



ASIAL

AUSTRALIAN SECURITY INDUSTRY
ASSOCIATION LIMITED

The peak body for security professionals

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

(AM2019/17)

20 February 2020

4 yearly review of modern awards – finalisation of exposure drafts – tranche 3 awards.

Security Services Industry Award – Exposure draft

2 March 2020

About the Australian Security Industry Association Limited (ASIAL)

ASIAL is the peak national body representing security professionals in Australia. The Association is comprised of over 2,600 members ranging from large corporate entities to small and medium sized operations.

ASIAL is:

- ✓ a Registered Organisation of Employers under the *Fair Work (Registered Organisations) Act 2009*
- ✓ an Approved Security Industry Association under security legislation in the Australian Capital Territory, Queensland and Victoria
- ✓ an accredited Registrar under the Australian Communications & Media Authority (ACMA) *Cabling Provider Rules*



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Australian Security Industry Association Limited

Security Industry House
41 Hume Street, Crows Nest, NSW 2065

ABN: 91 000 813 365

Phone: 1300 127 425

Email: ceo@asial.com.au

Web: www.asial.com.au

Introduction

1. Full Bench decision 29 January 2020

1.1 In its decision of 29 February 2020 the Full Bench invited interested parties “to comment on our provisional view and the Tranche 3 exposure drafts and draft variation determinations...”

2. Timetable for response

2.1 The Full Bench directed that *submissions be filed by no later than 4:00 pm on 4 March 2020 and submissions in reply by no later than 4:00 pm on 27 March 2020.*

An oral hearing is scheduled for 9:30 am on Monday 6 April 2020 and Tuesday 7 April 2020.

3. Security Services Industry Award – Exposure Draft

3.1 In the *September 2019 Decision*, at [28], the Full Bench set out a series of amendments that had been made to exposure drafts since they were last published in early 2019. In addition to those changes, the following amendments were made to the Tranche 3 exposure drafts:

- Re-inserting the current award clauses in relation to casual conversion for those awards that had pre-existing casual conversion clauses prior to the determination of AM2014/197.
- Deleting all tables in the wages schedules that relate to overtime for casual employees where that issue is currently before the Full Bench in AM2017/51.
- ***Removing the word ‘ordinary’ from ‘the reference to ‘ordinary hours’ in relation to the casual loading where the current award does not limit the application of the loading to ordinary hours.*** (ASIAL emphasis)
- The deletion of the ‘note’ in the Schedules of Rates
- The reference to the summary of hourly rates of pay schedule in the minimum rates clause will be converted from an information box to a Note. The reference to ‘penalties’ in this note will be corrected to ‘penalty rates’.

3.2 ASIAL’s submissions deal with the provisional view of the Full Bench to remove of word ‘ordinary’ from ‘the reference to ‘ordinary hours’ in relation to the casual loading where the current award does not limit the application of the loading to ordinary hours.

3.3 The provisional view of the Full Bench is to vary Clause 11.2 Casual Loading to give effect to the above as follows:

Plain language exposure draft—Security Services Industry Award 20XX

11.1 An employee is a casual employee if they are engaged as a casual employee.

11.2 Casual loading

(a) An employer must pay a casual employee for each **ordinary** hour worked a loading of 25% in addition to the minimum hourly rate otherwise applicable under **Table 4—Minimum rates.**

(b) *The casual loading is paid in addition to any penalty rates for shift, weekend or public holiday work payable to full-time employees.*

3.4 *NOTE: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.*

4. ASIAL's Submission

4.1 It is our view that the current award does indeed limit the application of the 25% Casual loading to ordinary hours as expressed in Matter No: AM2017/51 Overtime for casuals – Submissions in reply to United Voice submissions of 13 May 2019, Security Services Industry Award 2010 MA 000016, (filed 1 July 2019, (Attachment 1)).

4.3 In its decision in AM2017/51 Overtime for casuals at [63] the Full Bench said:

“[63] It is not in dispute that casual employees are not currently entitled to receive the casual loading when being paid overtime penalty rates, and the above variation is not intended to disturb that position....”

In ASIAL's opinion the removal of the word “ordinary” as proposed by the Full Bench on 29 February 2020 would in fact “disturb that position”. It would create ambiguity and lead to disputation.

4.4 It has been already been accepted by the Commission that the current award does not provide for the casual loading to be included in the calculation of overtime. (4.2 above).

4.5 ASIAL seeks the Full Bench to retain the word “ordinary” in the proposed wording, which we submit should read:

“An employer must pay a casual employee for each ordinary hour worked a loading of 25% in addition to the minimum hourly rate otherwise applicable under Table 4—Minimum rates”.

