commonplace. Of 122 modern awards reviewed, 118 permit casual employment. Of the 118 with casual employment, 109 provide some form of overtime entitlement to casual employees and the standard is some form of intraday and intraweek entitlement similar to the Variations. We have done more analysis on these provisions and an updated table is included with this submission. The table below provides a summary of the criteria used for the calculation of overtime for casual employees within these 109 modern awards.

8 hours a day/38 per week <sup>12</sup>	10 hours a day/38 per week alone <sup>13</sup>	38 hours a week alone	other
14	41	8	46

19. A table summarising overtime provisions in 122 modern awards is filed with this submission.

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<sup>12</sup> Modern awards that posit durations less than 8 hours as the criterion for intraday overtime are included in this category *i.e.* *Car Parking Award 2010*.

<sup>13</sup> Modern awards that have maximum weekly hour less than 38 have been included in this category if overtime is referable to work in excess of 10 hours a day and maximum weekly hours *i.e.* *Concrete Products Award 2010*.

## Part 2

### The Variations

20. The amended draft Variations ('the Variations') filed on 3 March 2016 in relation to each of the Hospitality Awards seek to create an entitlement for casual employees to overtime for work:

- a) in excess of 38 hours per week;*
- b) which exceeds 10 hours per day; or*
- c) in excess of 10 hours which is part of a continuous or broken shift.*

21. The first criterion aligns the entitlement to any work in excess of the ordinary hours of work for a full time employee. Evidence indicates that fatigue and disability begins being evident after an individual weekly hours of work approaches and exceed 38 hours a week.<sup>14</sup> Further, it is desirable that casual employment should broadly be cost equivalent with permanent full time employment.

22. The National Employment Standards ('NES') at s. 62 of the Act provides that 38 hours is the maximum weekly hours. The effect of paragraph 62(1)(b) is that 38 hours a week is the maximum weekly hours for casual employees under the Hospitality Awards as casual employees do not have any '*ordinary hours of work in a week*'.<sup>15</sup> Section 62 has an implicit connection to overtime as hours worked in excess of maximum hours will ordinarily be considered overtime. Subsection 62(2) provides a right for employees to refuse additional work beyond 38 hours a week if they are unreasonable. In determining whether additional hours are reasonable or unreasonable, the Act requires that a number of considerations are to be taken into account in subsection 62(3) of the Act. One consideration as to whether a direction to work additional hours is reasonable is:

- (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;*

23. For the purpose of the Variations, s. 62 also provides a clear basis to say that 38 hours is the appropriate number of intraweek hours beyond which overtime should be paid.

24. The second criterion posits work in excess of 10 hours a day as overtime. There is evidence that approaching and exceeding this duration is associated with fatigue and disability. Our

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<sup>14</sup> Exhibit 290, statement of Olav Muurlink, 29 February 2016, Annexure C *Impacts of intraday or intraweek overtime on physical and psychological health, generally and pp 16 to 17. (hereafter 'Muurlink'*.

<sup>15</sup> *Fair Work Act 2009* (Cth), s 62(1)(b)(ii).

review of modern awards noted at [17] indicates that for intraday overtime work in excess of 10 hours a day is a commonest criterion applied.

25. The third criterion is supplementary to the second and is designed to deal with particular features of the unsocial and intermittent nature of casual employment under the Hospitality Awards
26. The Hospitality Awards are distinguishable from most modern awards in that there is no shift work and shift allowances or span of hour's rules. Casual employees under these awards frequently work long shifts into the early hours of the morning at times that elsewhere would attract some premium. Casual employees also work intermittently and it is not usual for casual employees to be engaged only for a Friday or Saturday because these are the busy periods when long shifts will be commonly required.
27. The third criterion is designed to ensure that these overtime provisions apply to continuous shifts that traverse a day when that shift may be the only work that the employee does in a week. Such continuous or broken shifts should attract overtime, even if less than 10 hours is worked within a single day. This aspect is consistent with established industrial practice concerning the calculation of overtime.
28. Further, in circumstances where an employee has worked a continuous shift that traverses two days and is then required to commence work later on the second day, the hours worked in the early hours of that day should not be attributed to the calculation of overtime for any later shift provided that the provisions in the particular award concerning breaks are complied with.
29. The Variations have not included any amendment to the clauses in each of the Hospitality Awards that provide '*overtime worked on any day stands alone*'. It is assumed that '*continuous and broken shifts*' will traverse a day and notionally mean that overtime does not stand alone on a day but that the industrial practice reflected by these provisions should continue. The current provisions are not clear and are informed by custom and practice. This is not a desirable state of affairs and these provisions in the Hospitality Awards should be amended as noted below.
30. If the Variations are made, overtime will be relevant to casual employment and provisions in each of the Hospitality Awards dealing with breaks and the deeming of when ordinary hours are worked within a day become relevant. These provisions avoid work from one shift being attributed to overtime later that day provided that the employee takes the necessary break. Any subsequent shift will commence at the '*ordinary rate*' for the employee.
31. It is desirable that the operation of the Variations should be as clear as possible and not seek to rely on custom and practice in relation to their practical operation.
32. A review of modern awards indicates some variation in the wording of equivalent provisions in different modern awards dealing with '*overtime standing alone within a day*'. We believe a

clearer and unambiguous wording is found in the *Aluminium Industry Award 2010*, *Coal Export Terminals Award 2010*, *Hydrocarbons industry Award 2010*, *Medical Practitioners Award 2010*, *Oil Refining and Manufacturing Award 2010*, *Salt Industry Award 2010* and *Wool Storage Sampling and Testing Award 2010*. This formulation is:

*When computing overtime payments, each day or shift worked will stand alone.*

33. Criteria 2 and 3 have some overlap. Criterion 2 could theoretically be dispensed in the event that the award provisions concerning breaks are complied.
34. There is utility in the three pronged formulation proposed for the following reasons. First, intraday overtime is likely to be the most relevant entitlement due to the pattern of casual work in this sector. A very clear provision to this effect that some premium must be paid for more than 10 hours of work a day is warranted. Second, the sector covered by the Hospitality Awards has high levels of non-compliance and intermittently engaged casual employees are a vulnerable class. Limited 'wriggle room' for employers is desirable. Concern that this formulation may lead to mistakes contrary to the interest of employers is unlikely. Lastly, there is a level of complexity that cannot be avoided due to the provisions in the Hospitality Awards concerning breaks and the erratic nature of work in this sector.

### **The Rate**

35. The Variations intend that overtime is paid to casual employees in accordance with the general rule applying in each award and is not culminative on the casual loading. In all cases, each of the Hospitality Awards provide for an initial overtime rate of 150 per cent of the ordinary rate for the first 2 hours of overtime, 200 per cent thereafter and between 175 per cent to 250 per cent of the rate for the first 2 hours of overtime worked on weekends and public holidays. The Variations seek to apply these rates to casual employees on the basis that the decision to engage or ask a particular employee to work additional hours should be cost neutral.

### **Hospitality Award**

36. In the Hospitality Award, a new clause 33.2(c) is sought to be inserted which reads:
  - (c) *A casual employee is paid at overtime rates for any work:*
    - (i) *in excess of 38 hours per week;*
    - (ii) *which exceeds 10 hours per day; or*
    - (iii) *in excess of 10 hours which is part of a continuous or broken shift.*
37. Clause 33.3 deals with the rate at which overtime is paid and requires limited amendment as it is phrased in terms of 'employees'. Clause 33.3 uses the terminology 'normal rate of pay'. A



new clause 33.3(a)(iv) is sought to the effect that, in the case of a casual employee, the *'normal rate of pay will be their rate of pay exclusive of the casual loading'* to clarify that overtime is not culminative on the casual loading.

38. The provision concerning breaks between ordinary hours is contained in clause 30 which is titled *Rosters* and provides full time and part-time employees with a right to a roster. Casual employees are excluded from any right to a roster in the Hospitality Award although in reality are frequently included in work rosters. Clause 30.1(b) of the Hospitality Award requires a 10 hour break between the working of ordinary hours for a full time and part-time employee. While it is not the ideal location for such a provision this clause should be amended to make it clear that a 10 hour break will make any subsequent work that day by a casual employee payable initially at the casual loading rate of 25 per cent. A new clause 30.3 should be inserted which reads:

*30.3 Casual employees will be provided with a minimum of 10 hours between the finish of ordinary hours on one day and the commencement of ordinary hours the next day or shift. If the casual employee is not provided with a 10 hour break between shifts any time worked must be paid as overtime until the employee has received a break of at least 10 hours.*

An 8 hour break is permissible for full time and part time employees in the case of changeover or rosters. As casual employees are excluded from the roster, this concession is not necessary.

### **The Clubs Award**

39. A new clause 10.5(e) is sought which will read:

*(e) Casual employees are paid at overtime rates for:*

- (i) all time worked in excess of 38 hours per week;*
- (ii) all time worked which exceeds 10 hours per day subject to clause 28.4; or*
- (iii) all time in excess of 10 hours which is part of a continuous or broken shift.*

40. Clause 28.1 needs to be amended to make it apply generically to *'employees'*.

41. Clause 28.2 sets the rate for overtime payments and a new clause 28.2(f) is sought to clarify that casual employees are within the scope of the clause. An amendment is further sought to clause 28.7 to ensure that casual employees receive the same meal allowance as permanent employees when required to work overtime.

42. Clause 28.4 of the Clubs Award which deals with the necessary break required between shifts is phrased in terms of *'employees'* and requires *'that the employee has had 10 hours' rest*

*before the employee's next regular starting time'. No amendment to this subclause is required.*

### **The Restaurant Award**

43. New clauses 33.1(c), (d) and (e) are sought for the Restaurant Award:

*(c) All time worked by casual employees in excess of 38 hours per will be paid at overtime rates.*

*(d) All time worked by casual employees which exceeds 10 hours per day, will be paid at overtime rates subject.*

*(e) All time worked by a casual employee in a continuous or broken shift which exceeds 10 hours will be paid at overtime rates.*

44. Clause 33.2 determines the rate at which overtime is paid. It requires no amendment as it is phrased in terms of 'employees' other than a clarification at proposed clause 33.2(e) that for casual employees 'the ordinary base rate of pay will be their ordinary rate of pay exclusive of the casual loading.'

