DECISION

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

4 yearly review of modern awards – Overtime for casuals
(AM2017/51)

VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BULL

SYDNEY, 18 AUGUST 2020

4 yearly review of modern awards – common issue – overtime for casuals – draft determinations

INTRODUCTION

[1] This decision is concerned with the identification and resolution of potential ambiguities in a number of modern awards in relation to the overtime entitlements of casual employees as part of the 4 yearly review of modern awards. It specifically deals with those remaining modern awards identified in a statement which was issued on 6 December 2019[1] (December Statement) in relation to which there remain outstanding issues. The awards listed in the December Statement fall into three categories:

(1) *Category 1* consists of 35 awards in relation to which there are contested issues requiring determination. These include the 34 awards set out in paragraphs [3], [8], [12], [14] and [15] of the December Statement. In addition, we have placed the *Local Government Industry Award 2010* (now *Local Government Industry Award 2020*) in this category because, although there is a consensus position amongst the parties, the Fair Work Ombudsman has published a pay rates guide to the award which is at odds with the parties' position.

(2) Category 2 consists of 55 awards where there has been a consensus reached (either by way of agreement or the non-expression of any opposition to a party's position) as to the meaning and effect of the existing provisions concerning the overtime entitlements of casual employees. These are the awards identified in paragraphs [4], [6], [16], [17], [21], [22] and [23] of the December Statement, except for the Local Government Industry Award. In some cases, variations to the awards are agreed or not opposed to give effect to the consensus position.

[1] [2019] FWC 8318

(3) Category 3 consists of the 3 awards listed in paragraph [19] of the December Statement about which no submissions have been made.

In addition, there is a fourth category of three awards which were referred to in a statement which was issued on 14 October 2019[2] (October Statement). In relation to these awards, paragraph [2] of the October Statement said that: "interested parties advised that they were in agreement as to the meaning and effect of the current casual overtime provisions in the following awards, and no modification of the exposure drafts for those awards was required". This decision seeks to finalise the position with respect to these category 4 awards.

[2] We will deal with each of the above categories in turn in this decision.

CATEGORY 1 AWARDS

[3] In respect of a number of the awards in this category, variations have been made which have resulted in new 2020 versions of the awards being published in a number of tranches from 4 February 2020 onwards. These awards generally contain altered casual provisions which reflect standardised drafting changes, but exclude any tables of hourly overtime rates for casual employees where this is a contested issue in the proceedings before us.[3]

[4] The submissions before us in relation to the Category 1 awards all relate to the text of the relevant modern awards as they were in 2019, and do not take into account the text of any 2020 versions of the contested awards which have been made. The course we propose to take is to determine the issues concerning the overtime entitlements for casual employees on the basis of a determination of the effect of the relevant provisions of the awards as they were prior to the making of any 2020 versions of those awards. Therefore, where a 2020 version of a contested award has been made, all references in this decision will be to the award as it was immediately before the 2020 version was made (unless specified otherwise). In respect of each award (whether a 2020 version has been made or not), we will publish a draft determination giving effect to our conclusion and invite further submissions in response. Those draft determinations are intended to introduce standardised unambiguous drafting of the relevant provisions of the awards.

[5] We note at the outset that in respect of a number of awards, various parties have submitted that the Full Bench of the Australian Industrial Relations Commission which conducted the award modernisation process pursuant to Part 10A of the *Workplace Relations Act 1996* (AIRC award modernisation Full Bench) adopted a standardised approach or "general rule" as to the payment of the casual loading and overtime penalty rates. This standard approach was said to be discernible in the following passage of a decision issued on 19 December 2008:[4]

> "[50] In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate."