If it please the Commission

Chris Delaney



Workplace Relations Advisor ASIAL



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**AUSTRALIAN SECURITY INDUSTRY
ASSOCIATION LIMITED**

The peak body for security professionals

**IN THE FAIR WORK COMMISSION - Matter No: AM2017/51
Overtime for casuals – Submissions in reply to United Voice
submissions of 13 May 2019.**

Security Services Industry Award 2010 MA 000016.

5 July 2019

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1. This submission in reply to the submissions made by United Voice on 13 May 2019 is made by ASIAL on behalf of its members throughout Australia.
2. This submission is to be read in conjunction with our ASIAL's submissions of 8 November 2017 regarding the calculation of the overtime rate for Casuals engaged under the Security Services Industry Award 2010 (the Award) (Attachment 3).

United Voice Submissions 13 May 2019

3. **United Voice submissions at 76 to 79** inclusive are offered as examples of ambiguity in the Award where clearly no ambiguity exists, refer ASIAL submissions (Attachment 3)
4. **United Voice Point 76** - ASIAL rejects United Voice's interpretation of Clause 21. The entire Clause provides that Casuals may work ordinary time shifts between a minimum of 4 and a maximum of 10 hours and up to 12 ordinary hours subject to the same provisions as other employees (21 (a)(i) and 21 (b)).
5. **United Voice Point 77** - ASIAL rejects United Voice's interpretation and submits that this clause provides the employer the discretion to direct employees to work in accordance with a roster – whether permanent, permanent part time or casual. The clause does not exclude casuals. In ASIAL's opinion the award allows an employer to, for instance, engage a casual to cover a permanent employee during a period of extended leave. This may require the casual to work in accordance with a roster for a period of up to 8 weeks without disturbing the casual nature of the employment relationship.
6. **United Voice Point 78** - ASIAL rejects the United Voice assertion that averaging is not a facility that can be applied with fairness to a casual employee. There are, we submit, circumstances where averaging may be applied fairly, e.g. in the instance described in 5 above.
7. **United Voice Point 79** - ASIAL submits that United Voice has misinterpreted the meaning and effect of Clause 21.11. This Clause is designed to release the employer from being required to provide advance notice of a roster to two (2) categories of employees, relieving officers (who are paid an allowance for the short notice to cover another employee's absence) and a Casual, who is also paid an allowance for, amongst other matters, short notice.
8. **United Voice Point 80** - ASIAL accepts that time off in lieu of overtime is irrelevant to the concept of casual employment. However, we do not accept that the United Voice submission has any relevance to the question in this matter.
9. **United Voice Point 81** - ASIAL rejects the addition of the new clause 10.5 (c) suggested by United Voice. The proposed clause is unnecessary.
10. **United Voice Point 82** - ASIAL is satisfied that 10.5 (b) of the Award properly reflects the intention of the Award and pre-reform awards, that the 25% casual loading is paid on top of ordinary hours only and is not included when calculating the overtime rate.
11. **United Voice Point 82** - ASIAL rejects any assertion of ambiguity.

12. **United Voice Point 83** - ASIAL submits that the addition of a new clause in the form sought by United Voice is unnecessary and a significant departure from the current award provisions.
13. ASIAL submits that to vary the Award in terms submitted by United Voice would create significant extra costs for employers, contrary to the objects of award modernisation
14. ASIAL further submits that such a change confers a greater benefit than available under any of the pre-reform awards where Casuals, prior to the making of the modern award were paid loadings of 15% of the ordinary rate for the casual nature of the work and, separately 1/12th (notionally 8.5%) of the ordinary rate to account for no entitlement to paid annual leave. **See Attachments 1 and 2.**
15. When considering the references to Overtime in Attachments 1 and 2, it follows clearly that the overtime rate for casuals in pre-reform Awards did not include either the 15% or the 1/12th on top off the ordinary rate of pay.
16. Further to ASIAL's submissions above and of those of 8 November 2017, should the Fair Work Commission form the view that the award provisions with regard to the calculation of overtime are unclear or ambiguous, ASIAL proposes amendments to the Security Services Industry Award 20XX Plain English Exposure Draft published 13 February 2019, in the terms set out in Attachment 4.



Chris Delaney
Workplace Relations Advisor ASIAL

5 July 2019

Attachment 1

AP796356 – Security Industry (New South Wales) Award 1999

This Fair Work Australia consolidated award incorporates all amendments up to and including 1 October 2008 (variation PR983533).

11.2 Casual employees

11.2.1 A casual employee for working ordinary time must be paid one thirty-eighth of the award wage prescribed by this award for the class of work performed plus 15 per cent (calculated to the nearest whole cent).

11.2.2 In addition to the ordinary hourly rate prescribed at 11.2.1, span penalties and overtime penalties must be paid where appropriate.