45. Any reference to clause 33.4 is not necessary. As clause 33.4 is phrased in terms of 'employees' it will apply to both the proposed clause 33.1(d) and subclause (e).

46. Clause 31.5 requires amendment. This clause deals with the need for a 10 hour break before ordinary time recommences. The exclusion 'other than casual' should be deleted from clause 31.5. Casual employees will always require a 10 hour break because, as they are excluded from the roster, the provision allowing an 8 hour break in the case of changeover of rosters cannot apply to them. A reference to the roster should also be deleted. Consequently, the proposed clause 31.5 reads:

#### **31.5 Minimum break between shifts**

*For all employees a minimum 10 hour break must be provided between the finish of ordinary hours on one day or shift and the commencement of ordinary hours on the following day or shift. In the case of changeover of rosters, eight hours will be substituted for 10 hours.*

47. The phrase 'or shift' has been added. We understand that the custom and practice was that a 10 hour break between shifts was mandated by the clause and this is evident from the heading of the clause. It is desirable that the text of the clause is clear on its face.

### Part 3

#### The proper approach to this application

48. Paragraphs 56 to 64 in our submission of 29 February 2016 are relied on.
49. The Variations are made in the context of the first 4 yearly review of modern awards under the Act. The task of the Full Bench is governed by statute. Section 156 of the FW Act sets out the requirement to conduct the review. The Commission has broad discretion as to the conduct of the review, but each modern award must be reviewed in its own right.<sup>16</sup> The Commission must ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective set out in s 134(1) of the Act.
50. The Act provides that the Commission must conduct a four yearly review of modern awards (s 156(1)). Section 156(2) deals with what has to be done in a review:
- (2) *In a four yearly review of modern awards, the FWC:*
    - (a) *must review all modern awards; and*
    - (b) *may make:*
      - (i) *one or more determinations varying modern awards; and*
      - (ii) *one or more modern awards; and*
      - (iii) *one or more determinations revoking modern awards.*

51. In *Re Four Yearly Review of Modern Awards –Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 ('Jurisdictional Issues Decision') the Full Bench identified that in addition to section 156 a range of other provisions in the Act are relevant to the review. Those provisions included the objects of the Act (s. 3), the interaction with the NES (s. 55) and those provisions providing for the performance of functions and exercise of powers by the Commission (ss. 577 and 578).<sup>17</sup>

52. Section 577 relevantly provides, amongst other matters, that the Commission must perform its functions and exercise its powers in a manner that is fair, just, open and transparent. Section 577 also requires the Commission to operate in manner that is '*quick, informal and avoids unnecessary technicalities*'. Section 578 relevantly provides that in performing functions or

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<sup>16</sup> *Fair Work Act 2009* (Cth), s 156(5).

<sup>17</sup> *Four Yearly Review of Modern Awards–Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at para 10.

exercising powers, in relation to a matter (including a review), the Commission must take into account: the objects of the Act; equity, good conscience and the merits of the matter; and the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination.

53. Subsection 156(5) provides that in a review each modern award is reviewed ‘*in its own right*. However this does not prevent the Commission from reviewing two or more modern awards at the same time.<sup>18</sup>
54. Whilst the Commission may review the Hospitality Awards together, it must in assessing the Variations sought review each of those awards in their own right. It is nevertheless both appropriate and permissible to address issues on the basis that they have relevance across all or a number of modern awards and make findings that have application across more than one modern award. In the case of the Hospitality Awards, due to the similarity of the industries that they cover and that many substantive provisions of each award are identical or very similar, it is appropriate to treat evidence and material strictly relevant to one of the awards as relevant to the others. It is noted that the Bench has chosen to group these Awards in consideration of other matters put before it as part of the four yearly review.
55. In relation to the Variations, what is sought in each award is the creation of a broadly identical overtime entitlement for casual employees where there is currently no entitlement. Lastly, on the basis of the universally accepted disability associated with long hour of work, the Variations seek to apply an overtime provision that is reasonably comparable with the standard applied in most other modern awards.

#### **The historical context & previous decisions**

56. In conducting a review the Commission must also have regard to the historical context applicable to each modern award.<sup>19</sup>
57. It is proper to accept that in the broadest sense, when reviewing modern awards, that at the time the award was made, it was consistent with the modern awards objective.<sup>20</sup> A related argument that is often put by those opposing change is that a particular modern award requires no change because the instrument was the product of award modernisation and therefore complied with the modern awards objective in all respects then and now. These arguments are put with varying degrees of sophistication and frequently demand a substantial change in circumstances before any change is possible.

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<sup>18</sup> Ibid at para 8.

<sup>19</sup> Ibid at para 24.

<sup>20</sup> Ibid.

58. First, such an argument begs the question of why the Parliament has directed the Commission to conduct 4 yearly reviews. The regular 4 yearly review cycle provided for by s. 156 of the Act demands that the Commission ‘*must*’ review all modern awards and may vary, revoke, or make a modern award. The Full Federal Court in *National Retail Association v Fair Work Commission* [2014] FCAFC 118 (11 September 2014) observed in relation to the 2 yearly transitional review (at paras. 19-20):

*19. The absence of any requirement for formal hearings and any mandated role for the industrial parties affected, together with the mammoth task given to the AIRC (in Award Modernisation) and the relatively short period in which it was required to be completed, provide some indication of the underlying rationale for the transitional review.*

*20. That rationale was explained in the Second Reading speech to the Bill which became the Transitional Act. The Minister for Employment and Workplace Relations relevantly said:*

*Further, the Bill provides for Fair Work Australia to conduct a bedding-down review of modern awards after two years of their operation – that is, from 1 January 2012 – ahead of the regular four-yearly review cycle. This will allow any necessary refinements to modern awards to be made to ensure they are meeting the modern awards objectives and are operating effectively without anomalies or technical problems.*

*This transitional review will complement the four-yearly review of modern awards set out in the substantive Fair Work legislation and will allow any operational difficulties to be identified and remedied swiftly.*

59. Second, the only legislative assumption, made through the deeming provision in item 4 of the Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), was that a modern award made pursuant to the award modernisation process was a modern award for the purposes of the Act and there is no absolute acceptance that such an award made was meeting the modern awards objective. In the context of the 2 yearly transitional review the Full Bench observed that awards made as a result of award modernisation demonstrated a legislative acceptance that the terms of the existing modern award are consistent with the modern awards objective.<sup>21</sup> The Full Bench in the 2014 Jurisdictional Issues Decision clearly indicated that the 4 yearly review ‘*will proceed on the*

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<sup>21</sup> *Re Modern Awards* [2012] FWAFB 5600; 223 IR 49, at 69.

basis that *prima facie* (emphasis added) the modern award being reviewed achieved the modern award objective at the time it was made'.<sup>22</sup>

60. Thirdly, the modern awards objective can be changed and in the context of the Variations a significant change has occurred since the 2 yearly transitional review by the insertion of the paragraph 134(1)(da) consideration on 1 January 2014.
61. Further, alleged historical industrial practice and conduct within a particular industry is not decisive. The Respondents notes at paragraph 32 of their submission that it '*is well established that the application of overtime entitlements in the Hospitality Industry does not extend to casual employees*'.<sup>23</sup>
62. The Respondents further seeks to highlight the significance that the current Hospitality Awards were '*made*' with the consent of the Applicant. The Respondents notes (para 50) that when the Hospitality Awards:

*... were made, the Union was satisfied that the then existing Awards used as a basis for the establishment of the modern awards, provided an appropriate safety net for the employees in those industries.*

63. These statements provide little assistance in determining whether a particular modern award now complies with the modern awards objective. The Variations are not seeking to re-agitate something that has recently been arbitrated or determined on its merits. The issue of whether casual employees covered by the Hospitality Awards should have an entitlement to overtime was not a matter that was the subject of any contest between the participants in award modernisation including any particularly scrutiny by the Full Bench.
64. The only available instance when the issue appears to have been arbitrated is in a 1979 decision of Commissioner Bracks concerning Variations to the then federal *Hotel and Retail Liquor industry Award 1975*<sup>23</sup> quote in the Respondents' submission at paragraph 37. Commissioner Bracks did refuse an application by the union for a provision entitling casual employees to overtime but part of the reasoning of Commissioner Bracks in refusing the claim was that under this award the rate payable to casual employees was superior to that paid to weekly employees. Some penalties were clearly culminative under this award: casual employees received a 75 per cent loading on Saturdays whereas weekly employees only 50 per cent; and for Sunday work, a casual employee received a loading of 100 per cent whereas this was the maximum overtime rate for weekly employees.<sup>24</sup>

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<sup>22</sup> *Four Yearly Review of Modern Awards—Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at para. 24.

<sup>23</sup> *Decision Hotels and Retail Liquor Industry Award 1975* (1979) 16 CAR 794.

<sup>24</sup> *Ibid* at p.804.

65. There are no recent instances where the issue of overtime for casual employees has been arbitrated or in any sense disputed. Accordingly, the Variations are not seeking a fresh assessment of a matter that has recently been determined.
66. Award histories demonstrate that this Full Bench is not being asked to depart from a recent relevant decision. Award histories in the predecessor awards to the Hospitality Awards should also be assessed in terms of the current practice across the modern award system where the provision to casual employees of overtime can be described as a standard form of entitlement. One of the features of the modern award system is that comparisons across the modern awards system are increasing more relevant than historical and intra-industry comparison which dominated past arbitral practice.
67. Lastly, the focus by the Respondents in their submission on the past behaviour of stakeholders also disregards the fundamentally different paradigm in which modern awards operate and the role of the Commission in their ongoing review. Employer and employee organisations are not bound by modern awards or parties to them but covered by them and capable of enforcing rights under these instruments generally. Modern awards also do not name any parties.<sup>25</sup> The Full Federal Court in *National Retail Association v Fair Work Commission* noted that in comparison with the traditional award making function of Federal tribunals, the powers exercised during award modernisation were ‘novel’.<sup>26</sup> The Australian Industrial Relations Commission (‘AIRC’) was given very wide discretion to determine both the contents of modern awards and the procedure by which it would perform the award modernisation function. There was no requirement for hearings to take place and no mandated role for industrial parties in relation to the ‘mammoth task’ given to the AIRC.’<sup>27</sup>
68. Lastly, the Parliament has directed the Commission to ‘ensure’ modern awards comply with the modern awards objective. The review role given to the Commission is intrinsically a progressive one. As further noted below in discussion of paragraph 134(1) (da), the role of the Commission is to review modern awards in terms of what are the standards at the time of the review. Past behaviour by industrial organisation in consenting to or not disputing what was the perceived *status quo* is irrelevant when there are current matters clearly relevant to the Commission’s statutory duty.

