



REPORT TO FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

(AM2019/17)

DEPUTY PRESIDENT CLANCY

MELBOURNE, 11 JUNE 2020

4 yearly review of modern awards – finalisation of Exposure Drafts and draft variation determinations – Tranche 3 awards – Food, Beverage and Tobacco Manufacturing Award 2010.

[1] Arising from the Decision of the Full Bench dated 27 April 2020¹ with respect to finalising the Tranche 3 awards, conferences with parties with an interest in the *Food, Beverage and Tobacco Manufacturing Award 2010* were held on Monday 25 May 2020 and Tuesday 9 June 2020 in an effort to resolve the outstanding issues in dispute.

Casual Employees

[2] Clause 10 of the Exposure Draft deals with casual employees. Clauses 10.2 and 10.3 provide as follows:

“**10.2** A casual employee working ordinary time must be paid:

- (a) the ordinary hourly rate prescribed in clause 14—Minimum wages and classifications for the work being performed; plus
- (b) a casual loading of 25% of the ordinary hourly rate.

10.3 The loading constitutes part of the casual employee’s all-purpose rate.”

[3] The AMWU seeks to insert what would be an equivalent clause to clause 11.2(c) of the *Manufacturing and Associated Industries and Occupations Award 2010* so that it is clear that the rate resulting from the calculation required by 10.2 and 10.3 is the ‘*casual ordinary hourly rate*’. The AMWU is concerned that clause 10 does not currently clarify that where employees are entitled to a penalty rate or shift loading, that penalty or loading is to be calculated as a percentage of the casual ordinary hourly rate and not the ordinary hourly rate.

¹ [2020] FWCFB 2124 at [98]-[122].

[4] The AWU has previously contended that there is no longer a dispute that the casual loading is payable on a compounding basis when overtime is worked, a position which is accepted by ABI and Ai Group.

[5] ABI did not oppose the introduction of a definition of ‘*casual ordinary hourly rate*’ to clause 10 to make it clear how penalty rates or shift loadings are to be calculated but was concerned about ensuring there was consistency with the definition of ‘*casual ordinary hourly rate*’ in clause B.2.1 of the Exposure Draft.

[6] Schedule B of the Exposure Draft sets out tables of rates that summarise the entitlements under the Award. Clause B.2 deals with casual rates and clause B.2.1 provides:

“Casual ordinary hourly rate means the hourly rate for a casual employee for the employee’s classification prescribed by this award, inclusive of the casual loading which is payable for all purposes. Where an additional allowance is payable for all purposes in accordance with clause 20.2(a), this forms part of the employee’s casual ordinary hourly rate and must be added to the casual ordinary hourly rate prior to calculating penalties and overtime.”

[7] The parties undertook discussions during the period between the conferences and arrived at an agreed position that would result in deleting clauses 10.2 and 10.3 of the Exposure Draft and inserting in their place:

10.2 A casual employee working ordinary time must be paid:

- (a) the ordinary hourly rate; plus
- (b) a casual loading of 25% of the ordinary hourly rate.

10.3 The loading constitutes part of the casual employee’s all-purpose rate.

10.4 The resulting rate is the **casual ordinary hourly rate**.

10.5 Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

[8] The remainder of clause 10 of the Exposure Draft would then be renumbered accordingly and there would be consequent amendments to clause 7.2(a) (with the reference to clause 10.4 to be amended to clause 10.6) and clause 7.3(a) (with the reference to clause 10.6(j) to be amended to clause 10.8(j)).

[9] As regards Schedule B of the Exposure Draft, the parties agreed as follows:

- Deleting clause B.2.1 and inserting in its place:

“**Casual minimum hourly rate** includes the casual loading which is payable for all purposes. Where an allowance is payable for all purposes in accordance with clause 20.2, this forms part of an employee’s casual ordinary hourly rate and

must be added to the applicable permanent minimum hourly rate in B.1. prior to the application of the 25% casual loading to form the casual employee’s ordinary hourly rate. The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime.”

- Inserting a new clause B.2.2 as follows:

“The rates in the table below do not contain any clause 20.2 all-purpose allowances. Where a casual employee is entitled to a clause 20.2 all-purpose allowance the casual employee’s ordinary hourly rate is calculated according to B.2.1.”

- Renumbering tables B.2.2 and B.2.3 as B.2.3 and B.2.4 respectively.
- Replacing footnote 1 in table B.2.3 and footnote 2 in table B.2.4 with the following:

“Rates in table are calculated based on the casual minimum hourly rate see clauses B.2.1 and B.2.2.”

- Inserting a new table B.2.5 as follows:

B.2.5 Casual employees – other than continuous shiftworkers – overtime

	Monday to Saturday		Sunday	Public Holiday
	First 3 hours	After 3 hours		
	150%	200%	200%	250%
% of casual ordinary hourly rate¹				
	\$	\$	\$	\$
Level 1	36.54	48.72	48.72	60.90
Level 2	37.62	50.16	50.16	62.70
Level 3	39.05	52.06	52.06	65.08
Level 4	40.40	53.86	53.86	67.33
Level 5	42.57	56.76	56.76	70.95
Level 6	43.89	58.52	58.52	73.15

¹ Rates in table are calculated based on the casual minimum hourly rate see clauses B.2.1 and B.2.2.

- Inserting a new table B.2.6 as follows:

B.2.6 Casual employees – continuous shiftworkers - overtime

	Monday to Sunday and Public Holidays
	% of casual ordinary hourly rate¹
	200%
	\$

Level 1	48.72
Level 2	50.16
Level 3	52.06
Level 4	53.86
Level 5	56.76
Level 6	58.52

¹ Rates in table are calculated based on the casual minimum hourly rate see clauses B.2.1 and B.2.2

[10] The proposed amendments at [7] – [9] above resolve all issues in dispute in respect of casual employees and, if adopted, all outstanding issues related to this Award.



DEPUTY PRESIDENT