

IN THE FAIR WORK COMMISSION

Section 156 - 4 Yearly Review of Modern Awards

(AM2019/17)

AWARD STAGE

FINALISATION OF EXPOSURE DRAFTS – TRANCHE 3

Textile Clothing Footwear and Associated Industries Award 2010
Timber Industry Award 2010
(Exposure Draft and Draft Determination published 29 January 2020)

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

(9 April 2020)

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BACKGROUND

1. On 29 January 2020, the Fair Work Commission (FWC) issued its Decision [2020] FWCFB 421¹ (*January 2020 Decision*) and published various Exposure Drafts and Draft Determination for Tranche 3 modern awards as part of matter AM2019/17, Award Stage – Finalisation of Exposure Draft proceedings.
2. In Tranche 3 the Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ('CFMMEU – MD') has an interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award') and the Timber Industry Award 2010 ('Timber Award').
3. On 6 March 2020, the CFMMEU – MD filed submissions with respect to the TCF Award.²
4. On 10 March 2020, the CFMEEU-MD filed submissions with respect to the Timber Award.³
5. On 23 March 2020, the Full Bench published a document titled 'Tranche 3 Background Paper' ("Background Paper"). The Background paper deals with the TCF Award at paragraphs [334] to [365] and the Timber Award at paragraphs [367] – [437]. On the same date, the Full Bench published a Statement [2020] FWCFB 1539⁴ with respect to the Tranche 3 awards ("*March 2020 Statement*").

¹ 4 yearly review of modern awards – finalisation of exposure drafts – Tranche 3 awards; [2020] FWCFB 421 (29 January 2020)

² (AM2019/17) CFMMEU – Manufacturing Division submission in relation to the Textile, Clothing, Footwear and Associated Industries Award 2010 (6 March 2020)

³ (AM2019/17) CFMMEU – Manufacturing Division submission in relation to the Timber Industry Award 2010 (10 March 2020)

⁴ [2020] FWCFB 1539 (23 March 2020)

6. The CFMMEU-MD, together with the Ai Group, subsequently participated in Telephone Conferences before Commissioner Bissett with respect to both the Timber Award (1 April 2020) and the TCF Award 2010 (3 April 2020).

REPLY SUBMISSIONS

7. At paragraph [7] of the March 2020 Statement, the Full Bench stated (in part):

1. *Reply submissions are to be filed by 4pm Tuesday 7 April 2020.*
2. *The reply submissions are to reply to the submissions filed and address the provisional views and other issues raised in the Background Paper, including the proposal to correct minor drafting errors and responding to invitations to comment on other submissions. These are contained in Attachment A.*

Note: If a provisional view in the Background Paper, is unopposed then we will adopt it and amend the relevant Exposure Draft and variation accordingly. [added emphasis]

8. An extension was provided to the CFMMEU-MD to file its reply submissions by 12pm, 9 April 2020.
9. In addition to the matters raised in the Background Paper, these submissions specifically respond to submissions made by the **Ai Group**⁵ (in relation to the TCF Award⁶ and the Timber Award⁷) and the ABI & NSWBC⁸ (in relation to the TCF Award⁹ and the Timber

⁵ (AM2019/17) Ai Group Submission: Finalisation of Exposure Drafts – Tranche 3 (6 March 2020)

⁶ Ibid; paragraphs 88 – 99 (TCF Award 2010)

⁷ Ibid; paragraphs 100 – 102 (Timber Award 2010)

⁸ (AM2019/17) ABI & NSWBC Submission: Tranche 3 Exposure Drafts (6 March 2020)

⁹ Ibid; paragraphs 69 – 73 (TCF Award 2010)

Award¹⁰). The majority of the CFMMEU-MD's views outlined were similarly expressed in the respective conferences held and subsequently confirmed to Commissioner Bissett.

TCF AWARD 2010

ABI & NSWBC SUBMISSIONS

Calculation of overtime for casuals

(paragraphs [335] – [338] of the Background Paper)

10. The CFMMEU-MD agrees with the provisional view of the Full Bench contained at paragraph [338] of the Background Paper.

