

IN THE FAIR WORK COMMISSION

Section 156 - 4 Yearly Review of Modern Awards

(AM2019/17)

AWARD STAGE

FINALISATION OF EXPOSURE DRAFTS – TRANCHE 3

Timber Industry Award 2010

(Revised Exposure Draft and Draft Determination published 8 May 2020)

Statement [2020] FWCFB 1539 – 10 June 2020

**REPLY SUBMISSION OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION
(MANUFACTURING DIVISION)**

(26 June 2020)

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BACKGROUND

1. The Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division (“CFMMEU-MD”) has a primary interest in the Timber Industry Award 2020 (“Timber Award”).
2. On 27 April 2020, the Fair Work Commission (FWC) issued a Decision [2020] FWCFB 2124¹ in matter (AM2019/17) in relation to the finalisation of exposure drafts for Tranche 3 modern awards (*“April 2020 Decision”*), including the Timber Award.
3. On 8 May 2020, the FWC published a Revised Exposure Draft - Timber Industry Award 2020 (“Timber Award ED”).²
4. On 4 June 2020, a Conference was held of interested parties before Commissioner Bissett with respect to outstanding issues in the Timber Award ED. A Report was subsequently prepared by Commissioner Bissett, (5 June 2020) regarding the outcomes of the conference.³
5. On 10 June 2020, the Full Bench published a Statement, [2020] FWCFB 2984 with respect to the outstanding issues in the Timber Award ED⁴ (*“June 2020 Statement”*). At paragraph [5] of the *June 2020 Statement*, the Full Bench stated:

[5] The employer parties and/or any party generally supporting the views expressed at [439] –[440] of the April Decision are to file written submissions on the issues identified by no later than 4.00pm Wednesday, 17 June 2020. Any party opposing the views expressed in the April Decision are to file written submissions by no later than 4.00pm Wednesday, 24 June 2020.

¹ 4 yearly review of modern awards; (AM2019/17) – Finalisation of exposure drafts – tranche 3 awards; Decision [2020] FWCFB 2124 (27 April 2020)

² Timber Industry Award 2020 – Revised Exposure Draft (8 May 2020)

³ Timber Industry Award 2010 – Report (5 June 2020)

⁴ Statement [2020] FWCFB 2984 (10 June 2020)

6. The Housing Industry Association (“HIA”) filed a submission on 17 June 2020.⁵ The Australian Business Industrial & NSW Business Chamber (“ABI”) filed a submission on 19 June 2020.⁶
7. On 24 June 2020, the CFMMEU-MD was granted an extension to 26 June 2020 to file its submissions in reply. These submissions of the CFMMEU-MD respond to the submissions of the HIA and ABI.

TIMBER AWARD – SUBMISSIONS IN REPLY

8. At paragraph [3] of the *June 2020 Statement*, the Full Bench referred to the Report (5 June 2020) and an issue identified in the *April 2020 decision* concerning penalty rates and casual employees. For completeness, paragraph [3] of the *June 2020 Statement* is reproduced below:

[438] In clause D.3, parties were asked whether the public holiday penalty rate for casual workers should be limited to the General Timber Stream.

[439] ABI submitted that, based on the current wording of the Exposure Draft, casual employees are not entitled to public holiday loadings, unless they are in the General Timber Stream:

‘78. This is because, clause 27.1(d) prescribes the public holiday penalty for casual employees. This clause is clearly limited to employees in the General Timber Stream.

79. Clause 27.1(c) also prescribes a public holiday penalty, but it expressly limited to weekly employees and so does not apply to casual employees, whether in the General Timber Stream or not.

80. Further to this, the Saturday and Sunday payments prescribed in clauses 27.1(a) and (b), are also expressly limited to weekly employees and do not apply to casual employees.

81. The Saturday and Sunday rates in the table at clause D.3.1 should be amended to reflect this.’

⁵ (AM2029/17) Timber Industry Award 2010 – Submission by Housing Industry Australia (17 June 2020)

⁶ (AM2019/17) Timber Industry Award 2010 – Submission by ABI & NSWBC (19 June 2020)

[440] At [370] of the Tranche 3 BP we invited interested parties to comment on the issue raised by ABI and the solution proposed.

[441] HIA agreed with ABI's comments and submits that clause D.3.1 should be amended to provide public holiday rates only for casual employees in the General Timber Stream and remove the Saturday and Sunday rates currently specified.

[442] The CFMMEU – MD oppose ABI's submission:

'We note at the outset that there is no actual definition of 'weekly employees' in the Timber Award 2010. However, even on the assumption that the expression 'weekly employees' was intended to exclude casual employee, we submit that this does definitively determine the respective issues.

Clause 12.2 (Casual employment) of the Timber Award provides as follows:

12.2 Casual employment

(a) A casual employee will be paid per hour 1/38th of the award rate applicable for the work performed plus a loading of 25% of the applicable rate of pay.

