

*Fair Work Act 2009*

FAIR WORK COMMISSION

**s. 156 – 4 yearly review of modern awards**

**OUTLINE OF SUBMISSIONS**

**Revised Exposure Draft Group - 1C, 1D and 1E Awards**

*Textile, Clothing, Footwear and Associated Industries Award 2010 (AM2014/91)*

*Wool Storage, Sampling and Testing Award 2010 (AM2014/94)*

*Maritime Offshore Oil and Gas Award 2010 (AM2014/77)*

*Timber Industry Award 2010 (AM2014/92)*

**20 NOVEMBER 2015**

## **The Australian Workers' Union's outline of submissions**

We refer to the directions in [2015] FWCFB 7236<sup>1</sup>, where interested parties have been directed to provide feedback by 4pm on 20 November 2015 on the revised exposure drafts (dated 30 October 2015) for awards in group 1C; 1D and 1E. These submissions will respond to the revised exposure drafts of the (1) *Maritime Offshore Oil and Gas Award 2010*; (2) *Textile, Clothing, Footwear and Associated Industries Award 2010*; (3) *Timber Industry Award 2010*; and (4) *Wool Storage, Sampling and Testing Award 2010*.

### ***Maritime Offshore Oil and Gas Award 2010***

#### Clause 7.1(c) – Ordinary hours

1. Clause 7.1(c) of the exposure draft says (emphasis added),

*“Employees may be required to work up to eight ordinary hours per day”.*

2. Clause 7.1 (c) of the exposure draft needs to be amended as per clause 18.1 of the current award to read (emphasis added),

*“The ordinary hours of work will be eight hours per day”.*

3. The terms “will be” needs to be retained in the exposure draft because it makes it unequivocal that the ordinary hours of work per day is 8 hours.

### ***Textile, Clothing, Footwear and Associated Industries Award 2010***

#### Clause 6.3(h) – Part-time employees

4. The cross reference to clause 6.3(c) is incorrect. The correct cross-reference is 6.3(d).

#### Clause 6.4(h) – Casual employees

5. A new sub clause asking parties to list provisions that did not apply to casual employees was proposed by the Commission but employer and Union parties overwhelmingly rejected this. Therefore, in [2014] FWCFB 9412 at [69] the Full Bench removed the proposed sub clause.
6. However, in this award in addition to the removal of the Commission's proposed sub clause, clause 6.4(h) of the exposure draft has also been

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<sup>1</sup>s156 - 4 yearly review of modern awards (AM2014/72 and others) [2015] FWCFB 7236 at [358]

deleted. Clause 6.4(h) of the exposure draft needs to be retained as it presently appears at 14.7 of the current award.

#### Clause 8.3(a) – Changes to hours

7. The semi-colon at the end of this clause needs to be replaced with a full stop.

### **Timber Industry Award 2010**

#### Clause 7.4(c)(i) – Casual employees – Casual loading

8. The proposed clause says, “*for each ordinary hour worked*”, this should be changed to “*for each hour worked*” because casual loading in this award is paid for all hours worked.

9. For example clause 12.2(a) of the current award says (emphasis added),

*“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”.*

10. Additionally, clause 12.2(b) of the current award explicitly states that casual loading is payable on overtime, Saturday, Sunday and public holidays.
11. We note that clause 12.2(b) of the current award has not been incorporated in the exposure draft, thus it is a substantive change to the award. We submit that clause 12.2(b) of the current award must be retained in the exposure draft.

### **Wool Storage, Sampling and Testing Award 2010**

#### Clause 6.3(b) – Part-time employees

12. The terms of the current award at clause 10.2(b) should be retained.

13. Clause 10.2(b) of the current award says,

*“For each ordinary hour worked, a part-time employee will be paid no less than 1/38th of the minimum weekly rate of pay for the relevant classification in clause 13—Classifications and minimum wage rates”.*

14. On the other hand, clause 6.3(b) of the exposure draft states,

*“For each ordinary hour worked, a part-time employee must be paid the minimum hourly rate”.*

#### Clause 6.4(d) – Casual employees – Casual loading

15. The proposed clause excludes the terms, “*provided in this award*” from the end of the clause. The terms “*provided in this award*” should be retained as per clause 10.3(c) of the current award.

#### Clause 14.1(a) and (b) – Overtime – definition of overtime

16. Clause 25.1 – *Overtime employees other than continuous shiftworkers* of the current award explicitly applies to all employees but continuous shiftworkers.

17. However, in the exposure draft at 14.1(a) and (b) the clause separates its application into part-time employees and casual and full-time employees, it states:

*“(a) For a full-time or casual employee, overtime is any time worked in addition to rostered hours on any shift, or in excess of the total ordinary hours in the work cycle.*

*“(b) For a part-time employee, hours worked in addition to the employee’s ordinary hours (agreed in accordance with clause 6.3(c)) will be paid at the appropriate overtime rate”.*

18. Clause 14.1(b) of the exposure draft appears in the current award’s part-time provision at 10.2(d).

19. In the exposure draft the clause appears twice, in the part-time clause at 6.3(d) and also in the overtime clause at 14.1(b).

20. We submit that clause 14.1(b) should be deleted from the exposure draft, as it presently does not appear in the overtime clause of the current award.

21. We further suggest deletion of the commencement words, “*for a full-time or casual employee*” from clause 14.1(a) of the exposure draft because under the current award the overtime clause applies to all employees except continuous shiftworkers. This will maintain the status quo of the current award, where the overtime clause has the same effect on casual, part-time and full-time employees.

