



Title of matter: 4 yearly review of modern awards

Section: 156

Matter number: AM2014/1

Item: Item 1 – Casual employees – casual overnight charter employees

Document: Submission regarding the Full Bench’s provisional view as to clause 6.4 of the *Exposure Draft ‘Marine Tourism and Charter Vessels Award 2015’*

Filed: Pursuant to Decision [2018] FWCFB 3802 at para 200

Lodged by:	Australian Federation of Employers and Industries	Telephone:	(02) 9264 2000
Address for Service:	Australian Federation of Employers and Industries PO Box A233, Sydney South NSW 1235	Facsimile:	(02) 9264 5699
		Email:	paula.thomson@afei.org.au

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

Title of matter: 4 yearly review of modern awards

Section: 156

Matter number: AM2014/1

Item: Item 1 – Casual employees – casual overnight charter employees

Document: Submission regarding the Full Bench’s provisional view as to clause 6.4 of the *Exposure Draft ‘Marine Tourism and Charter Vessels Award 2015’*

Filed: Pursuant to Decision [2018] FWCFB 3802 at para 200.

1. The provisional view of the Full Bench is that the Exposure Draft should incorporate the redrafted clause 6.4(c) proposed by the AWU.¹
2. The provisional view appears to be informed by a position advanced in the AWU submission to the effect that the Exposure Draft *‘has altered the meaning of the current award’*.²
3. For the reasons addressed further in this submission, the AFEI and the interested parties on whose behalf AFEI makes this submission, say this:-
 - i. The Exposure Draft does not alter the meaning of the current award;
 - ii. The AWU’s redrafted clause should not be incorporated into the Exposure Draft.

¹ [2018] FWCFB 3802 at para 200.

² [2018] FWCFB 3802 at para 200.

4. Clause 10.3(a) of the current award reads:

(a) An Overnight Charter Employee or Non-overnight Charter Employee may be engaged to work on a casual basis. A casual employee:

(i) is engaged to work a variety of hours if they are a Non-overnight Charter Employee or a specified trip or trips if they are an Overnight Charter Employee at the direction of the employer;

(ii) if they are an Overnight Charter Employee, must be engaged for a minimum of one half day trip as per clause 20.3, or if they are a Non-overnight Charter Employee must be engaged for a minimum of two hours per shift and a maximum of 12 hours per shift;

(iii) cannot be engaged for more than 38 hours per week if they are a Non-overnight Charter Employee; and

(iv) must be paid the applicable loading as defined in clause 13—Minimum wages.

5. Clause 13.1 of the current award provides for adult minimum wages and reads:

13.1 Adult employee minimum wages

(a) Overnight Charter Employees

The classifications and minimum wages for full-time and part-time adult Overnight Charter Employees are set out in the following table:

[13.1(a) varied by PR997967, PR509124, PR522955, PR536758, PR551681, PR566772, PR579879, PR592194, PR606419 ppc 01Jul18]

<i>Classification</i>	<i>Daily rate \$</i>
<i>Crew Level 1</i>	<i>154.82</i>
<i>Crew Level 2</i>	<i>164.28</i>
<i>Crew Level 3</i>	<i>171.58</i>
<i>Dive Master/Dive Instructor</i>	<i>171.58</i>
<i>Coxswain</i>	<i>185.34</i>
<i>Master V</i>	<i>235.64</i>

(b) The wage rates set above have been calculated to include compensation for weekend and public holiday penalties.

(c) An Overnight Charter Employee employed on a casual basis will be paid at the rate of the daily rate plus 25% for all work performed within the ordinary hours of work prescribed by clause 20—Ordinary hours of work and rostering.

6. Clause 6.4(c) of the Exposure Draft reads:

(c) A casual Overnight Charter Employee:

(i) is engaged to work a specified trip or trips, at the direction of the employer;

(ii) must be engaged for a minimum of one half day trip; and

(iii) for working ordinary hours must be paid the ~~ordinary~~ minimum daily rate calculated in accordance with clause 10.1 for the classification in which they are employed plus a loading of 25%.'

No material difference

7. It is apparent from the text of clause 10.3(a) and the text of clause 6.4(c) that each clause is similarly concerned with particular terms and conditions of employment for employees engaged on a casual basis for overnight charter work.

8. The comparison which follows below at paragraphs [9] to [17] shows that the entitlements and obligations of clause 10.3(a) and clause 6.4(c) correspond so closely that they are essentially the same; and any differences in expression or formatting do not make any material difference in either the entitlements available to an employee or the obligations imposed on an employer.

A comparison of 10.3(a) and 6.4(c)

9. **First**, a common characteristic is that the casual overnight charter employee is '*engaged to work a specific trip or trips, at the direction of the employer*'.