(b) A casual employee who works in excess of the ordinary hours fixed for weekly employees on any day will be paid at the appropriate overtime rate provided in clause 30 – Overtime, Saturday, Sunday and public holiday payments-day work an shiftwork based on their ordinary rate of pay (including the loading provided for in clause 12.2(a). [added emphasis]

(c) A casual employee engaged for any part of any day will be entitled to a minimum of four hours' pay per day whether the casual employee is required to work for four hours or not.

Clause 12.2 of the Timber Award is silent as to whether casual employees are (generally) excluded from an entitlement to penalty payments on public holidays and for work undertaken on Saturdays and Sunday.

It is the case that employees in the General Timber Stream expressly have an entitlement to public holiday penalty rates (see clause 30.7(b) of the Timber Award or clause 27.1(c) of the Exposure Draft). However, arguably, clause 30.7(b) is intended to carve out a different regime of penalty payments for casual employees in the General Timber Stream (reflecting the position in the pre-modern award) rather than operating to the effect that casual employees in the other two streams (i) Wood and Timber Stream; and (ii) Pulp and Paper Stream, have no entitlement to public holiday penalty rates.

Further, clause 12.2 of the Timber Award therefore expressly provides a casual employee an entitlement to overtime rates (as set out in clause 30) for all work undertaken on any day in excess 'of the ordinary hours fixed for weekly employees'.

Clause 30.1 (Payment for working overtime) of the Timber Award provides a general entitlement for all employees (including casuals) working overtime in relation to ordinary hours, expressed as follows (in part):

30.1 Payment for working overtime

(a) All time worked by employees outside of the spread of hours prescribed in clause 27 – Hours of work or in excess of the ordinary daily number of hours prescribed in clause 27, will be paid for at the rate of time and a half for first two hours and double time thereafter.

(b) In computing overtime each day's work will stand alone.

(c) For the purpose of this clause ordinary hours will mean the hours fixed in an establishment in accordance with 27 – Hours of Work.

Clause 27.2 makes provision for ordinary hours of all employees, by agreement, to be worked on any day of the week, including Saturday and Sunday inclusive. This applies to both day workers (27.2(b)) and shiftworkers (27.3(b)).

As such, if a casual employee's ordinary hours include hours on a Saturday or Sunday, and they work additional hours on that day, we submit, at a minimum, they would be entitled to overtime payments of time and half for the first two hours, and double time thereafter for such additional hours.⁷

9. In summary, in the HIA's submission (17 June 2020):

- HIA reconfirms its views expressed in correspondence (7 April 2020).
- HIA agrees with ABI's comments outlined in paragraph 3 of the Statement.
- Clause D.3.1 should be amended to provide public holiday rates only for casual workers in the General Timber Stream, and remove Saturday and Sunday rates as currently specified; and

⁷ Statement [2020] FWCFB 2984 (10 June 2020) at [3]

- For the sake of clarity HIA suggests that the table at clause D.3.1 provide a note specifying ordinary rates also apply for the purposes of Saturday and Sunday work.⁸

10. In summary, in the ABI submission (19 June 2020):

- ABI reconfirms its views as expressed at paragraph 76 of submissions dated 6 March 2020.
- This view is consistent with the submission of the CFMEU in 2009 which sought an entitlement to the public holiday loading for General Timber Stream casual employees only.
- ABI would like to clarify how the table at D.1 should be amended as follows:
 - (a) Splitting the General Timber Stream and Wood and Timber Furniture Steam into separate sections of the table;
 - (b) Continuing to provide a public holiday rate for the General Timber Stream (which is 275%);
 - (c) Removing public holiday rates for the Wood and Timber Furniture Stream and the Pulp and Paper Stream; and
 - (d) Removing the Saturday and Sunday rates for all casual employees regardless of the stream.⁹

11. The CFMMEU-MD opposes the submissions of HIA and AIG. The CFMMEU-MD relies on its previous submissions filed 9 April 2020¹⁰ and as follows.

12. It is important to consider how the issue in dispute first arose in these proceedings. The FWC research team in Timber Award ED (29 January 2020) asked a single question,

⁸ HIA submission (17 June 2020) at page 1

⁹ ABI & NSWBC submission (20 June 2020) at paras 3 - 6

¹⁰ (AM2019/17) CFMMEU – Manufacturing Division submission (8 April 2020) at paras 19 - 26

*‘Whether the public holiday penalty rate for casual workers should be limited to the General Timber Stream?’*¹¹ As well as providing a response to this question, ABI and HIA have gone further and formed (what we submit are incorrect) conclusions regarding the entitlement of casuals to Saturday and Sunday payments in clause 27.1(a) and (b) [of the ED].

