

# HENRY DAVIS YORK

19 July 2017

Our Ref AJW/AJK/3126847

**BY EMAIL amod@fwc.gov.au**

Copy to: RTBU, AIG, AMWU, AWU, ASU, ACTU, APESMA.

Fair Work Commission  
80 William Street  
EAST SYDNEY NSW 2010

## **4 yearly review of modern awards - Casual employment and Part-time employment (AM2014/196) and (AM2014/197) - Rail Industry Award**

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We act for Aurizon, Australian Rail Track Corporation, Brookfield Rail Pty Ltd, Metro Trains Melbourne, Sydney Trains and V/Line Passenger Pty Ltd (**Rail Employers**) in relation to the 4 yearly review of the Rail Industry Award 2010 (**Rail Award**).

We refer to the decision of the Fair Work Commission dated 5 July 2017<sup>1</sup> (**Decision**) dealing primarily with common issues regarding part-time and casual employment, and also dealing with (among other claims) the claim of the Rail, Tram and Bus Industry Union seeking to vary the Rail Award in respect of the interaction between the casual loading and overtime and penalty rates for casual employees (**RTBU Claim**).

In the Decision, the Fair Work Commission directed the Rail Employers to prepare a draft determination to give effect to the aspect of the Decision regarding the RTBU Claim. Attached at **Annexure 1** to this letter is a copy of the Rail Employers draft determination.

We note the following in respect of the draft determination:

- (a) The draft determination proposes amendments to current provisions of the Rail Award, not the Exposure Drafts of the Rail Industry Award 2015 published by the Fair Work Commission on 13 June 2017 (**Exposure Draft**), although it is the intention of the Rail Employers that the same amendments will be applied in the relevant sections of the Exposure Draft.
- (b) The proposed amendments at item [1] of the draft determination seek to amend clause 10.3 of the Rail Award so as to give effect to paragraphs [891] and [892] of the Decision, and to bring it in line with clause 6.3 of the Exposure Draft.

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<sup>1</sup> [2017] FWCFB 3541.

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- (c) The proposed amendments at item [2] of the draft determination seek to amend clause 23 of the Rail Award so as to give effect to paragraph [891] of the Decision, and to bring it in line with both clauses 13 and 14 of the Exposure Draft. In order to do so, it was necessary to replicate parts of clauses 13 and 14 of the Exposure Draft in clause 23.
- (d) Other consequential amendments will need to be made to the Exposure Draft to ensure consistency with the amendments proposed by the draft determination. For example, the tables in Schedule B.2 setting out the summary of hourly pay for casual employees, particularly the references to "*% of casual ordinary hourly rate*", will need to be amended.

Yours faithfully  
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## DRAFT DETERMINATION

*Fair Work Act 2009*  
s.156 - 4 Yearly reviews of modern awards

**4 yearly review of modern awards – Casual employment and Part-time employment**  
(AM2014/196 and AM2014/197)

**VICE PRESIDENT HATCHER**  
**SENIOR DEPUTY PRESIDENT HAMBERGER**  
**DEPUTY PRESIDENT KOVACIC**  
**DEPUTY PRESIDENT BULL**  
**COMMISSIONER ROE**

SYDNEY, XXXX 2017

*Review of modern awards to be conducted.*

Further to the Decision in [2017] FWCFB 3541, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Rail Industry Award 2010* be varied as follows:

[1] Delete clause 10.3 of the Rail Industry Award 2010 and insert the following new clause:

**"10.3 Casual Employment**

- (a) A casual employee is an employee who is engaged and paid as a casual employee.
- (b) A casual employee's ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer.
- (c) **Casual loading**

For each ordinary hour worked, a casual employee must be paid:

- (i) the ordinary hourly rate; and
- (ii) a loading of 25% of the ordinary hourly rate,

**(d) Casual penalty rates**

- (i)** A casual employee will be paid **175%** of the ordinary hourly rate for the first three hours, and **225%** of the ordinary hourly rate thereafter, for any overtime hours on a Monday to Friday.
- (ii)** A casual employee will be paid **175%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Saturday.
- (iii)** A casual employee will be paid **225%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Sunday.

**(e)** A casual employee will be paid **275%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a public holiday prescribed in s.115 of the Fair Work Act.

**(f)** The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment."

[2] Delete clause 23 of the Rail Industry Award 2010 and insert the following new clause:

**"23 Overtime and penalty rates**

An employee will be paid the following penalty rates.

**23.1 Shift Work Penalties**

- (a)** For each hour worked on early morning shift or afternoon shift an employee will be paid \$2.73.
- (b)** For each hour worked on night shift, an employee will be paid \$3.24.
- (c)** For each hour worked on permanent night shift, an employee will be paid \$6.15.

**23.2 Sunday work**

A full-time or part-time employee will be paid **200%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Sunday.

**23.3 Public holidays**

A full-time or part-time employee will be paid **250%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a public holiday.

**23.4 Saturday work**

A full-time or part-time employee will be paid **150%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Saturday.

### **23.5 Definition of overtime**

- (a) For a full-time employee, overtime is any time worked in excess of the employee's ordinary hours (see clause 20).
- (b) For a part-time employee, hours worked in excess of the employee's ordinary hours (agreed in accordance with 10.2(c) and 10.2(d)) will be paid at the appropriate overtime rate.
- (c) For a casual employee, overtime is any time worked in excess of the employee's ordinary hours (see clause 10.3(b)).

### **23.6 Exclusions from overtime**

- (a) An employee within the Clerical, Administrative and Professional classifications engaged on an annual salary equivalent that is at or above Level 7 will not be entitled to overtime.
- (b) An employee working overtime will not receive a shift penalty in accordance with clause 23.1.

### **23.7 Overtime rates**

Where a full-time or part-time employee works overtime the employer must pay to the employee the overtime rates as follows:

<b>For overtime worked on</b>	<b>% of ordinary hourly rate</b>
Monday to Friday: <ul style="list-style-type: none"><li>• First 3 hours</li><li>• After 3 hours</li></ul>	150% 200%
Saturday – all hours	150%
Sunday – all hours	200%
Public holiday – all hours	250%

### **23.8 Time off instead of payment for overtime**

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 23.4.
- (c) An agreement must state each of the following:
  - (i) the number of overtime hours to which it applies and when those hours were worked;

- (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
- (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
- (iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule G. There is no requirement to use the form of agreement set out at Schedule G. An agreement under clause 23.4 can also be made by an exchange of emails between the employee and employer, or by other electronic means

- (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 23.4 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

- (e) Time off must be taken:
  - (i) within the period of 6 months after the overtime is worked; and
  - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 23.4 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (h) The employer must keep a copy of any agreement under clause 23.4 as an employee record.
- (i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then

clause 23.4 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 23.4 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause 23.4

### **23.9 Call back**

Where an employee is recalled to work overtime after leaving the employer's premises, the employee will be paid for a minimum of four hours."

The determination shall operate on and from XXXX 2017.

BY THE COMMISSION