

[2020] FWCFB 2984

The attached document replaces the document previously issued with the above code on 10 June 2020.

Due date for submissions at paragraph [5] corrected to Wednesday, 17 June 2020.

Casey Sutton  
Associate to Justice Ross, President

Dated 11 June 2020





# STATEMENT

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

## **4 yearly review of modern awards** (AM2019/17)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

MELBOURNE, 10 JUNE 2020

*4 yearly review of modern awards—finalisation of exposure drafts—Timber Industry Award 2020*

[1] On Monday 27 April 2020 we issued a decision<sup>1</sup> (*April Decision*) with respect to the finalisation of exposure drafts for tranche 3 awards. Since that time a number of exposure drafts have been reissued including a revised Exposure Draft for the *Timber Industry Award 2010* which was published on 8 May 2020.

[2] In the *April Decision* we indicated that a conference would be convened to discuss any outstanding issues arising from the revised Exposure Draft or the *April Decision*.

[3] A conference of the interested parties was convened on 4 June 2020 by Commissioner Bissett. A [Report](#) from that conference was published on 5 June 2020. At paragraph [11], the Report identifies an issue raised in the *April Decision* about penalty rates and casual employees:

‘[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.

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<sup>1</sup> [2020] FWCFB 2124.

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

[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.'

[4] At the conference the parties sought an opportunity to make further submissions on this issue.

[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 issue 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**.

[6] Submissions must be sent electronically to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

[7] Following receipt of the submissions we will determine the matter on the basis of the material filed.

[8] We also propose to give effect to all of the matters agreed at the conference and will amend the draft variation determination accordingly.

PRESIDENT

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