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<sup>25</sup> *Re Request from the Minister for Employment and Workplace Relations – Award Modernisation* [2008] AIRCFB 1000 at paras 14–15.

<sup>26</sup> *National Retailers Association v Fair Work Commission* (2014) 225 FCR 15, para. 18 (per Collier, Bromberg, Katzman JJ).

<sup>27</sup> *Ibid.*

## The modern awards objective – discretion and necessity

69. Section 134(1)(a) to (h) factors in the modern awards objective are ‘*broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)*’.<sup>28</sup> The criteria ‘*do not set any standard against which a modern award could be evaluated*’ and many of them are properly described as ‘*broad social objectives*’.<sup>29</sup>
70. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of the matters set out must be treated as a matter of significance in the decision making process.<sup>30</sup>
71. In circumstances where the nature of the modern awards objectives are broadly expressed, and there are a range of considerations which the Commission must take into account, there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.<sup>31</sup>
72. Section 138 of the Act relevantly provides:

*138 A modern award may include terms that it is permitted to include, and must include terms that it is **required to include, only to the extent necessary to achieve the modern awards objective** and (to the extent applicable) the minimum wages objective. (Emphasis added).*

The effect of s. 138 is that there is a category of terms within a modern award that must be included as ‘*necessary to achieve the modern awards objective*’.

73. Justice Tracey in *Shop, Distributive and Allied Employees Association v National Retail Association* (No. 2) [2012] FCA 480 noted (at para 46):

*... a distinction must be drawn between what is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.*

74. What is ‘*necessary*’ in a particular case is a value judgment based on an assessment of the considerations in subsection 134(1), having regard to the submissions and the evidence

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<sup>28</sup> Ibid at para. 109 (per Collier, Bromberg, Katzman JJ).

<sup>29</sup> Ibid.

<sup>30</sup> *Four Yearly Review of Modern Awards—Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at para. 31 citing *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 and *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 and *Edwards v Giudice* (1999) 94 FCR 561.

<sup>31</sup> Ibid at para. 34.



directed to those considerations.<sup>32</sup> What is necessary is also referable to the specificity of the consideration within the modern awards objective. When, for example, a consideration demands that additional remuneration be provided for working overtime, the task of the Commission in conducting its review is directly informed by a clear direction of the Parliament, this distinguishes the paragraph 134(1)(da) consideration from broad social objectives that may be realised in a wide variety of ways.

75. When a variation is squarely aimed at a specific consideration within the modern awards objective, the Commission is obliged to identify what terms of the modern award in any sense are giving effect to the particular consideration. If after a proper review, the Commission is unable to find any term or identifies terms that are inadequately giving effect to the consideration, the Commission's intervention is necessary. There is considerable discretion as to how a necessary term can be made but no real discretion in relation to remedying a deficiency. Section 138 demands that a modern award *'must include terms that it is required to include'*.

#### **The new paragraph 134(1)(da) consideration**

76. Section 134(1)(da) was inserted by the *Fair Work Amendment Act 2013*(Cth) with effect from 1 January 2014.

77. Section 134(1)(da) provides that the Commission is to take account of:

*(da) the need to provide additional remuneration for:*

*(i) employees working overtime; or*

*(ii) employees working unsocial, irregular or unpredictable hours; or*

*(iii) employees working on weekends or public holidays; or*

*(iv) employees working shifts...*

78. The Explanatory Memorandum to the *Fair Work Amendment Bill 2013* stated, in respect of the addition of subsection 134(1)(da):

*This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.*

79. Clearly, by operation of the insertion of s. 134(1) (da), Parliament intends that the assessment required by s. 134(1) of the Act to ensure that modern awards, together with the NES provide a fair and relevant minimum safety net of terms and conditions, must expressly consider the need to provide for additional remuneration for *'employees working*

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<sup>32</sup> Ibid at para. 36.

*overtime* and *'unsocial, irregular or unpredictable hours'*. Those being hours that impact on work/life balance and the enjoyment of life outside of work and are also recognised as associated with some disability.

80. For casual employees, who make up a large component of hospitality workers, the only measures that are currently directed towards paragraph 134(1)(da) in the Hospitality Awards are the penalty rates provisions in each of the awards. The penalty rates provisions also apply to permanent employees and these employees also have access to overtime.
81. As noted in our original submission, any attempt to say overtime is included in the casual loading (paragraphs 35-36) is not supported by the decisions and judgments that discuss and analyse the components of what comprises the 25 per cent loading. The 25 per cent loading as determined by the Full Bench of the AIRC in *Re Metals, Engineering and Associated Industries Award* 1998<sup>33</sup> is broadly accepted as the current industrial standard for modern awards.<sup>34</sup>
82. The absence of any entitlement to overtime for casual employees is not explicable in terms of any other provisions in the Hospitality Award that compensates casual employees for the absence of this entitlement. The absence of this entitlement cannot be explained in terms of different combinations or permutations of provisions that somehow achieve an appropriate safety net outcome. No such provisions exist. However, this absence of entitlement can be properly identified as a deficiency of a required term that is necessary to ensure that these employees have a fair and relevant safety net of terms and conditions
83. Accordingly, the absence of any entitlement to additional remuneration for work that would elsewhere be classified as overtime for casual employees under the Hospitality Awards and paragraphs 134(1)(da) makes the creation of some entitlement to overtime for casual employees necessary if these modern awards are to achieve the modern awards objective as demanded by s. 138 of the Act.

#### **Paragraph 134(1)(e) consideration**

84. Paragraph 134(1)(e) requires the Commission to ensure that modern awards in the provision of a fair and relevant safety net take into account *'the principle of equal remuneration for work of equal or comparable value'*.
85. In each of the Hospitality Awards permanent employees enjoy an entitlement to overtime from which casual employees are excluded. It is trite to say but casual employees are subject to the same classification structure as permanent employees and their work is in every sense equal and of comparable value. Currently, in circumstances where a permanent employee is

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<sup>33</sup> (2001) 105 IR 27.

<sup>34</sup> *Re Request from the Minister for Employment and Workplace Relations – Award Modernisation* [2008] AIRCFB 1000 at para. 49.

paid a premium in the form of overtime, a casual employee performing identical work will not be paid this premium and there is a clear lack of equal remuneration for work of equal or comparable value.

86. Section 12 of the Act defines 'equal remuneration for work of equal or comparable value' with reference to subsection 302(1) of the Act. The subsection reads:

*Equal remuneration for work of equal or comparable value means equal remuneration for men and women workers for work of equal or comparable value.*

87. Women are disproportionately represented within the cohort of casual hospitality employees. Dr Oliver's report provides the available statistical data for employees in accommodation and food services with no paid leave entitlements and those with paid leave entitlements by sex.<sup>35</sup> For ease of reference, we have produced a table which is **Annexure B** that provides the percentage differences in the gender break up of these employees. Female employees with no paid leave entitlements are consistently more than 60% of the workforce. Employees with paid leave entitlements have a more gender neutral distribution although there is still a discernible bias to female employees. The gender discrimination in the distribution of paid leave entitlements in the hospitality industries is not gross but there is a clear gendered difference in the distribution of employees with and without paid leave entitlements that invites the Commission's intervention under the paragraph 134(1)(e) consideration.
88. There is no requirement for a comparator as required for an order under s. 302 of the Act for the gendered nature of the inequality noted here to be relevant. The Full Bench in the *Equal Remuneration Decision* [2015] FWCFB 8200 at paragraph 292 observed:

*[292] Our conclusion that Part 2–7 requires a comparator group of the opposite gender does not exclude the capacity to advance a gender-based undervaluation case under the FW Act. We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s.156(3) or s.157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s.156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland*

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<sup>35</sup> Oliver, pp.9 to 10.

*jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s.156(3) or s.157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.*

89. Overtime is not a component of what the Act terms ‘modern award minimum wage’ as subsection 284(3) notes the rate of minimum wages comprises ‘wages ... casual loadings and piece rates.’ While the creation of access to a penalty will have the practical effect of increasing remuneration, the structure and scope of penalties are not work value issues. Despite this, the Commission’s comments concerning the relevance of gender-based undervaluation noted above are still relevant to the modern awards objective. The presence of the paragraph 134(1)(c) consideration within the modern awards objective without any qualification is significant.

#### **Sections 62 and 147**

90. The Jurisdiction Issue Decision clearly indicated that a range of matters in addition to the modern awards objective are relevant in a 4 yearly review and one relevant matter is the NES and the Hospitality Awards’ interaction with the NES.<sup>36</sup> Section 55 of the Act provides that a modern award must not exclude the NES or any provision of the NES and applies the now well established principle that modern awards can alter the NES provided that the treatment is more beneficial and can be characterised as not detrimental to the employee.

91. Subsection 62(1) of the Act notes:

#### ***Maximum weekly hours***

#### ***Maximum weekly hours of work***

*(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:*

*(a) for a full-time employee--38 hours; or*

*(b) for an employee who is not a full-time employee--the lesser of:*

*(i) 38 hours; and*

*(ii) the employee's ordinary hours of work in a week.*

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<sup>36</sup> *Four Yearly Review of Modern Awards--Preliminary Jurisdictional Issues [2014] FWCFB 1788 at para. 10.*

*Employee may refuse to work unreasonable additional hours*

92. Section 62 is part of the NES and posits 38 hours as the maximum weekly hours. The provision clearly is intended to apply to casual employees by force of paragraph 62(1)(b)(1).