10. This is expressed in the current award at clause 10.3(a)(i); the corresponding condition appears in the Exposure Draft at clause 6.4(c)(i).
11. **Second**, a common characteristic is the obligation to engage the casual for '*a minimum of one half day trip*'.
12. This is expressed in the current award at clause 10.3(a)(ii); the corresponding condition appears in the Exposure Draft at clause 6.4(c)(ii).
13. **Third**, a common characteristic is that the employee is entitled to be paid a rate inclusive of a casual loading.
14. In the current award, this entitlement arises from the combined effect of clauses 10.3(a)(iv) and 13.1(c).³ The Exposure Draft provides the corresponding entitlement at clause 6.4(c)(iii).
15. **Fourth**, in both the current award and the Exposure Draft it is the '*ordinary hours*' to which the casual loading entitlement applies.
16. In the case of the current award, clause 13.1(c) clearly identifies '*ordinary hours of work*' as being the particular hours affected by the entitlement to the casual loading.
17. In the case of the Exposure Draft, the words '*for working ordinary hours*' open clause 6.4(c)(iii) with the consequence that this clause can only be understood as concerned with an entitlement to the casual loading on ordinary hours.

Conclusion

18. For the reasons advanced above, there would be no alteration in meaning if clause 6.4(c) remains in the Exposure Draft. Thus no case is shown to justify a departure from the Exposure Draft.

³ Clause 13.1 provides: *An Overnight Charter Employee employed on a casual basis will be paid at the rate of the daily rate plus 25% for all work performed within the ordinary hours of work prescribed by clause 20—Ordinary hours of work and rostering.*

No potential for Exposure Draft to remove entitlement

19. In addition to the matters addressed above, it is also relevant to note that the AWU's proposed redraft is founded on a conclusion drawn from that union's interpretation that clause 10.3(a)(iv) of the current award '*requires the casual loading to be paid for all hours worked*'.⁴ (underlining for emphasis).
20. For reasons which follow, it is respectfully submitted that:
- i. this interpretation misconstrues the award; and
 - ii. the award does not have the effect postulated in the AWU submission.
21. **First**, clause 10.3(a)(iv) does not express any requirement that the casual loading be paid for all hours worked.
22. The clause directs the reader's further attention to clause 13. In doing so, the clause contributes to the establishment of an enforceable entitlement to payment of 'the applicable loading'. However, clause 10.3(a)(iv) is neither directed at, nor concerned with, any particular hours of work.
23. **Second**, clause 13.1(c) of the current award provides the entitlement to a 25% loading '*for all work performed within the ordinary hours of work*' (underlining for emphasis).
24. These are words of clear limitation as they do not suggest any entitlement or obligation attaching to hours beyond the ordinary hours.
25. In short, the text does not support the proposition that the casual loading entitlement attaches to all hours worked.⁵
26. **Third**, contrary to the AWU submission,⁶ clause 13.1(c) does *not* express any entitlement to the inclusion of the casual loading within overtime payments.

⁴ AWU submission 20 November 2015 at para [4].

⁵ AWU submission 20 November 2015 at para [4].

⁶ AWU submission 20 November 2015 at para [4].

27. The text of the clause does not disclose any expression regarding overtime, nor does it suggest any connection with work performed during hours other than *ordinary hours*.
28. **Fourth**, the interpretation does not find support in the relevant award provision dealing with overtime worked by overnight charter employees. This is clause 22.2 which reads:

All time worked by Overnight Charter Employees in excess of:

- 12 hours per day;
- 20 days in a 28 day cycle, or
- the average ordinary hours as per clause 20.3(a),

is overtime and must be paid at one and a half times the employee's ordinary rate for the first two hours and double the ordinary rate thereafter calculated hourly.

29. It is clearly apparent from the text that overtime is paid on '*the employee's ordinary rate*'. This requirement is cast in specific terms and thus it is not possible to derive any requirement for the inclusion of the casual loading within the payment of overtime.

Conclusion

30. As there is no entitlement or obligation to include the casual loading within overtime payments, there can be no potential for the Exposure Draft to '*remove*' such an entitlement. It follows that the redrafted provision serves no purpose.

An issue beyond technical and drafting matters

31. From the propositions advanced in the AWU submission, it can be presumed that the objective of the redrafted provision is the inclusion of the casual loading within the overtime calculation.
32. As addressed earlier in this submission, the inclusion of the casual loading within the overtime calculation is not an obligation of the current award.
33. But if such an obligation were established by variation arising from these proceedings, it would be a substantial change in industrial regulation of the industry.

34. Of course such a change would be well beyond the technical and drafting changes which are the subject of these proceedings. Even if unintended, it would be reasonable conjecture that such a change would have additional cost consequences for businesses.
35. While it is arguable that the redrafted provision would have this consequence, the Full Bench should, nevertheless, exercise caution by declining to incorporate the redrafted clause.
36. Further, if it is the position of any party (including the AWU) that the casual loading should be included in overtime calculations, then that party has the opportunity to advance that position before the Full Bench constituted to deal with AM2017/51.

Conclusion

37. These submissions have addressed the sound and compelling reasons why the Full Bench should decline to incorporate the AWU's redrafted clause into the Exposure Draft.

Australian Federation of Employers and Industries, also on behalf of:

Boating Industry Association (Commercial Vessel Division)

Dated: 16 July 2018