Whether the public holiday rate for casual workers should be limited to the General Stream

13. We rely on, and reiterate our previous submission (9 April 2020) that all casual workers covered by the Timber Award are entitled to the public holiday rate under the current Timber Award¹² and that such entitlement should be accurately reflected in the Timber Award ED. Our previous submissions are reproduced in full above and we do not consider that there is utility in summarising them again.
14. The ABI in its submission (19 June 2020) refer to the submissions of the CFMEU-FFPD (16 December 2009) as part of an application under section 576H of the Workplace Relations Act 1996. (“CFMEU submission – 2009”). The submissions were in support of a variation to insert into the modern Timber Industry Award 2010 (prior to its commencement on 1/1/2010), a new clause 30.7(b) ‘Payment for casual workers working on public holidays – General Timber Stream.’ The terms of clause 30.7(b) which was ultimately inserted into the award is an identical formulation to that which currently exists at clause 30.7(b) of the Timber Award.
15. ABI submits that the CFMEU submission [in Dec 2009] *‘was consistent with the position that there was no entitlement for public holiday loading for any casual employees at*

¹¹ (AM2019/17) Finalisation of Exposure Drafts (Tranche 3), 23 March 2020 at paras [368]-[370]

¹² Timber Industry Award 2010 (as varied to 12 June 2020)

*that date.*¹³ In our view, this inference drawn by ABI mischaracterises the CFMEU submission.

16. It is evident from the CFMEU submission 2009, that the objective of the CFMEU was to reflect expressly in the new modern Timber Award, the terms of the pre-existing entitlement to public holiday loadings for casual employees in the General Timber Steam. That is, effectively, the same entitlement which had existed in the pre-reform *Timber and Allied Industries Award 1999*¹⁴ and similar clauses in various NAPSA's.¹⁵ The entitlement makes clear that for employees in the General Stream, they receive a loaded penalty rate for public holiday work.

17. It is not reasonable to definitively conclude (as the ABI has done) that the fact of the CFMEU-FFPD's proposed variation in December 2009 meant '*that there was no entitlement of public holiday loading for any casual employee at that date.*' The CFMEU submission does not submit or concede this was the case.

18. As submitted previously, clause 12.2 (Casual employment) of the Timber Award does not expressly exclude casual employees from the public holiday loading in clause 30 and is otherwise silent (generally) about this issue.

Saturday and Sunday payments applicable to casual employees

19. The additional matters raised by HIA and ABI in their respective submissions go to proposals to alter the tables in clause D.3.1.

¹³ ABI & NSWBC submission (19 June 2020) at para 4

¹⁴ Timber and Allied Industries Award 1999 – clauses 15.4.2 and 49.2

¹⁵ S.576H WR Act – Application to vary a modern award; CFMEU-FFPD submission (16 December 2009) at para 3

20. In its submissions (17 June 2020) HIA suggests, for the sake of clarity, *'that the table at clause D.3.1 provide a note specifying ordinary rates also apply for the purposes of Saturday and Sunday work [for casual employees].* In its submissions, ABI (19 June 2020) propose *'removing the Saturday and Sunday rates for all casual employees regardless of the stream.'*

21. We oppose the proposals of the HIA and ABI, as it will infer that casual employees are only entitled to their ordinary rate of pay if they undertake work on Saturday or Sunday. In context of the other relevant provisions of the Timber Award this is incorrect and would have the potential to mislead readers regarding their rights and obligations.

22. The hours of work for employees are prescribed by clause 27.2 and 27.3 of the Timber Award [clause 17.1 – 17.4 of the Timber Award ED]. The default ordinary hours of work for day workers are an average of 38 hours per week and will be worked between the hours of 6.30am and 6.00pm Monday to Friday. Therefore, if a casual employee (day worker) was to undertake work on a Saturday or Sunday these hours would be outside their ordinary hours of work and would attract overtime penalties.

23. Under clause 12.4 of the Timber Award ED, a casual day worker would be entitled to the following penalty:

12.4 A casual employee who works in excess of the ordinary hours fixed for day workers in clause 17.2 will be paid at the appropriate overtime rate provided in clause 26 – Overtime based on their ordinary rate of pay (including the loading provided for in clause 12.3)

24. Therefore, a casual day worker undertaking work on a Saturday or Sunday, would be entitled to an overtime rate calculated (on a casual loaded rate) as follows:

Saturday

- 1.5 for the first 2 hours
- 2.0 for all time after that

Sunday

- 2.0 for all time worked

25. We note that clause 27.2 of the Timber Award [clause 17.2 of the Timber Award ED] provides that (for day workers and shift workers):

'Where agreement exists the ordinary hours of work can be worked on any day of the week, Saturday and Sunday inclusive.'

26. Even where agreement exists under 17.2 and a casual employee's ordinary hours include a Saturday or Sunday, *all hours* worked in addition to those ordinary hours would attract an overtime penalty.

27. For these reasons we oppose the respective suggestions of HIA and ABI.

Filed on behalf of:

**Construction Forestry Maritime Mining and Energy Union
(Manufacturing Division)**

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(26 June 2020)