93. Section 147 of the Act provides as follows:

***Ordinary hours of work***

*A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.*

94. Section 147 appears to be principally in aid of s. 62. The term ‘ordinary hours’ is not generally defined in the Act although s.16 provides that:

*(1) The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:*

*(a) incentive-based payments and bonuses;*

*(b) loadings;*

*(c) monetary allowances;*

*(d) overtime or penalty rates;*

*(e) any other separately identifiable amounts.*

95. Further s. 20 provides as follows:

***Meaning of ordinary hours of work for award/agreement free employees***

***Agreed ordinary hours of work***

*(1) The ordinary hours of work of an award/agreement free employee are the hours agreed by the employee and his or her national system employer as the employee's ordinary hours of work.*

***If there is no agreement***

*(2) If there is no agreement about ordinary hours of work for an award/agreement free employee, the ordinary hours of work of the employee in a week are:*

*(a) for a full time employee--38 hours; or*

*(b) for an employee who is not a full-time employee--the lesser of:*

(i) 38 hours; and

(ii) the employee's usual weekly hours of work.

96. These provisions have general application and apply to casual employees although the main practical function of the concept of ordinary hours relates to the calculation of NES entitlements that only apply to permanent employees.
97. These NES standards indicate that modern awards *'must'* include terms that provide for some differentiation in the duration of hours worked by employees and that work in excess of an employee's ordinary hours should attract some premium. Ordinary hours cannot be greater than 38 in a week. One of the reasons that there is not a general definition of ordinary hours is that an employee's ordinary hours are generally determined by the hours of work that do not attract overtime and the instrument will usually determine when overtime applies.
98. There is nothing in the Hospitality Awards directed to casual employees' maximum hours or ordinary hours. The undifferentiated nature of the hours of work for casual employees under the Hospitality Awards is problematic.
99. An employer can direct a casual employee to work in excess of 38 hours a week during week days and the work would be paid at the same rate. Casual hospitality employees have the NES right to refuse the additional work if the direction can be characterised as unreasonable. A factor in determining whether a direction to work additional hours is reasonable is *'whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours'*.<sup>37</sup> Currently, the Hospitality Awards require casual employees to disobey a direction of their employer and then activate an uncertain and obscure industrial right to establish their maximum and ordinary hours of work.
100. The absence of any provision in the Hospitality Awards to indicate that work beyond a certain weekly duration attracts some premium raises real concerns that s. 62 is excluded for casual employees and that the Hospitality Awards offend s. 55. An intraweek overtime provisions as proposed is the obvious term within a modern award that will be directed to section 62 and overcome concerns that an NES right has been excluded.

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<sup>37</sup> Paragraph 62(3) (d).

## Part 4

### The Evidence

#### Olav Muurlink

101. Dr Muurlink, an academic social psychologist, gave expert evidence and provided a report titled *'Impacts of intraday or intraweek overtime on physical and psychological health'*. The report addressed the generic disability associated with the patterns of work that the Variations seek to cover. Dr Muurlink conducted a comprehensive literature review directed to examining the physical and psychological impacts of working more than 10 hours in a single day or night and working more than 38 hours in a single 7 day period with a particular reference to hospitality workers.

102. Dr Muurlink notes that his report relied largely on studies outside the hospitality industry and that most of the research tended to focus on high value industries but:

*... the spread of studies across industries suggest there is a genera effect. In fact I would go further and suggest that findings arising from research in to 'high value' industries such as medical care are likely to be amplified in blue collar settings, and even more so in the field of casual (as opposed to permanent) work. A key finding in this regard is that casual employees in five star hotels in Sydney describing experiencing markedly lower sense of control than permanent.<sup>38</sup>*

103. Dr Muurlink also observed that a greater sense of control is one of the key variable associated with better health outcomes and *'the hospitality industry is also marked by a relatively larger proportion of more unusual hours.'*<sup>39</sup>

104. In relation to intraday working hours, Dr Muurlink concluded that the literature demonstrated that intraday working durations greater than an 8 hours saw a rise in risks (both physical and psychological) associated with the duration of work, these risks increased the longer the individual worker and the risks rose steeply after 10 hours was worked in a day.<sup>40</sup>

105. In relation to intraweek working hours, Dr Muurlink observed that the evidence was overwhelming that intraweek working hours in excess of 48 have a deleterious effect on health and that there is mounting evidence that workloads in excess of 40 hours a week have serious health implications.<sup>41</sup> Most of the studies reviewed by Mr Muurlink used 40 hours a week as the intraweek standard as it is the standard working week in most countries.<sup>42</sup> In relation to intraweek

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<sup>38</sup> Muurlink, p.3.

<sup>39</sup> Muurlink, p.3.

<sup>40</sup> Muurlink, pp. 9-10 and p. 16.

<sup>41</sup> Muurlink, p.16.

<sup>42</sup> Muurlink, p.11.

work hours, reductions in hours were found to have an important beneficial effect particularly on 'recovery'. Dr Muurlink observed:

*The period of recovery required is thus a reasonably reliable marker of the degree of fatigue accrued. So the evidence that men working over 40 hours a week report needing significantly more recovery time than those working between 36-40 hours a week, suggesting that there is an optimal level for working time ... is particularly pertinent to this report. Studies that look at the impact of a reduction in work are again a useful alternative way to look at the question. Berniell (2012) took advantage of changes in working hours in France to examine this effect. She found that for an average reduction in working time of 3.5 hours the probability of smoking dropped by 4.3%, and for each additional hour spent not working, the chance of engaging in sport rose by 2.2%. An Australian study conducted in the construction industry (Brown, Bradley, Lingard, Townsend, & Ling, 2010) looked at a particular group of workers who had their number of days worked reduced from six to five days a week, while holding working hours constant. The study showed improvements in work-life balance.<sup>43</sup>*

89. As noted above, the issue of the appropriateness of 38 hours a week as the criterion for overtime for intraweek periods is in effect legislated by s. 62 of the Act which clearly indicates that 38 is the maximum weekly hours of work and any work beyond this point can be potentially considered unreasonable additional hours.

**Dr Damian Oliver**

106. Dr Damian Oliver, deputy director, Centre for Management and Organisational Studies, University of Technology, gave expert evidence and provided a report titled '*Characteristics of casual and part-time hospitality employees*' which addressed the level of casual, part time and permanent work in the hospitality industry, average working hours, income, tenure, demographic characteristics and patterns of work.
107. Dr Oliver's report found persistently high levels of casualisation in the accommodation and food services industries with the proportion of the workforce engaged casually between 63 and 67 per cent since 2006. Casual workers also have a high rate of award reliance. Close to 60 per cent of casual employees' conditions are set by the award and casual employees are significantly more award reliant when compared with full and part time employees (25.1 per cent and 35.4 per cent respectively).<sup>44</sup>

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<sup>43</sup> Muurlink, p. 15.

<sup>44</sup> Oliver, p. 23.



108. A reasonable inference from Dr Oliver's evidence is that many casual employees work hours that would attract overtime should the Variations be made. Since 2011, over 14 per cent of casual employees in hospitality have averaged more than 38 hours a week.<sup>45</sup> The average weekly hours of casual employees are consistently around 20 per week<sup>46</sup> and the median number of days worked by casual employees per week is 3.<sup>47</sup> Median average shifts lengths for casual employees were 6 hours.<sup>48</sup> This is in the context of the minimum engagement for casual employees is 2 hours, the median weekly days worked is 3 and the average weekly hours worked is 20.

### **Keith Harvey**

109. Keith Harvey's tendered statement<sup>49</sup> focussed on agreement making and award reliance in the hospitality sector. The evidence of Keith Harvey indicates that the hospitality industry and related sectors are the most award-reliant industries in the Australian economy with more than half of all employees paid no more than the award rate of pay<sup>50</sup> and hospitality employees are the lowest paid group of employees in Australia.<sup>51</sup> The evidence of Keith Harvey also indicated that collective bargaining, when it was occurring in hospitality, is not providing the expected uplift in remuneration and most recent statistical data from the Australian Bureau of Statistics indicated that *'accommodation and food services employees paid by collective agreement are paid less than those paid award rates of pay.'*<sup>52</sup> Keith Harvey's investigation of the data also demonstrated that there appears to have been a significant decline in agreement making in the sector.<sup>53</sup>
110. The evidence of Keith Harvey is relevant to paragraph 134(1)(a) – *'relative living standards and the needs of the low paid'* in relation to the making of the Variations. Further, the material provides some basis to say the Variations are necessary due to the apparent failure of bargaining in this sector to provide hospitality employees with better living standards.

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<sup>45</sup> Oliver, p. 16.

<sup>46</sup> Oliver, p. 16.

<sup>47</sup> Oliver, p. 23.

<sup>48</sup> Oliver, p. 24.

<sup>49</sup> Exhibit 288.

<sup>50</sup> Harvey, at para. 8.

<sup>51</sup> Harvey, at para. 28.

<sup>52</sup> Harvey, at para. 29.

<sup>53</sup> Harvey, at paras 40 to 41.

## **Jack Gibney**

111. Jack Gibney made a statement and gave evidence.<sup>54</sup> Mr Gibney is a university student and works a casual bartender under the Hospitality Award for a number of venues. At the time of his oral evidence he had changed employers but was still a casual bartender. He quite regularly worked shifts that commenced at 5pm and ended sometime after 3am and on at least on occasion demonstrated by the evidence work in excess of 46 hours in a week.<sup>55</sup>

112. Mr Gibney noted:

*The downside of working long shifts is fatigue. After working successive long shifts it takes me a few days afterwards to properly recover. This affects my performance at university and it is not until mid-week that I start to feel normal and functional again. Also the late nights interfere with my normal sleeping patterns, as usually I would go to sleep much earlier than 3am to be awake in time for my 9am lectures.<sup>56</sup>*

113. One of the features of Mr Gibney's pattern of work was that he had rostered start times but no rostered finish times.<sup>57</sup>

114. Mr Gibney considered that the Variations would affect him in the following ways:

*I will take home more pay and be able to work less and focus more on my studies. However, I believe my employer would hire more people for fewer hours to avoid the additional cost, which means I may not actually end up with more pay. The benefit of this however is that if I work shorter shifts I will be less tired for university.<sup>58</sup>*

## **Padriajona Hilario Alvero**

115. Ms Alvero provided a statement and gave evidence.<sup>59</sup> Ms Alvero had broad experience working in hospitality as a chef and had worked in clubs, hotels and restaurants in the Australian Capital Territory. In her statement she deposes to her then work as a casual chef under the Restaurants Award but it clear from her evidence that she would have also worked casually as a chef under both the Clubs Award and the Hospitality Award.