#### **Substantive variation**

#### 6.4(c) – Casual employees – Casual loading

22. We refer to paragraph [333] in the [2015] FWCFB 7236 decision which states (emphasis added):

**[333]** *The proposed amendment raises the general question of whether the casual loading is applied on top of other loadings or penalties. It seems clear that the current award provides that overtime payments are paid in substitution for the casual loading. However, it is not clear whether weekend and other penalties are paid in substitution for the casual loading or whether the casual loading is applied to the weekend penalty rate. Given the ambiguity in the current award this is essentially a merit issue and we will refer it to the Casual and Part-time Employment Full Bench in [AM2014/197](#).*

23. We do not agree that casual loading is **not** paid on overtime.

24. In the current award casual employees receive casual loading for all hours worked. As outlined in our submissions for the exposure draft of this award dated 20 October 2015 at [7], and our reply submissions dated 12 November 2015 at [7], clause 10.3(b) of the current award states (emphasis added):

*“For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 13—Classifications and minimum wage rates, plus a casual loading of 25%” (our emphasis).*

25. The words “*For each hour*” in clause 10.3(b) of the current award makes it unequivocal that the casual loading is paid for all hours worked.

26. Removing casual loading on overtime significantly reduces casual employee entitlements, which is a substantive change to the award.

27. Furthermore, the overtime entitlements prescribed in the preamble of clause 25.1 of the current award says (emphasis added):

*“...an employee will be paid the following additional payments for all work done in addition to their ordinary hours...”*

28. The words “*following additional payments*” suggest that the payments are in addition to other entitlements such as the payment of minimum rates and the casual loading.

29. Also a potentially important distinction between the current award and the exposure draft is the location of overtime and penalty rate provisions.

30. In the current award overtime and penalty rates are contained within one clause – clause 25. In contrast, the exposure draft includes penalty rates in clause 13 and overtime rates in clause 14.

31. The inclusion of penalty rates and overtime entitlements within one clause of the current award appears relevant to interpreting clause 25.4(b) of the current award.

32. Clause 25.4(b) of the current award is in the same terms as clause 14.4(b) of the exposure draft and states (emphasis added),

*“Any payments under this clause are in substitution for any other loadings or penalty rates”.*

33. The inclusion of the words “*under this clause*” confines its operation to the entitlement contained in clause 25 of the current award.

34. We submit that the intended effect of the provision is to make it clear that an employee will only receive one of the additional entitlements contained in clause 25 at a time, for example:

- If they are receiving overtime payments, they do not receive shift loadings on weekend penalty rates; and
- If they are receiving weekend penalty rates, they do not receive shift loadings.

35. If clause 25.4(b) of the current award was intended to remove the entitlement to casual loading, it could have easily been drafted to state:

*“Any payments under this clause are in substitution of any other loadings or penalty rates **under this award**”.*

36. In the absence of terms “*under this award*”, clause 25.4(b) should not be interpreted as removing a casual employee’s entitlement to their casual loading “*for each hour worked*”.

37. In the circumstances whereby the Full Bench considers that the current award provisions (clause 10.3(b) and clause 25.4(b)) are in conflict, then we submit that the following principle should be applied.

*“Where ambiguity exists it should be resolved in favour of affording a more generous entitlement rather than depriving employees of a benefit that was reasonably open on the words used in the award”<sup>2</sup>.*

38. The application of this principle will result in clause 25.4(b) of the current award being interpreted as confined to the entitlements contained in clause 25

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<sup>2</sup> See NSW Nurses Association v Ramsay Health Care Australia Pty Ltd & Ors [2009] FMCA 579 at 114 – cited with approval in Wilson v Nowra Coaches Pty Ltd [2014] FCCA 1916 at [15]

as opposed to effectively overriding the entitlement in clause 10.3(b) for the casual loading to be paid for all hours worked.

*Fair Work Ombudsman*

39. Moreover, the Fair Work Ombudsman's online pay rate facility informs users that under this award casual loading is paid for all hours worked, including overtime. A copy of a summary document accessed on 20 November 2015 to this affect is attached and marked "AWU 1".

Casual and Part-time Full Bench

40. Most importantly it should be noted that during the hearing for the exposure draft of this award on 28 November 2015 the Full Bench at PN48 of the transcript made a decision to refer this issue to the Part-time and Casual Full Bench.

41. The issue has been referred to the Part-time and Casual Full Bench and is listed as item 1.4.5 and item 1.4.6 of the document titled "*Issues relating to Casual Employment – Referred to Full Bench AM2014/97*", the document was published on 29 June 2015.



Jamila Gherjestani  
**NATIONAL LEGAL OFFICER**



Pay Calculator > Find your award

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## Overtime - Monday to Friday - first 2 hours - not continuous shiftworkers ?

### Result

**\$30.96 per hour**

### Calculations

The employee's overtime rate for work between Monday and Friday (first 2 hours) value \$30.96 [Detail >>](#)

- The employee's overtime rate for work between Monday and Friday (first 2 hours) calculation :  
\$30.96 [Detail >>](#)

$$\$17.69 + \$8.85 + \$4.42 = \$30.96$$

- The employee's hourly base rate of pay without loadings : \$17.69 [Detail >>](#)
- The employee's penalty amount for overtime between Monday and Friday (first 2 hours) :  
\$8.85 [Detail >>](#)
- The casual loading rate : \$4.42 [Detail >>](#)

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