11.2.3 In addition to the ordinary hourly rate prescribed in 11.2.1 a casual employee is entitled to be paid one-twelfth of the ordinary hourly rate as entitlement to pro-rata annual leave. This amount must be paid at the same time as prescribed for the payment of wages in clause 16 – Payment of Wages. Provided that that time is no later than on a weekly or fortnightly basis (dependent upon the employers pay period).

22. OVERTIME

22.1 Loading for overtime

Subject to the provisions of 22.2, employees who are required to work overtime in addition to their ordinary time hours of work (as defined) must, in addition to the ordinary time rate provided for the employee's classification under Table 1 of Part B, be paid a loading equal to:

22.1.1 for overtime work performed during a weekday (as defined) or Saturday span (as defined), but excluding overtime work performed during a Public Holiday span (as defined), 50% of the ordinary time rate for the first two hours of overtime worked and 100% thereafter;

22.1.2 for all overtime work performed during a Sunday span (as defined), 100% of the ordinary time rate;

22.1.3 for all overtime work performed during a Public Holiday span (as defined), 150% of the ordinary time rate.

22.2 Appendix B agreements voluntary overtime

In lieu of the loading provided under 22.1, an employee may elect to work additional hours under an Appendix B agreement, subject to the following conditions:

22.2.1 Any such agreement must be committed to writing in the form set out in this award. Such agreement must have the written consent of the employer and the employee.

22.2.2 For all work performed under an Appendix B agreement the employee concerned must be paid at the rate of 150% of the rate of pay applicable for ordinary time worked on that day between the hours of 0600-1800.

22.2.3 No employee may work more than a total of 14 hours in any one day, including both overtime and ordinary time.

22.3 Calculation of overtime payments

In computing overtime payments, each day's work stands alone. The hourly (sic – rate) is determined by dividing the appropriate weekly rate by 38, even in cases where an employee works more or less than 38 ordinary hours in a week.

Attachment 2

AP796143CRV - Security Employees (Victoria) Award 1998

12.4 Casual employees

[12.3 renumbered as 12.4 by PR916095 ppc 27Mar02]

12.4.1 A casual employee is an employee who is engaged and paid as such but will not include a part-time or full-time employee.

12.4.2 Casual employees will be paid, in addition to the ordinary hourly rate and rates payable for shift and weekend work on the same basis as a weekly employee, an additional loading of 15% of the ordinary hourly rate for the classification under which they are employed.

12.4.3 Casual employees will not be entitled to:

- Clause 14 - Redundancy
- Clause 18.2.1(b) - Shift work allowances – permanent night shift
- Clause 26 - Public holidays
- Clause 28 - Parental leave
- Clause 29 - Personal/carers' leave
- Clause 30 - Jury service
- Clause 31 - Accident make-up pay



**Australian Security Industry
Association Limited**

*The peak body for
security professionals.*

FAIR WORK COMMISSION (AM2017/51)

4 yearly review of modern awards - overtime for casuals.

*Supporting members, promoting standards
and safeguarding public interest*



4 *yearly review of modern awards - overtime for casuals (AM2017/51)*

1. This submission is made in relation to the Statement issued by the Full Bench of the Fair Work Commission on 4 December 2017 inviting interested parties to provide a written response concerning the accuracy of the list of awards in Attachment A. Specifically these submissions concern the Security Services Industry Award 2010 (MA000016), (the Award).
2. Attachment A identifies the Award as being:
Unclear on whether overtime is payable to casuals;
Unclear when overtime commences; and
Unclear at what rate overtime is payable.
3. The entitlement to overtime and the interaction between the casual loading and overtime rates is clearly addressed in the Award.
4. Clause 10.5 (b) of the Security Services Industry Award 2010 [MA000016] states:
 - a. *'In addition to the ordinary hourly rate and penalty rates payable for shift, weekend and public holiday work payable to full-time employees, casual employees will be paid a loading of 25% of the ordinary hourly rate for the classification in which they are employed.'*
5. It is clear that the loading is not payable at times that are not specified. Overtime as provided for under clause 23 is not one of those times when the casual loading in clause 10.5 is specified as payable.
6. It follows that a casual employee who works overtime is **not** paid a loading of 25% when overtime is worked as the loading is only paid on the **ordinary rate** and only in cases where the penalty rates for shift, weekend and public holidays apply. The casual loading is treated as compensation for leave etc. ordinarily paid to permanent employees under the Award. In the case of a permanent employee under the Award, accruals for leave are only on ordinary hours. It follows that the statements within the Award support the interpreted intent which is that casuals are not entitled to the casual loading of 25% on overtime shifts.
7. With regard to *'when overtime commences'* or *'that overtime is payable to casuals'*, ASIAL submits that while the Award does not include specific references to *these matters* there are sufficient references relating to overtime that may be taken to refer to casuals.
8. **Clause 21 Ordinary Hours and roster cycles** makes it clear what ordinary hours are and in so doing indicates that what is not ordinary hours by default is overtime.