116. Ms Alvero noted that her pattern of work was 'erratic' and that her 'roster is regularly changed at short notice (and) this can result in cancelled shifts or call ins'.<sup>60</sup> Ms Alvero noted that during

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<sup>54</sup> Exhibit 292, Statement of Jack Gibney, dated 24 February 2016. Transcript of proceedings at PN1491 – 1604.

<sup>55</sup> Transcript of proceedings at PN1574.

<sup>56</sup> Gibney, at para. 17.

<sup>57</sup> Gibney, statement, at para. 12 and 19; see also the tendered rosters: Exhibit 293.

<sup>58</sup> Statement, Gibney, [21] to [23].

<sup>59</sup> Exhibit 294, statement of Ms Alvero, 29 February 2016; Transcript of proceedings PN1626 – 1728.

<sup>60</sup> Statement, Alvero, [10] to [11].

holiday periods she would regularly work very long shifts and occasionally a 14 hour shift. At the end of her 14 hour days, Ms Alvero said:

*I felt like a wreck, like I was dying. I then drove home and this was dangerous because I was falling asleep.*<sup>61</sup>

117. Ms Alvero expressed some trepidation in refusing additional work when asked to work long shifts by her employer.<sup>62</sup>

118. Ms Alvero noted:

*I support any move to have casuals paid overtime. I think that if you work for 12 or 14 hours a day you should be paid extra. It is a real burden to work such long shifts. If employers had to pay over time for long shifts, I believe that they would be more careful about asking casual staff to stay back and work longer hours. Currently there is no disincentive for employers to roster a casual employee for long shifts during busy periods.*<sup>63</sup>

119. Anecdotally, the evidence of both Ms Alvero and Mr Gibney supported the observations made by Dr Muurlink that casual hospitality work in comparison with other types of work has a relatively larger proportion of more unusual hours and a diminished sense of control as a result of erratic roster patterns.<sup>64</sup> Both these witnesses had rostered starts but would be asked or directed to remain for longer periods than anticipated if the venue was busy. As Dr Muurlink observed ‘unusual hours’ and lack of control over one’s working routine amplified the disability associated with long hours of work.<sup>65</sup>

#### **Absence of any evidence disputing the Variations**

120. The Respondents have not filed any evidence and only presented a submission contesting the Variations. While this jurisdiction is one where the rules of evidence do not apply and the Commission is required to perform its function in a manner that is ‘quick, informal and avoid unnecessary technicalities’ (s. 577) there are some comments that should be made concerning the state of the evidence.

121. On 21 January 2016, a directions hearing took place which was conducted by Vice President Hatcher concerning the progression of these claims. The Australian Hotels Association, Motor Inn and Motels Accommodation Association, Clubs Industrial, the Restaurant and Catering Association and the NSW Business Chamber appeared. No issues were raised concerning the filing of evidence by any of the employer groups present.

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<sup>61</sup> Statement, Alvero at para. 16.

<sup>62</sup> Statement, Alvero, at para. 15; Transcript of proceedings at PN 1714–1726

<sup>63</sup> Statement, Alvero, at para. 26.

<sup>64</sup> Muurlink, p. 3.

<sup>65</sup> Muurlink, p. 6.

122. On 18 February 2016, orders were made by the Full Bench concerning the filing of evidence and/or submissions. Any interested party that wished to adduce any evidence in reply was required to file such evidence by 24 June 2016.
123. On 29 February 2016, the Applicant filed a written submission and 5 witness statements and a number of reports.
124. On 24 June 2016, a submission by the Respondents was filed. The only evidence filed was a statement in reply in relation to a witness that The Applicant did not ultimately rely on. The Respondents are the 3 principal employer stakeholders for the Hospitality Awards, is represented by experience counsel and the submission is appropriately sophisticated.
125. The Respondents' submission does not indicate that it has elected not to file evidence but it can be reasonably inferred that such an election has been made.
126. The principle in *Jones v Dunkel* [1959] HCA 8 is relevant. The principle is generally that the unexplained failure by a party to present any evidence in reply that that party could have reasonably be expected to have called can lead to inferences that the uncalled evidence would not have assisted the party's case. Further the failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. It is acknowledged that the absence of a witness or document cannot be used to make up any deficiency in the evidence.
127. It can be assumed that the main focus of the Respondents' evidence would have been evidence from employers or their associations. It is not reasonable that the Applicant could have been expected to lead evidence from employers or employer industry associations as to how the Variations might affect them although the lay witnesses speculate as to how the Variations may impact on employer behaviour.<sup>66</sup>
128. Due to the absence of any evidence from employers, the Commission should be cautious in making any finding that there would be any adverse impacts on employers that will result from the Variations. In terms of the modern awards objective, the failure of the Respondents to call any evidence impacts most directly on paragraph 134(1)(f) – *'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'*.
129. In our first submission at paragraphs 74 and 75, we indicated that the Commission is entitled to come to certain conclusions concerning the beneficial impact of the Variations in terms of paragraph 134(1)(c) – *'the need to promote social inclusion through increased workforce participation'* of the modern awards objective. We indicated that the Commission is entitled to conclude that the Variations would, among other things, increase workforce participation as having to pay casual employees overtime would provide an incentive for employers to better plan

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<sup>66</sup> Exhibit 292, statement of Jack Gibney, 24 February 2016, paras 22 -23; Exhibit 294, Statement of Padriajona Hilario Alvera, 29 February 2016, at para. 26.

their labour needs and likely lead to employers hiring more employees to cope with periods of hire demand. The Variations would create a disincentive to over utilise casual employees. In our earlier submission we indicated that the Commission is entitled to come to this view on the basis of reasonable assumptions about rational employer behaviour and the statements made by our lay witnesses noted above. In the absence of any evidence from employers in these proceedings, the Commission can more readily come to reasoned conclusions concerning the likely impact of the Variations on work force participation and productivity. In relation to productivity and in light of the evidence of Dr Muurlink, the proper conclusion in relation to productivity is that the Variations would generally assist productivity. The Variations would be apt to create a healthier hospitality workforce and better planned responses to busy periods.

130. These matters are also inferences that can be properly drawn from the whole of the evidence.<sup>67</sup>

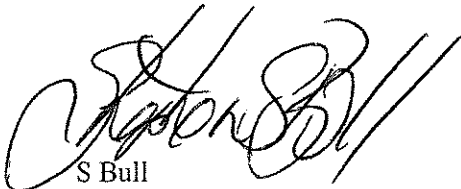
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<sup>67</sup> *Queen v Baden-Clay* [2016] HCA 35; in relation to inferences in industrial cases: *Maritime Union of Australia v Patrick Stevedores* [2013] FWCFB 7736 at paras 21-30.

## Part 5

### Conclusion

131. A sufficient merit case has been made by the Applicant to enable the Commission with reasonable prudence to make the Variations with some minor amendments. The Applicant has presented expert and lay evidence and in this submission and its earlier submission provided detailed material concerning the operation of the Hospitality Awards and sound and balanced reasons for the changes proposed.
132. The relevant considerations within the modern awards objective are paragraphs 134(1)(da) and (e) of the modern awards objective. Sections 62 and 147 of the NES are also relevant.
133. The necessity of the Variations flows principally from the exclusion of casual employees from any entitlement to overtime and the inability to indentify in the Hospitality Awards any term or condition that can be said to be directed to achieve additional remuneration for casual employees working overtime or compensate this category of employee for their disadvantageous treatment in comparison with permanent employees. The penalty rates that casual employees are entitled to under the Hospitality Awards only provide limited and inadequate additional remuneration and there is no impediment to employers over utilisation of casual employees beyond 38 hours a week.
134. A clear deficiency of a necessary term has been identified and, at least, in terms of intraweek overtime, the Hospitality Awards would appear to potentially exclude casual employees from the NES requirements concerning maximum weekly hours.
135. The appropriate manner in which these deficiencies should be remedied is by inserting explicit provisions entitling casual employees to intraday and intraweek overtime as is the norm in many modern awards.
136. The Variations with some amendment should be made by the Commission in this 4 yearly review.
137. We attach further amended variations for each of the Hospitality Awards for the assistance of the Commission.



S Bull

**United Voice**

**19 September 2016**

## Annexure A

### Employment status by Industry group (modified ANZSIC group), 2013 (%)

Industry	Casual Employee	Part-time employee	Full-time employee	Employer or Self-employed	Total
Agriculture, Forestry and Fishing	16.6	4.3	20.5	58.6	100.0
Mining	10.1	6.6	82.0	1.2	100.0
Manufacturing	15.3	10.2	61.3	13.2	100.0
Electricity, Gas, Water and Waste Services	7.6	23.4	69.0	-	100.0
Construction	13.7	4.9	46.4	35.0	100.0
Wholesale Trade	9.4	10.4	64.8	15.4	100.0
Retail Trade and Takeaway Food	42.9	25.3	24.4	7.4	100.0
Hospitality	62.2	10.1	19.8	8.0	100.0
Transport, Postal and Warehousing	18.5	11.2	58.8	11.5	100.0
Information Media and Telecommunications	13.3	21.7	55.1	9.8	100.0
Financial and Insurance Services	3.6	18.8	70.1	7.5	100.0
Rental, Hiring and Real Estate Services	13.9	22.1	50.8	13.2	100.0
Professional, Scientific and Technical Services	8.1	15.0	52.6	24.3	100.0
Administrative and Support Services	20.7	19.4	33.8	26.1	100.0
Public Administration and Safety	5.6	22.5	71.1	0.8	100.0
Education and Training	16.0	35.8	42.1	6.1	100.0
Health Care and Social Assistance	13.2	42.7	37.0	7.1	100.0
Arts and Recreation Services	35.8	21.7	28.7	13.8	100.0
Other Services	13.7	12.6	40.7	32.9	100.0
Total*	18.9	20.7	46.2	14.2	100.0

Note: Total includes could not be coded to an industry group.