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[2] [2019] FWC 7087

[3] See [2019] FWCFB 8569 at [13]-[14]

[4] [2008] AIRCFB 1000

[6] While it is certainly the case that the 25% casual loading is, with a few exceptions, the standard in modern awards, it cannot be said notwithstanding the above passage that any standard or general approach was actually applied by the AIRC award modernisation Full Bench concerning the relationship between the casual loading and overtime penalty rates. The modern awards made as a result of the award modernisation process are marked by a high degree of diversity in this respect, as will become apparent in the analysis of the disputed awards. Some modern awards, at least originally, did not provide for casual employees to receive overtime penalty rates at all. Of those that provide for overtime penalty rate entitlements for casual employees, they may be divided into three categories:

(1) awards where overtime penalty rates are payable in substitution for the casual loading;

(2) awards where the casual loading and the overtime penalty rate are added separately to the minimum hourly rate (the cumulative approach);

(3) awards where the overtime penalty rate is applied to an ordinary hourly rate consisting of the minimum hourly rate and the casual loading (the compounding approach).

[7] Accordingly we do not consider that the issues in dispute in the Category 1 awards can be resolved by reference to any "general rule".

Aboriginal Community Controlled Health Services Award 2010

[8] There is a contested issue about whether casual employees have any entitlement to overtime under this award beyond where they work outside the span of ordinary hours. Clause 10.4 of the award deals with casual employment and provides:

10.4 Casual employment

(a) A casual employee is an employee engaged as such on an hourly basis.

(b) A casual employee will be paid per hour an amount calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification, plus a casual loading of 25% instead of the paid leave entitlements of full-time and part-time employees.

(c) The minimum period of engagement of a casual employee is three hours.

(d) Casual employees who are required to work on public holidays will, instead of the casual loading, be paid an additional 50% for such work.

[9] Clause 24.2 deals with overtime and provides:

24.2 The following overtime rates will be paid for all work done:

> **(a)** in excess of the number of hours fixed as a day's, a week's or a fortnight's work as the case may be—time and a half for the first two hours and double time thereafter;
>
> **(b)** outside the span of hours in clause 21.1—time and a half for the first two hours and double time thereafter;
>
> **(c)** outside a spread of nine hours from the time of commencing work by an employee rostered to work broken shifts—time and a half; and
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> **(d)** outside a spread of 12 hours from the time of commencing work by an employee rostered to work broken shifts—double time.

[10] In respect of the above provisions, the Health Services Union (HSU) submitted that clause 24 – *Overtime and penalty rates* applies to all employees and there is no indication in the award that it does not apply to casual employees. It proposed a variation to insert new sub-clauses to clause 24.2(e) and (f) which would clarify the entitlement of casual employees to 150% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter for all work performed in excess of 38 hours per week or 10 hours per shift and make overtime rates payable in addition to casual loading.

[11] Australian Business Industrial and the NSW Business Chamber (ABI) agreed that clauses 24.2(b) to (d) apply to casual employees, however disagreed that clause 24.2(a), which refers to overtime as being hours worked in excess of hours "*fixed*" for an employee, automatically or universally applies to casual employees. This is because the nature of casual employment is such that employees do not generally have "*fixed*" hours by which any hours outside these could be identified. Further, ABI submitted that the award does not contain an entitlement to overtime for hours worked by casuals in excess of 38 hours per week and that no probative evidence had demonstrated a cogent basis for the variations sought by the HSU.

[12] We do not accept that the reference to the number of hours "*fixed*" for a day's, week's or fortnight's work in clause 24.2(a) is to be read as excluding casuals. In circumstances where, as ABI accepts, clauses 24.2(b)-(d) are applicable to casuals, it is unlikely that any intention to exclude casuals from the operation of clause 24.2(a) would be expressed in anything other than clear language. The provision is badly drafted, but the reference to the hours "*fixed*" is best understood to mean the ordinary hours of work fixed by clause 20 of the award. Clause 20.1 fixes ordinary hours for full-time employees at an average of 38 per week over a fortnight (which tends to explain the reference to a fortnight's work in clause 24.2(a)), and clause 20.2 provides that not more than 10 ordinary hours of work are to be worked in a day. That fact that clause 20.1 operates by reference to full-time employees does not mean that clause 24.2(a) is to be read as confined in the same way, since that would be inconsistent with the fact that clause 20.2 is not confined to full-time employees.