Ai GROUP SUBMISSIONS

Minor drafting issues

(paragraphs [341] – [342] of the Background Paper)

11. The CFMMEU-MD has no objection to the proposed amendments contained at paragraph [341] of the Background Paper.

Clauses 4.7 & 4.8 (Coverage)

(paragraphs [343] – [352] of the Background Paper)

12. The CFMMEU-MD agrees with the provisional views of the Full Bench at paragraphs [347] and [352] of the Background Paper, and the Ai Group's proposed amendments to address the issue.

CFMMEU-MD SUBMISSIONS

¹⁰ Ibid; paragraphs 76 – 81 (Timber Award 2010)

Schedules C.4 and C.5 (casual employees' rates of pay)

(paragraph [366] of the Background Paper)

13. Paragraph [366] of the Background states:

[366] The CFMMEU (Manufacturing Division) identifies a range of issues in respect of the other Schedules (see [54] – [74]). These issues, and all other matters in relation to the award, will be the subject of separate conferences.

14. The issues raised by the CFMMEU-MD concern the applicable method of calculation for casual employees with respect to public holiday rates and other penalty rates for casual employees contained at C.4.1, C.5.1, C.5.2 and C.5.3 in Schedule C.

15. The CFMMEU-MD confirms its position that the most sensible approach at this stage is to delete those columns in C.4.1, C.5.1, C.5.2 and C.5.3 which purport to specify casual rates for anything but ordinary hours (i.e. in effect deleting C.5.1, C.5.2 and C.5.3 and the public holiday column in C.4.1).

16. Secondly, the parties to revisit the issues once the Full Bench in matter AM2017/51 determines the overtime for casuals issue for the TCF Award. At that time, we consider there could be utility in the convening of a further conference of the parties.

TIMBER AWARD

ABI & NSWBC SUBMISSIONS

Clause D.3 – Parties are asked whether the public holiday penalty rate for casual workers should be limited to the General Timber Stream

(paragraphs [368] – [370] of the Background Paper)

17. The ABI & NSWBC position in relation to this question are contained at paragraphs 76 to 81 of its submissions. In short summary, the *'ABI submits 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.'* Its position is based on the following submission:

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.

18. The CFMMEU-MD oppose the submissions of the ABI & NSWBC.

19. 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.

20. 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.

21. 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.
22. 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.
23. 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'.

24. 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.

25. 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)).

26. 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.

CFMMEU-MD SUBMISSIONS

Clause 22.12 – Wet places allowance

(paragraphs [399] – [402] of the Background Paper)

27. The CFMMEU-MD raised this issue at paragraphs 29 to 31 of its submissions.¹¹

28. At paragraph [401] of the Background Paper, the CFMMEU-MD's position is summarised as:

[401] The CFMMEU submits that the introduction of the qualifier in clause 22.12(c) arguably changes the meaning of the clause, is not necessary and does not reflect the current, substantive provision in the award and the words 'required' should be deleted from clause 22.12(a) of the Exposure Draft.

29. The Full Bench at paragraph [402] 'agree with the CFMMEU and will amend the Exposure Draft and draft variation accordingly.'

30. Further to the conference held before Commissioner Bissett, it was suggested (as an alternative to the course proposed by the CFMMEU) that the wording of clause 22.12(c) of the Exposure Draft could simply revert to the current formulation in clause 21.15 of the Timber Award (but amended to include the actual dollar rate of the allowance). If such an approach was adopted, clause 22.12(c) of the Exposure Draft would read:

(a) An employee working in any place where clothing or boots become saturated, whether by water, oil or otherwise, will receive and allowance of \$0.52 whilst so engaged.

31. Such an outcome is also acceptable to the CFMMEU-MD.

Clause 23.13 (Travelling allowance – bushworkers other than piece workers)

(paragraphs [405] – [411] of the Background Paper)

32. At paragraph [411] of the Background Paper the Full Bench states:

¹¹ (AM2019/17) CFMMEU – Manufacturing Division; Submission (10 March 2020)

[411] It is our provisional view that the Exposure Draft and variation determination revert to the current award provision as proposed by the CFMMEU.

33. We confirm our position in support of the Full Bench's provisional view with respect to clause 23.12.

Clause 27.2 (Shiftwork arrangements)

(paragraphs [417] – [421] of the Background Paper)

34. This issue was discussed at the Conference held before Commissioner Bisset.

35. The CFMMEU-MD is open to further discussions involving the Ai Group in order to resolve the issue.

Filed on behalf of:

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

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(9 April 2020)