Source: HILDA, wave 13

**Employees with and without paid leave entitlements by industry (ANZSIC), 2014**

Industry of main job	With paid leave entitlements		Without paid leave entitlements		Total
	N	%	N	%	N
Agriculture, forestry and fishing	57.1	51.0	53.2	47.5	112.0
Mining	204.3	90.5	24.9	11.0	225.8
Manufacturing	652.7	81.2	152.3	18.9	804.0
Electricity, gas, water and waste services	117.9	93.2	11.0	8.7	126.5
Construction	472.0	76.0	148.4	23.9	620.8
Wholesale trade	297.1	86.0	50.5	14.6	345.6
Retail trade	690.2	62.5	415.8	37.6	1,105.0
Accommodation and food services	254.2	36.8	435.2	63.0	690.8
Transport, postal and warehousing	392.0	77.7	111.7	22.1	504.7
Information media and telecommunications	162.0	82.4	35.4	18.0	196.5
Financial and insurance services	355.3	95.2	21.4	5.7	373.2
Rental, hiring and real estate services	132.5	82.4	27.8	17.3	160.8
Professional, scientific and technical services	587.2	87.1	87.5	13.0	674.2
Administrative and support services	177.4	67.5	83.6	31.8	262.9
Public administration and safety	634.6	89.8	70.8	10.0	706.3
Education and training	697.5	79.1	183.6	20.8	881.4
Health care and social assistance	1,047.6	81.4	240.6	18.7	1,287.7
Arts and recreation services	92.5	53.5	80.3	46.5	172.8
Other services	252.9	76.2	78.5	23.7	331.9
<b>Total</b>	<b>7,279.0</b>	<b>75.9</b>	<b>2,305.6</b>	<b>24.1</b>	<b>9,585.1</b>



Notes:

Rows do not add to 100% because of rounding in the ABS totals.

N= 1000s

The category '*Accommodation and food services*' includes fast food.

Source: *Characteristics of Employment (Australia)*, ABS Cat No 6333.0, August 2014, Table 3.1.

Tables prepared by Damian Oliver, 11 August 2016.

## Annexure B

*Gender distribution of Accommodation and Food Services by whether received paid leave entitlements, 2000-2014 (%)*

Year	With no paid leave entitlements		With paid leave entitlements		All employees	
	Males	Females	Males	Females	Males	Females
2000	35.0	65.0	54.4	45.6	43.2	56.8
2001	36.1	63.9	49.6	50.4	42.2	57.8
2002	34.7	65.3	52.2	47.8	42.3	57.7
2003	37.0	63.0	51.5	48.5	43.0	57.0
2004	35.8	64.2	54.6	45.4	43.6	56.4
2005	33.9	66.1	54.8	45.2	41.8	58.2
2006	36.6	63.4	47.4	52.6	40.5	59.5
2007	37.3	62.7	50.5	49.5	42.2	57.8
2008	39.8	60.2	49.5	50.5	43.2	56.8
2009	37.7	62.3	52.6	47.4	43.0	57.0
2010	38.3	61.7	53.9	46.1	43.5	56.5
2011	38.5	61.5	50.2	49.8	42.5	57.5
2012	39.2	60.8	53.4	46.6	44.2	55.8
2013	39.4	60.6	46.7	53.3	41.9	58.1
2014	39.1	60.9	47.7	52.3	42.2	57.8

Source: ABS Cat no 6310 (2000-2013), Cat no 6333 (2014)

Note: Data for 2000-2005 is based on ANZSIC 93 Category "Accommodation, Cafes and Restaurants" and excludes takeaway food services. Data for 2000-2006 includes owner managers of incorporated enterprises (OMIEs).

***Further Amended DRAFT DETERMINATION***

*Fair Work Act 2009*

Part 2-3, Div 4 – 4 yearly reviews of modern awards

**Hospitality Industry (General) Award 2010**

(MA000009)

**Casual employment**

(AM2014/197)

VICE PRESIDENT HATCHER

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT HAMBERGER

COMMISSIONER ROE

COMMISSIONER BULL

SYDNEY, XX YYY 2016

*Review of modern awards to be conducted.*

- [1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Hospitality Industry (General) Award 2010 be varied as follows.
- [2] Delete existing clause 13.1 and insert a new clause as follows:  
  
“13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% or overtime as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements of full-time or part time employment. Where casual employees are entitled to overtime, the overtime rate of pay is paid.”

- [3] Insert a new clause 30.3 as follows:

*“30.3 Casual employees will be provided with a minimum of 10 hours between the finish of ordinary hours on one day and the commencement of ordinary hours the next day or shift. If the casual employee is not provided with a 10 hour break between shifts any time worked must be paid as overtime until the employee has received a break of at least 10 hours.”*

- [4] Delete clause 33.1(a) and insert a new clause 33.1(a) as follows:

**“33.1 Reasonable overtime**

- (a) Subject to 33.1(b) an employer may require an employee to work reasonable overtime at overtime rates.”

- [5] Insert a new clause 33.2 (c) as follows:

**“(c)** A casual employee is paid at overtime rates for any work:

- (i) in excess of 38 hours per week;
- (ii) which exceeds 10 hours per day; or
- (iii) in excess of 10 hours which is part of a continuous or broken shift.”

- [6] Insert a new clause 33.3(a) (iv) as follows:

**“(iv)** In the case of a casual employee the normal rate of pay will be their rate of pay exclusive of the casual loading.”

- [7] Delete existing clause 33.3(c) and insert a new clause as follows:

**“(c) Overtime stands alone**

When computing overtime payments, each day or shift worked will stand alone.”

- [8] The determination shall operate on and from XX YYY 2016.

VICE PRESIDENT



## Further Amended DRAFT DETERMINATION

*Fair Work Act 2009*

Part 2-3, Div 4 – 4 yearly reviews of modern awards

### Registered and Licensed Clubs Award 2010

(MA000058)

#### Casual employment

(AM2014/197)

VICE PRESIDENT HATCHER

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT HAMBERGER

COMMISSIONER ROE

COMMISSIONER BULL

SYDNEY, XX YYY 2016

*Review of modern awards to be conducted.*

[1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Hospitality Industry (General) Award 2010* be varied as follows.

[2] Delete existing clause 10.5 (b) and insert a new clause as follows:

**“(b) Casual loading**

Casual employees will be paid the percentage at the ordinary hourly rate for the classification in which they are employed as prescribed in clause 29.1, which includes a 25% casual loading. The late and early work penalty prescribed in clause 29.4 for work between Monday and Friday also applies to casual employees. Where casual employees are entitled to overtime, the overtime rate of pay is paid.”

[3] Insert a new clause 10.5(e) as follows:

(e) Casual employees are paid at overtime rates for:

- (i) all time worked in excess of 38 hours per week;
- (ii) all time worked which exceeds 10 hours per day subject to clause 28.4; or
- (iii) all time in excess of 10 hours which is part of a continuous or broken shift.”

[4] Delete existing clause 28.1 and insert a new clause as follows:

“An employer may require an employee to work reasonable overtime at overtime rates.”

[5] Insert a new clause 28.2(f) as follows:

“(f) casual employees are paid overtime at the same rate as applicable to permanent employees.”

[6] Delete existing 28.3 and insert a new clause as follows:

“When computing overtime payments, each day or shift worked will stand alone.”

[7] Delete existing clause 28.7 and insert a new clause as follows:

“28.7 An employee required to work overtime for more than two hours without being notified on the previous day or earlier that they will be so required to work will be either supplied with a meal by the employer or be paid the allowance prescribed in clause 18.1(a)(i).”

[8] The determination shall operate on and from XX YYY 2016.

VICE PRESIDENT

***Further Amended DRAFT DETERMINATION***

Fair Work Act 2009

Part 2-3, Div 4 – 4 yearly reviews of modern awards

**Restaurant Industry Award 2010**

(MA0000119)

**Casual employment**

(AM2014/197)

VICE PRESIDENT HATCHER

SENIOR DEPUTY PRESIDENT HARRISON

SENIOR DEPUTY PRESIDENT HAMBERGER

COMMISSIONER ROE

COMMISSIONER BULL

SYDNEY, XX YYY 2016

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Restaurant Industry Award 2010 be varied as follows.
- [2] Delete existing clause 13.1 and insert a new clause as follows:
- “13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% or overtime as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements of full-time or part time employment. Where casual employees are entitled to overtime, the overtime rate of pay is paid.”
- [3] Delete existing clause 24.1 (a) and insert a new clause 24.1(a) as follows:
- “(a) An employee required to work overtime for more than two hours without being notified on the previous day or earlier that the employee will be so required to work will be supplied with a meal by the employer or paid a meal allowance of \$12.30.”



[4] Delete existing clause 31.5 and insert a new clause as follows:

**“31.5 Minimum break between shifts**

For all employees a minimum 10 hour break must be provided between the finish of ordinary hours on one day or shift and the commencement of ordinary hours on the following day or shift. In the case of changeover of rosters, eight hours will be substituted for 10 hours.”

[5] Insert new clauses 33.1(c) , (d) and (e) as follows:

“(c) All time worked by casual employees:

- (i) in excess of 38 hours per week; or
- (ii) that exceeds 10 hours per day, or
- (iii) in a continuous or broken shift which exceeds 10 hours,

will be paid at overtime rates .”

[6] Insert a new clause 33.2(e) as follows:

“(e) In the case of a casual employee the ordinary base rate of pay will be their ordinary rate of pay exclusive of the casual loading.”

[7] Delete existing clause 33.3 and insert a new clause as follows:

“33.3 When computing overtime payments, each day or shift worked will stand alone.”

[8] The determination shall operate on and from XX YYY 2016.