[13] It is also important to note that it is clear that clauses 25.3 and 25.4, which establish penalty rates for ordinary hours worked by a "*shiftworker*" on Saturdays and Sundays respectively, apply to casual employees, since clause 25.5 provides:

> **25.5 Ordinary rate** will not include any percentage addition by reason of the fact that an employee is a casual employee. That is the shift penalty is calculated upon the ordinary rate, prior to the addition of the 25% casual loading.

[14] An interpretation of the award which provides for casual employees to receive penalty rates for ordinary hours worked on weekends, but not for non-ordinary hours worked on weekends, is not logically sustainable.

[15] It may also be noted that clause 25.5 assumes that the casual loading is payable in addition to weekend penalty rates, but seeks to makes clear that the rate is calculated on a non-compounding basis. That would appear to establish the default position for the award, notwithstanding the use of the expressions "*time and a half*", "*double time*" and "*double time and a half*" to describe the rate of overtime in clause 24.2. In this connection, it may be noted that clause 24.4 provides that overtime rates are payable in substitution for and not cumulative upon the shift loadings prescribed by clause 25. This provision could only operate rationally if overtime rates, like the shift loadings in clause 25 for which they substitute, do not compound upon the casual loading. Clause 10.4(d) makes it clear that any departure from that default position so described is stated in express terms.

[16] In summary, we consider that casual employees are entitled to overtime penalty rates for all work performed in excess of an average of 38 hours per week over a fortnight, or 10 hours in a day, in addition to the circumstances identified in clauses 24.2(b)-(d). The casual loading is payable in addition to such penalty rates on a non-compounding basis.

[17] The *Aboriginal Community Controlled Health Services Award 2020* took effect on 13 April 2020. Clause 20.1(a)(i) is, in substance, in the same terms as the previous clause 24.2(a). We will publish a draft determination to vary the 2020 award to clarify the position in a manner consistent with our conclusion and invite submissions in response within 21 days.

Aged Care Award 2010

[18] The HSU has proposed a variation to the *Aged Care Award* for the purpose of making it clear that casual employees will receive overtime for work in excess of 38 hours per week. Currently, clause 25.1(b) of the award provides:

> **(b) Part-time and casual employees**
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> **(i)** All time worked by a part-time or casual employee in excess of 38 hours per week or 76 per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturdays and Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.
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> **(ii)** Subject to the provisions of clause 25.1(b)(iii) below, all time worked by a part-time or casual employee which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.
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> **(iii)** For a part-time employee, all time worked in excess of their rostered hours on any one day (unless an agreement has been entered into under

clause 10.3(c)), will be overtime and paid at the rates prescribed by clause 25.1(b)(i).

[19] The HSU proposed that the reference to casual employment in clause 25.1(b) be deleted (so that it only concerned overtime for part-time employees), and that a new clause 25.1(c) be added as follows:

(c) Casual employees

(i) All time worked by a casual employee in excess of 38 hours per week will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturdays and Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by a casual employee which exceeds 10 hours per day or shift will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) All time worked in excess of their rostered hours on any one day will be overtime and paid at the rates prescribed by clause 25.1(c).

(iv) Overtime rates are payable in addition to casual loading.

[20] In support of this proposal, the HSU submitted that it was impractical and unfair that clause 25 of the award, as currently drafted, would allow casual employees to be paid overtime for work in excess of 76 hours per fortnight because casual employees generally have irregular hours when compared with part-time employees, and because clause 10.4 provides that a casual employee is one engaged "*to work up to and including 38 hours per week*". The HSU also submitted that the amendment would avoid any ambiguity created by the conflation of casual and part-time employees. Further, it was submitted, the rate of overtime pay is clearly outlined in clause 25.1(b) as it applies to casual employees and that, read in conjunction with clause 10.4(b), it can clearly be inferred that overtime should be paid in addition to the casual loading.

[21] ABI submitted that the language of clause 25.1(b) unambiguously provides for overtime to be paid to casuals for work in excess of 76 hours per fortnight and that the HSU's position is not supported by the words of the clause. It does not support the variations proposed by the HSU.