21.1 Ordinary hours and roster cycles

- i. **(b)** The following time is ordinary working time for the purposes of this clause and must be paid for as such:
 - (i) crib breaks;
 - (ii) time occupied by an employee in filling in any time record or cards or in the making of records (other than time spent checking in or out when entering or leaving the employer's premises);
 - (iii) time spent attending a court in the interest of the employer or any client of the employer in relation to any matter arising out of or in connection with the employee's duties;
 - (iv) time spent fitting the employee's own vehicle with any equipment or markings required by the employer (in relation to which the cost of any such equipment and markings must be met by the employer) unless the installation is required by reason of the employee choosing to change vehicles within three years of an initial fitting of equipment or markings; and

- (v) time spent at the direction of the employer attending training courses (other than any course undertaken by an employee in order to obtain a security licence where the employee does not already hold a security licence under licencing legislation).

9. **Clause 21.2 (a)(i) Shift duration** indicates that a Casual employee can only work a maximum of 10 ordinary hours in a shift or, by agreement between the employer and the majority of employees concerned in a particular establishment, ordinary working hours exceeding 10 but not exceeding 12 hours per shift.
10. **Clause 21.8 Shift start/end times** identifies what activities fall within ordinary hours.
11. **Clause 21.11 Notice of rosters** states that ...a *'casual employee may also, at the employer's discretion, work their ordinary hours of work in accordance with a roster for which advance notice has been given'*, indicating that the start and finish times of ordinary hours may be set. Therefore, when read in conjunction with other award clauses it would be clear that overtime would be any time not rostered as ordinary time.
12. **Clause 21.12 Display of roster and notice of change of roster** states that an *'employer must notify employees who work their ordinary hours in accordance with a roster of the commencing and ceasing times of their rostered hours of work'*, or that *'by agreement between the employer and the employee less than seven days' notice may be substituted'*. This further indicates how to draw a distinction between overtime and ordinary hours of work.
13. **Clause 23.3 Overtime rates** clearly sets out how overtime rates should be calculated for all employees i.e. *'Where an employee works overtime the employer must pay to the employee the **ordinary time rate for the period of overtime together with** a loading as follows* (emphasis added):

For overtime worked on	Loading payable in addition to ordinary time rate
	%
<i>Monday to Friday—first 2 hours</i>	<i>50</i>
<i>Monday to Friday—thereafter</i>	<i>100</i>
<i>Saturday—first 2 hours</i>	<i>50</i>
<i>Saturday—thereafter</i>	<i>100</i>
<i>Sunday</i>	<i>100</i>
<i>Public holiday</i>	<i>150'</i>

14. **Clause 23.4** indicates that the intention is that for the purposes of calculating overtime each day stands alone; and
15. **Clause 23.5 Minimum break following overtime** contemplates that overtime may occur prior to the commencement of a shift (ordinary hours) or as a continuation of work at the cessation of the shift.
 - i. **(a)** *An employee should have a break off duty of at least eight hours between:*
 - (i) *the conclusion of a shift or, if the employee worked overtime following the end of the shift, at the conclusion of such overtime; and*
 - (ii) *the commencement of work on the next shift or, if there is any pre-shift overtime before the commencement of the next shift, the commencement of that pre-shift overtime'.*

16. Further an extract from the online **Fair Work Ombudsman Library re Overtime for casuals in the Security Award** https://www.fairwork.gov.au/library/k600030_overtime-for-casuals-in-the-security-award includes the following interpretation re **casual and overtime**:

'Casuals get overtime pay when they work more than:

38 hours

an average of 38 hours a week

10 hours in a shift, or

12 hours by agreement.

Casuals don't get their casual loading when working overtime'.

17. ASIAL submits that the Award is clear on the rate at which overtime is payable to casuals and although there may not be specific clauses to deal with when overtime commences or whether overtime is payable to casuals there are sufficient references throughout the Award to allow for an appropriate understanding of a casual's entitlements when working overtime.

Chris Delaney



Workplace Relations Advisor ASIAL

8 November 2017

Attachment 4

Proposed variation to the Security Services Industry Award 20XX Plain English Exposure Draft published 13 February 2019, (the Exposure Draft):

Insert a new clause 11.2(c) the Exposure Draft:

'11.2(c) Payment of overtime to casuals

A casual employee will be paid overtime in accordance with clause 21.3, calculated on the minimum hourly rate in clause 15 Table 4. The 25% Casual loading is not paid in addition to overtime rates.

The hourly rate for a casual employee entitled to overtime rates is calculated by reference to the following formula:

minimum hourly rate x overtime rate in clause 21.3 Table 5'