VICE PRESIDENT

## MODERN AWARDS AND ENTITLEMENT OF CASUAL EMPLOYEES TO OVERTIME

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
1. <b>Aboriginal Community Controlled Health Services Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 ordinary hours 10 per day or 38 per week.	Silent
2. <b>Aged Care Award 2010</b>	Yes	Yes	Overtime is paid when work exceeds 10 hours per day or 38 per week.	Silent
3. <b>Air Pilots Award 2010</b>	Yes	No	No overt overtime provisions but a comprehensive system of allowances related to occupational patterns of work that applies generally to employees.	No
4. <b>Aircraft Cabin Crew Award 2010</b>	Yes	Yes	Employees receive overtime under the various schedules to the award when they work in excess of ordinary hours or roster cycle maximums.	No
5. <b>Airline Operations-Ground Staff Award 2010</b>	Yes	Yes	Overtime paid when work exceeds 10 ordinary hours on any day or shift or 38 per week.	<i>'In computing overtime, each day's work stands alone'</i>

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
6. <b>Airport Employees Award 2010</b>	Yes	Yes	Overtime paid when work exceeds 10 ordinary hours on any day or shift or 38 per week.	Silent
7. <b>Alpine Resorts Award 2010</b>	Yes	No		
8. <b>Aluminium Industry Award 2010</b>	Yes	Yes	Overtime paid on work in excess of ordinary hours in roster cycle as advised by employer or 38 per week.	<i>'When computing overtime payments, each day or shift worked will stand alone.'</i>
9. <b>Ambulance and Patient Transport Industry Award 2010</b>	Yes	Yes	Overtime paid on work in excess of 38 per week.	No
10. <b>Amusement, Events and Recreation Award 2010</b>	Yes	Yes	Overtime work paid for work over 10 hours (12 for exhibition employees) per day or 38 hours per week.	Silent
11. <b>Animal Care and Veterinary Services Award 2010</b>	Yes	Yes	Overtime is paid when work exceeds 10 hours per day (plus meal breaks) or 38 per week.	<i>'In computing overtime, each day's work stands alone.'</i>
12. <b>Aquaculture Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or 38 per week.	<i>'In computing overtime each day's work will stand alone.'</i>

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>13.Architects Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 38 ordinary hours per week.	Silent
<b>14.Asphalt Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 ordinary hours per day (8 for shift workers) or 38 hours per week.	<i>'In computing overtime, each day's work will stand alone.'</i>
<b>15.Banking, Finance and Insurance Award 2010</b>	Yes	Yes	Overtime is paid for work over 38 ordinary hours per week (depending on averaging arrangements).	<i>'In computing overtime each day's work will stand alone.'</i>
<b>16.Black Coal Mining Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess 10 ordinary hours per shift (or longer agreed period) of 35 hours per week.	<i>'In calculating overtime, except for clause 17.7, each day is to be treated separately.'</i>
<b>17.Book Industry Award 2010</b>	Yes	Yes	Overtime is paid for all work in excess of 7.5 hours in any one day	Overtime is calculated on a weekly basis
<b>18.Broadcasting and Recorded Entertainment Award 2010</b>	Yes	Yes	Varies significantly from stream to stream	
<b>19.Building and Construction General On-site Award 2010</b>	Yes	Yes	Overtime is payable for time beyond an employee's ordinary time of work.	

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>20. Business Equipment Award 2010</b>	Yes	Yes	Overtime is payable for work in excess of 8 ordinary hours per day (or 12 if agreed) and 38 hours per week.	Silent
<b>21. Car Parking Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 7.6 ordinary hours per day (10 by agreement) or 38 per week.	Silent
<b>22. Cement and Lime Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 ordinary hours per day (or more by agreement with the majority of workers at the workplace) or 35 per week.	<i>'Except as provided in clause 23.4, in computing overtime each day's work will stand alone.'</i>
<b>23. Cemetery Industry Award 2010</b>	Yes	Yes	Overtime is payable for work outside the ordinary hours per day or 38 hours per week.	<i>'provided that in computing overtime each day will stand alone.'</i>
<b>24. Children's Services Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 8 hours in any one day or shift or 38 hours in any one week. (See clause 10.5 (e))	<i>'Overtime will be paid at the rate of time and a half for the first two hours and double time thereafter. In calculating overtime, each day's work will stand alone.'</i>

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>25. Cleaning Services Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 7.5 hours per day, 5 days per week or 38 hours per week.	<i>'In computing overtime payments each day's work will stand alone.'</i>
<b>26. Clerks-Private Sector Award 2010</b>	Yes	Yes	Overtime is payable for work in excess of 10 ordinary hours (including meal breaks for day workers) per day or 38 per week (may be averaged).	Silent
<b>27. Coal Export Terminals Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (or 12 if agreed with majority of employees) or 35 per week.	<i>'When computing overtime, except for clause 18.5, each day or shift worked will stand alone.'</i>
<b>28. Commercial Sales Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours on any day or 38 a week.	Silent
<b>29. Concrete Products Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (or 12 by agreement with majority of workers) or 35 per week.	Silent
<b>30. Contract Call Centres Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or 152 hours per 28 days.	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>31. Corrections and Detention (Private Sector) Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours (or 12 for shift workers) per day or 38 hours per week (may be averaged).	Silent
<b>32. Cotton Ginning Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 7.6 hours (or 8 for RDO accrual) per day or 38 hours per week.	Silent
<b>33. Dredging Industry Award 2010</b>	Yes	Yes	Overtime is payable for work outside the ordinary hours (which varies based on the status of the vessel).	
<b>34. Dry Cleaning and Laundry Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over daily maximum hours (depends on workplace and roster pattern) or 38 hours per week (may be averaged depending on the workplace).	Silent
<b>35. Educational Services (Post Secondary Education) Award 2010</b>	Yes	Yes	Overtime is payable for work over 38 hours per week (may be averaged)	Silent
<b>36. Educational Services (Schools) General Staff Award 2010</b>	Yes	Yes	Overtime is payable for work over 38 hours per week (may be averaged).	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>37. Educational Services (Teachers) Award 2010</b>	Yes	Yes	Overtime is paid depending on working week of school, or where over 10 hours are worked in a day at a Long Day Care Centre	Silent
<b>38. Electrical Power Industry Award 2010</b>	Yes	Yes	Overtime is paid for work beyond the usual ordinary time in the workplace (day work); end of a shift (shift work); or work in excess of 37.5 hours (averaged over roster cycle).	Silent
<b>39. Electrical, Electronic and Communications Contracting Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day (or 12 by agreement) or 38 hours per week (may be averaged).	<i>'(b) Except as provided in clause 27.4, in computing overtime each day's work will stand alone.'</i>
<b>40. Fast Food Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 11 hours per day or 38 hours per week (may be averaged).	Silent
<b>41. Fire Fighting Industry Award 2010</b>	No			
<b>42. Fitness Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or 38 hours per week.	Silent



Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>43. Food Beverage and Tobacco Manufacturing Award 2010</b>	Yes	Yes	Overtime is paid for work over the daily ordinary hours of work for that enterprise fixed under the rostering clauses or 38 hours per week (may be averaged over 28 days)	<i>'(e) In computing overtime each day's work stands alone.'</i>
<b>44. Funeral Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or 38 hours per week (may be averaged)	Silent
<b>45. Gardening and Landscaping Services Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day or 38 hours per week.	Silent
<b>46. Gas Industry Award 2010</b>	Yes		Overtime is paid for work over ordinary hours per day (up to 12 hours by agreement with majority) per day or 38 per week (may be averaged)	Silent
<b>47. General Retail Industry Award 2010</b>	Yes	No		
<b>48. Graphic Arts, Printing and Publishing Award 2010</b>	Yes	Yes	Overtime is paid for work over 8.75 hours per day (may be 12 by majority agreement) or 38 hours per week (may be averaged).	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>49. Hair and Beauty Industry Award 2010</b>	Yes	No		
<b>50. Health Professionals and Support Services Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day or 38 per week (may be averaged).	Silent
<b>51. Higher Education Industry - Academic Staff - Award 2010</b>	No		Award does not provide for penalty rates or overtime.	
<b>52. Higher Education Industry - General Staff - Award 2010</b>	Yes	Yes	Overtime is paid for work outside span of hours or 38 hours per week (36.75 for PACCT staff, may be averaged).	Silent
<b>53. Horse and Greyhound Training Award 2010</b>	Yes	Yes	Overtime is paid for work over per the rostered hours for each day or 38 hours per week	Silent
<b>54. Horticulture Award 2010</b>	Yes	No		
<b>55. Hospitality Industry (General Award) 2010</b>	Yes	No		

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>56. Hydrocarbons Field Geologists Award 2010</b>	Yes	N/A	An excess attendance allowance is paid.	
<b>57. Hydrocarbons Industry (Upstream) Award 2010</b>	Yes	Yes	Overtime is paid for work over 12 hours per day or 38 hours per week (may be averaged).	<i>'When computing overtime payments, each day or shift worked will stand alone.'</i>
<b>58. Joinery and Building Trades Award 2010</b>	Yes	Yes	Overtime is paid for work over 8 hours per day (or more or less depending on roster cycle/RDOs) or 38 hours per week (may be averaged)	Silent
<b>59. Journalists Published Media Award 2010</b>	Yes	Yes	Daily Overtime is paid for work in 10 per day (metropolitan dailies), 7.5 hours per day (Other than metropolitan dailies), or 38 hours per week.	Silent
<b>60. Labour Market Assistance Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day 38 hours per week.	Calculated for <i>'any one day'</i> .
<b>61. Legal Services Award 2010</b>	Yes	Yes	Overtime is payable for work outside the ordinary hours on any day or shift or over 38 hours per week (may be averaged)	<i>'When calculating overtime, each day is to stand alone.'</i>

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>62. Live Performance Award 2010</b>	Yes	Yes	Varies significantly from stream to stream.	
<b>63. Local Government Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours (or 12 by agreement with employee) or 38 hours per week (may be averaged).	'In computing overtime, each day's work stands alone.'
<b>64. Mannequins and Models Award 2010</b>	Yes	No	Overtime is payable for work outside the times of beginning and ending work.	Silent
<b>65. Manufacturing and Associated Industries 2010</b>	Yes	Yes	Overtime is payable for all work done outside ordinary hours on any day or shift fixed under rostering process, or over 38 hours per week (may be averaged).	'In computing overtime each day's work stands alone.'
<b>66. Marine Tourism and Charter Vessels Award 2010</b>	Yes	Yes	Industry specific scheme for payment of wages.	Silent
<b>67. Marine Towing Award 2010</b>	Yes	Yes	Overtime is paid for work over 16 continuous hours or 35 hours per week (may be averaged).	No

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>68. Maritime Offshore Oil and Gas Award 2010</b>	No		No penalties or overtime. An aggregate overtime component is included in aggregate annual salaries.	
<b>69. Market and Social Research Award 2010</b>	Yes	No	Overtime payable for all time worked in excess of rostered ordinary hours.	
<b>70. Meat Industry Award 2010</b>	Yes	Yes	Overtime is payable for work in excess of 10 hours per day or shift or 38 hours per week (may be averaged).	Silent
<b>71. Medical Practitioners Award 2010</b>	Yes	Yes	All hours worked in excess of 38 hours per week	<i>'(a) When computing overtime payments, each day or shift worked will stand alone.'</i>
<b>72. Mining Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day (12 by agreement) or 38 hours per week (may be averaged over 26 weeks).	
<b>73. Miscellaneous Award 2010</b>	Yes	No	Overtime is paid for work over 10 hours per day (12 by agreement) or 38 hours per week.	