[22] The Australian Industry Group (Ai Group) submitted that the HSU's proposed variations should be rejected. With respect to the proposition of the HSU that the award allows payment of overtime for work in excess of 38 hour per week rather than 76 hours per fortnight for casuals, the Ai Group submitted this is not supported by cogent evidence and ignores the presumption that the construction of an award begins with a consideration of the ordinary meaning of its words. With respect to the HSU's proposed clause 25.1(c)(ii) the Ai Group contended that the HSU had not justified the requirement posed by any argument specific to the aged care industry or the award. Further, the Ai Group contended that the introduction of the requirement would conflict with clause 22.8, which provides:

> **(a)** **Broken shift** for the purposes of this clause means a shift worked by a casual or permanent part-time employee that includes breaks (other than a meal break) totalling not more than four hours and where the span of hours is not more than 12 hours.
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> **…**
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> **(c)** Payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clauses 25—Overtime penalty rates and 26—Shiftwork, with shift allowances being determined by the commencing time of the broken shift.
>
> **(d)** All work performed beyond the maximum span of 12 hours for a broken shift will be paid at double time.

[23] In circumstances where breaks of up to four hours occur on broken shifts and are not considered time worked, Ai Group maintained that it would be unfair to require employers to pay overtime rates where a shift exceeds 10 hours.

[24] With respect to HSU's proposed clause 25.1(c)(iii) the Ai Group submitted that no such entitlement currently exists under the award and practical difficulties follow such a requirement being made.

[25] We do not propose to adopt the HSU's proposal because we do not consider that any difficulty has been demonstrated with respect to the drafting of the existing provision. The current clause 25.1(b)(i) effectively allows the maximum of non-overtime hours of casual employees to be averaged over the period of a fortnight. We do not consider that this provision is on its face "*impractical and unfair*", as submitted by the HSU, in that the practical method of its operation is reasonably clear. If the HSU considers that the provision is unfair to casual employees and contrary to the modern awards objective in s 134(1) of the *Fair Work Act 2009* (FW Act), it would need to advance a substantive case supported by evidence to persuade us to change it. The HSU's proposed clause 25.1(c)(ii) merely reproduces what is currently provided for in 25.1(b)(ii) (and consequently the point being made about this aspect of the proposal by the Ai Group is unclear). The proposed clause 25.1(c)(iii) would establish a new entitlement, and no proper basis for this has been demonstrated. As to the proposed clause 25.1(c)(iv), no employer party raised any question concerning the entitlement of casual employees to receive the casual loading in addition to overtime penalty rates (on a cumulative basis). The entitlement arises from the expressions "*time and a half*", "*double time*" and "*double time and a half*" in clause 25.1(b)(i). These are traditional industrial expressions which have a traditional meaning. The "*time*" referred to is the rate of pay that would be payable to the employee for ordinary hours. In the case of casual employees, the ordinary time rate is inclusive of the casual loading. Therefore, the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise. That means that the casual loading is included in the overtime rate on a compounding basis.

[26] This position was established in the Full Bench decision in *AMWU v Energy Australia Yallourn Pty Ltd* (*Yallourn*),[5] which concerned the proper construction of a provision in an

[5] [2017] FWCFB 381; 262 IR 300

enterprise agreement which established a "*double time*" overtime rate of pay for casual employees. The Full Bench said:

> "[41] We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments."

[27] Similarly, the Full Bench majority in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* (*Domain*)[6] interpreted the overtime provisions in clause 28.1 of the *Nurses Award 2010*, which prescribed overtime rates of "*time and a half*" and "*double time*", as meaning in respect of casual employees, that the rates were calculated on the ordinary time rate inclusive of the casual loading. The Full Bench said:

> "[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1.
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> . . . .
>
> [19] The Commissioner's conclusion that overtime penalties are also paid on the loaded casual rates of pay is in our view also correct. Clause 28.1 simply speaks of 'time and a half for the first two hours and double time thereafter' for Monday to Saturday work, 'double time' for Sunday and 'double time and a half for public holidays.' The relevant 'time earnings' for a casual under clause 10.4 include the casual loading. Further, clause 28.1(c) provides that overtime rates are in substitution for and are not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the exclusion of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading."

[28] We see no basis to depart from the approach taken in the above Full Bench decisions (which we will subsequently refer to as the *Yallourn/Domain approach*). Accordingly the proposed new clause 25.1(c)(iv) is unnecessary.