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>74.Mobile Crane Hiring Award 2010</b>	Yes	Yes	Overtime is paid for work over 8 hours per day (10 by agreement) or 38 hours per week (may be averaged over 26 weeks).	Silent
<b>75.Nursery Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 8 hours on any day (10 by agreement).	Silent
<b>76.Nurses Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or shift; 38 hours per week (may be averaged).	No
<b>77.Oil Refining and Manufacturing Award 2010</b>	Yes	Yes	Overtime is paid for day work in excess of 10 hours per day (12 by agreement); 12 hours per shift; or 35 hours per week (may be averaged).	<i>'When computing overtime payments, each day or shift worked will stand alone.'</i>
<b>78.Passenger Vehicle Transportation Award 2010</b>		Yes	Overtime rates are paid for work in excess of 10 hours on any one day or 38 per week (may be averaged).	Silent
<b>79.Pastoral Award 2010</b>	Yes	Yes	Depends on type of workplace/time/classification of year	<i>'In computing overtime each day's work will stand alone.'</i>

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>80. <i>Pest Control Industry Award 2010</i></b>	Yes	Yes	Overtime is payable for work in excess of the maximum daily hours (depending on the RDO cycle).	'In computing overtime each day's work will stand alone.'
<b>81. <i>Pharmaceutical Industry Award 2010</i></b>	Yes	Yes	Overtime is paid for work in excess of 8 hours per day or 38 hours per week.	Silent
<b>82. <i>Pharmacy Industry Award 2010</i></b>	Yes	Yes	Overtime is paid for work in excess of 12 hours per day or 38 hours per week.	Silent
<b>83. <i>Plumbing and Fire Sprinklers Award 2010</i></b>	Yes	Yes	Overtime is paid for work in excess of 38 for a four week work cycle. Casuals must work less than an average of 38 hours over any two successive weeks.	Silent
<b>84. <i>Port Authorities Award 2010</i></b>	Yes	Yes	Over time is paid when work is performed outside the arrangement of working hours agreed under clause 19.5, a maximum shift length of twelve hours may be introduced. Overtime is paid for work over 38 hours each week (may be averaged).	No.

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>85. Ports, Harbours and Enclosed Water Vessels Award 2010</b>	Yes	Yes	Overtime is paid for work over 8 hours each day or 38 hours each week.	Silent
<b>86. Poultry Processing Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (12 hours by majority agreement) or 38 hours per week (may be averaged).	Silent
<b>87. Premixed Concrete Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (longer hours by majority agreement) or 38 hours per week (may be averaged).	<i>'Except as provided in clause 23.3, in computing overtime each day's work will stand alone.'</i>
<b>88. Professional Diving Industry (Industrial) Award 2010</b>	Yes	Yes	Overtime provision is unique to award.	Silent
<b>89. Professional Diving Industry (Recreational) Award 2010</b>	Yes	Yes	Overtime is paid for work on any one day in excess of 12 hours or 38 hours per week.	Silent
<b>90. Professional Employees Award 2010</b>	Yes	Yes	Overtime is accounted for through allowances, additional remuneration or annual salary.	Silent



Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>91. Quarrying Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours each day (unless otherwise agreed) or 38 hours per week.	<i>'Except as provided in clause 28.3, in computing overtime each day's work will stand alone.'</i>
<b>92. Racing Club Events Award 2010</b>	Yes	Yes	Overtime is paid for work over 8 hours per day or 38 hours per week.	<i>'Except as provided in clause 29.3, in computing overtime each day's work will stand alone.'</i>
<b>93. Racing Industry Ground Maintenance Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day or 38 hours per week.	<i>'Except as provided in clause <u>23.2</u>, in computing overtime each day's work will stand alone.'</i>
<b>94. Rail Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (12 with majority agreements) or 38 hours per week.	Silent
<b>95. Real Estate Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 38 hours per week (may be averaged).	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
96. <i>Registered and Licensed Clubs Award 2010</i>	Yes	No		Yes
97. <i>Restaurant Industry Award 2010</i>	Yes	No		Yes
98. <i>Road Transport (Long Distance Operations) Award 2010</i>	Yes	Yes	Per-kilometre rates of pay and hourly rates of pay are inclusive of an overtime allowance.	'Time must be computed from the time the employee is rostered or registers for duty, whichever is the later, and until the employee has been effectively released from duty.'
99. <i>Road Transport and Distribution Award 2010</i>	Yes	Yes	Overtime is paid for work in excess of 8 hours per day or 38 hours per week (35 for oil distribution workers).	'In computing overtime each day's work will stand alone.'
100. <i>Salt Industry Award 2010</i>	Yes	Yes	Overtime is paid for work over 10 hours per day (may be 12 by majority agreement) or 38 hours per week.	'When computing overtime payments, each day or shift worked will stand alone.'

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
101. <i>Seafood Processing Award 2010</i>	Yes	Yes	Overtime is paid for work over daily maximum hours (8 hours, but up to 12 by majority agreement) 38 hours per week.	'In computing overtime each day's work stands alone.'
102. <i>Seagoing Industry Award 2010</i>	No		Wages are expressed as an aggregate annual salary which includes an aggregate overtime component.	
103. <i>Security Services Industry Award 2010</i>	Yes	Yes	Overtime paid for work in excess of 10 ordinary hours (12 by majority agreement) per day or 38 hours per week (may be averaged over roster cycle).	No - 'Where a period of overtime commences on one day and continues into the following day, the portion of the period worked on each day attracts the loading applicable to that day.'
104. <i>Silviculture Award 2010</i>	Yes	Yes	Overtime is paid for work in excess of the maximum daily hours as specified by roster pattern or 38 hours per week (may be averaged).	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>105. Social, Community, Home Care and Disability Services Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day or 38 hours per week (or 76 per fortnight).	Silent
<b>106. Sporting Organisations Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 11 hours per day or 38 hours per week (may be averaged).	Silent
<b>107. State Government Agencies Administration Award 2010</b>	Yes	Yes	Overtime is paid for work outside ordinary hours or over 38 hours per week (may be averaged for shift workers).	Silent
<b>108. Stevedoring Industry Award 2010</b>	Yes	Yes	Overtime is payable for work performed in excess or outside of ordinary hours (or rostered hours in case of shift workers). Or 35 hours per week.	No

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>109. Storage Services and Wholesale Award 2010</b>	Yes	Yes	Overtime is payable for work in excess of 8 hours per day (10 hours by agreement) or 38 hours per week.	<i>'(a) each day or shift worked will stand alone;</i>  <i>(b) day means all the time between the normal commencing time of one day and the normal commencing time of the next succeeding day.'</i>
<b>110. Sugar Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (12 for shift workers by agreement) or 38 hours per week (maybe averaged).	<i>'Overtime is 'calculated on a daily basis'</i>
<b>111. Supported Employment Services Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 8 hours per day (10 by agreement with the employee) or 38 hours per week.	<i>'In computing overtime, each day's work will stand alone.'</i>
<b>112. Surveying Award 2010</b>	Yes	Yes	Overtime is payable for work in excess of the normal hours of duty.	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>113. Telecommunications Services Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (12 by agreement) or 152 hours in a 28 day period.	<i>'In computing overtime, each day's work will stand alone.'</i>
<b>114. Textile, Clothing, Footwear and Associated Industries Award 2010</b>	Yes	Yes	The award provides different maximum daily ordinary hours for different types of employment and roster patterns.	<i>'For the purpose of calculating overtime each day must stand alone.'</i>
<b>115. Timber Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of ordinary daily number of hours described in <i>Clause 27 – Hours of Work</i> length or 38 hours a week (may be averaged).	<i>'In computing overtime each day's work will stand alone.'</i>
<b>116. Transport (Cash in Transit) Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 8 hours per day (to accrue RDOs); 7.6 hours per day; or 38 hours per week.	Silent
<b>117. Travelling Shows Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 8 hours per day or 38 hours per week (Clause 10.4).	Silent

Award	Casuals	Overtime for Casuals?	Criteria for casual employee's overtime	Does each day stand alone?
<b>118. Vehicle Manufacturing, Repair, Services and Retail Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 12 hours per day (Vehicle Industry RS&R); 8 hours per day (or 10 by majority agreement) (Vehicle Manufacturing); or 38 hours per week.	Silent
<b>119. Waste Management Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 7.6 hours per day (8 for the purposes of accumulating RDOs) or 38 hours per week.	'Except as provided in clauses 30.1 and 30.3, in computing overtime each day's work shall stand alone.'
<b>120. Water Industry Award 2010</b>	Yes	Yes	Overtime is paid for work in excess of 10 hours per day (12 hours by agreement) or 38 hours per week.	'In computing overtime, each day's work stands alone.'
<b>121. Wine Industry Award 2010</b>	Yes	Yes	Overtime is paid for work over 10 hours per day (12 by majority agreement) or 38 hours per week.	Silent
<b>122. Wool Storage, Sampling and Testing Award 2010</b>	Yes	Yes	Overtime is paid for work over 12 hours or 38 hours per week.	'When computing overtime payments, each day or shift worked will stand alone.'