[29] We will publish a draft determination to vary the award consistent with our conclusion, and parties will have 21 days to file any submissions in response.

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[6] [2019] FWCFB 1716

Airport Employees Award 2010

[30] There were ultimately no submissions filed concerning this award, except that the Community and Public Sector Union (CPSU) submitted that it should be interpreted in the same way as other similarly drafted awards. However the *Airport Employees Award 2010* is not drafted in the same way as any other award dealt with in this decision. In the circumstances, we propose to express a provisional view and then invite submissions in response.

[31] Clause 12.4(b) of the award provides for the casual loading as follows:

> **(b)** A casual employee for working ordinary time must be paid per hour 1/38th of the appropriate weekly rate plus a 25% loading.

[32] The above provision only renders the casual loading payable on ordinary hours. Overtime entitlements for all employees are conferred by clause 30.1 and 30.2, which express the rate of overtime as "*time and a half*" or "*double time*". Applying the Yallourn/Domain approach, this would suggest that the casual loading is payable on overtime on a compounding basis. However, clause 30.3(b) provides:

> **(b)** The hourly rate for overtime purposes must be determined by dividing the appropriate weekly rate by 38.

[33] The award does not actually provide for weekly rates of pay; clause 15.1 provides instead for annual salaries for each classification. However, a weekly rate can be derived from those salaries, and then divided by 38 in accordance with clause 30.3(b). The hourly rate produced is clearly one that does not include a casual loading. Accordingly the overall position is that the casual loading is specified as payable only during ordinary time, and the hourly rate required to be used to calculate overtime rates does not include the casual loading.

[34] Our provisional view is that the Yallourn/Domain approach is not applicable because of the textual contra-indicator in clause 30.3(b), and that the casual loading is not payable on overtime.

[35] A 2020 version of this award has now been published and took effect on 13 April 2020. We will publish a draft determination to vary the 2020 award to ensure that it is drafted consistently with the conclusion we have expressed. Parties will have 21 days to file any submission in response.

Aluminium Industry Award 2010

[36] There is a dispute as to whether the casual loading is payable on overtime under the *Aluminium Industry Award 2010*. Clause 10.4 of the award provides for casual employment in the following terms:

> **10.4** Casual employment
>
> **(a)** A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38th of the relevant minimum weekly wage prescribed in clause 13.4 for the work being performed plus a casual loading of 25%. The casual loading is paid instead of annual

leave, paid personal/carer's leave, paid compassionate leave, notice of termination, redundancy benefits and any other matters from which casuals are excluded by the terms of this award and the NES.

[37] Overtime entitlements under the award are dealt with by clause 21.1(a):

> **21.1 Overtime payments—employees other than continuous shiftworkers**
>
> **(a)** Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following payments for all work done in addition to or outside the employee's ordinary hours:
>
> **(i)** 150% of the ordinary hourly rate of pay for the first three hours and 200% of the ordinary hourly rate of pay thereafter, for overtime worked each day from Monday to Saturday (inclusive);
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> **(ii)** 200% of the ordinary hourly rate of pay for overtime worked on a Sunday; and
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> **(iii)** 250% of the ordinary hourly rate of pay for overtime worked on a public holiday.

[38] The Australian Workers Union (AWU) submitted that in circumstances where there is ambiguity around whether the casual loading is or is not payable for overtime worked, the appropriate resolution in light of the Commission's endorsement of a principal of neutrality of treatment, entails that the Full Bench should amend the award to clarify that the casual loading shall be paid on a cumulative basis when overtime is worked. Further, the AWU contended that the the Fair Work Ombudsman (FWO) currently publishes overtime rates for the award which include the 25% casual loading on a cumulative basis, in support of its assertion.

[39] Both the Ai Group and ABI submitted that in its express terms, the ordinary meaning of clause 10.4(a) is that the casual loading is payable during ordinary hours of work only and that the absence of any clause rendering the loading payable on overtime does not necessitate reading such a loading into the overtime provisions. The Ai Group and ABI both noted that the FWO is a government organisation that provides guidance on how to pay employees; however, its guidance is not legally binding and should carry no greater weight than the views of the parties in the proceedings.

[40] Clause 10.4(a) plainly provides for the payment of the casual loading only in respect of ordinary time. It neither explicitly nor implicitly requires the casual loading to be paid on overtime. There is no dispute that the overtime entitlements of casual employees are contained in clause 21.1. The penalty rates specified in clause 21.1 are payable in respect of "*the ordinary hourly rate of pay*" in each case, and no distinction in this respect is made for casual employees. This expression is defined in clause 3.1 of the award to mean "*...1/38th of the weekly wage rate of pay for the employee's classification in clause 13—Classifications*". The definition makes it unambiguous that the ordinary hourly rate of pay upon which the overtime penalty rate is calculated does not include the casual loading. The AWU does not point to any other provision of the award which would render the casual loading payable on overtime. Accordingly we conclude that there is no ambiguity, and that the casual loading is not payable on overtime. If

the AWU wishes that position to change, it will need to make an application for a variation to the award and present a substantive case in support of the change.

[41] The 2020 version of this award has been published, and it took effect on 4 February 2020. We will publish a draft determination for the variation of the 2020 award consistent with our conclusion, and invite submissions in response within 21 days.

Amusement, Events and Recreation Award 2010

[42] The issue in contest in the *Amusement, Events and Recreation Award 2010* concerns whether the casual loading is payable on overtime. The casual loading is provided by clauses 10.4(c) and (d) of the Award, which read:

> **10.4 Casual employees**
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> . . . .
>
> **(c)** Casual employees may be employed for up to 10 ordinary hours each day, provided that all time worked in excess of ordinary working hours on any one day or in excess of 38 hours in any one week will be overtime.
>
> **(d)** Casual employees will be paid the hourly rates prescribed for the appropriate classification in clause 14—Minimum wages, plus an ordinary time loading of 25%.

[43] Clause 23.1 of the award deals with overtime entitlements as follows:

> **23.1** All time worked by any full-time, part-time or casual employee in excess of the rostered working hours as provided on any one day, or in excess of an average of 38 hours per week in any rostered workcycle as provided for in cause 21.1, will be deemed to be overtime and will be paid for at the rate of time and a half for the first three hours and at the rate of double time after that.

[44] Clause 23.4 provides that, relevantly, clause 23.1 does not apply to exhibition employees, and instead sets out special provisions to apply to such employees. In relation to casual employees, clause 23.4(d) provides:

> **(d) Casual employees**
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> Casual employees will receive overtime for all work performed in excess of 12 hours on a shift, paid at the rate of double the ordinary rate of pay for such hours worked (calculated to the nearest quarter of an hour).

[45] As with the *Aluminium Industry Award*, the AWU contends that where the provisions of the award are silent as to whether the casual loading is payable during overtime, and where the FWO pay guides include the casual loading calculated on a cumulative basis, the Full Bench should amend the award to clarify that casual loading is payable on a cumulative basis when overtime is worked.

[46] For reasons similar to those provided in its submission concerning the *Aluminium Industry Award*, ABI submitted that it is not appropriate to read the casual loading into the

overtime provisions. The Australian Federation of Employers & Industries (AFEI) similarly submitted that the language of clause 10.4, and absence of any provision referring to the casual loading being payable during overtime, indicates that the award does not provide as such. In this respect, it further asserts that to introduce a casual loading on overtime would be a substantive change, whereby the Commission should require both a merit basis as well as evidentiary substantiation for such a variation.

[47] There is no dispute that clause 23.1 applies to casual as well as permanent employees, except for exhibition employees who are covered by clause 23.4. The expressions "*time and a half*" and "*double time*" are used to quantify the overtime rate, the application of the Yallourn/Domain approach would indicate that the overtime rate includes and compounds upon the casual loading. But in this award there are two textual contra-indicators which suggest that the Yallourn/Domain approach should not be applied. The first is, as ABI points out, that clause 10.4(d) unusually describes the casual loading as "*an ordinary time loading*", which description implies that the loading is applicable to ordinary time only. The second is that the special provision for casual exhibition employees in clause 23.4(d) uses a different expression to quantify the overtime rate (as does clause 23.4(b) and (c) in respect of permanent employees), namely "*double the ordinary rate of pay*". The expression "*ordinary rate of pay*" is not defined, but the usage is not the traditional one to which the Yallourn/Domain approach is applicable. This leaves the position ambiguous.

[48] We have had regard to the historical industrial context in order to resolve this ambiguity. The award was made as a result of the award modernisation process conducted by the Australian Industrial Relations Commission (AIRC), and it is apparent from decisions issued by the AIRC on 22 May 2009[7] and 4 September 2009[8] that the bulk of the award's provisions were derived from the former federal *AWU Theme Park and Amusement Award 2001*[9] (TPA Award) with special provisions concerning the exhibition industry derived from the former *Exhibition Industry Award 2001*[10] (EI Award). Clauses 10.5.3-10.5.4 and 22.1 of the TPA Award are substantially the same as clauses 10.3(c)-(d) and 23.1 of the current award, and the terminology used to describe the casual loading and the overtime rates are exactly the same. However the TPA Award also has the following provision concerning weekend work:

> **23. WEEKEND WORK**
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> **23.1** All employees shall be entitled to time and a-quarter for all ordinary hours worked between midnight Friday and midnight Saturday and for all ordinary time worked between midnight Saturday and midnight Sunday shall be paid at the rate of time and a half.
>
> **23.2** Casual employees shall receive the same rate of pay for weekend work as all weekly employees.

[49] Clause 23.2 of the TPA Award makes it clear that the expressions "*time and a-quarter*" and "*time and a half*" used in clause 23.1 were not intended to include the casual loading, and

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[7] [2009] AIRCFB 450 at [75]

[8] [2009] AIRCFB 826 at [92]

[9] AP817297

[10] AP805480CRV

gives rise to the implication that the same intention applies to the equivalent expressions used to describe the overtime penalty rates in clause 22.1 of the TPA Award. The presence of clause 23.2 in respect of the weekend work provision, and the lack of any equivalent expression in respect of the overtime penalty rate provision in clause 22.1, is explicable by the fact that clause 23 is concerned with *ordinary* hours worked on weekends, and thus it was necessary to make clear that the "*ordinary time loading*" provided for in clause 10.5.4 was not to apply to weekend ordinary-time work. This, it appears, was not necessary in respect of clause 22.1 because it was assumed to be apparent that the "*ordinary time loading*" could not be applicable to overtime.

[50] Clause 24.3 of the EI Award is substantially the same as clause 23.4(d) of the current award, and uses the same expression "*double the ordinary rate of pay*" to describe the rate of overtime. However clause 3.7 of the EI Award provides a definition of this expression as follows:

> **3.7 Ordinary rate of pay** in 24 (Overtime), will mean the rate of pay prescribed in 17.1 and 20.1.

[51] Clause 17.1 of the EI Award sets out the weekly rates of pay for full-time employees. Therefore the ordinary rate upon which the overtime rate is to be calculated is one which does not include the casual loading. This position is confirmed by the fact that clause 17.2, which is not referred to in the definition of "*ordinary rate of pay*", is the provision which set out the casual hourly rates of pay inclusive of the casual loading. The other provision referred to in the definition, clause 20.1, specifies a number of all-purpose allowances, which are therefore loaded into the overtime rate.

[52] We therefore consider it to be reasonably apparent that under the two pre-modernisation awards from which the relevant provisions of the *Amusement, Events and Recreation Award 2010* were derived, the casual loading was not payable on overtime. Although equivalents of clause 23.2 of the TPA Award and clause 3.7 of the EI Award were not included in the current award, there is no indication from any decision of the AIRC award modernisation Full Bench that this was done intentionally for the purpose of changing the effect of the derived overtime provisions. Indeed, at least as far as the TPA Award is concerned, in its decision of 4 September 2009 the Full Bench said: "A number of employers raised concerns about the penalty rates applicable under the exposure draft. These have been altered to a degree to better reflect the provisions of the *AWU Theme Park and Amusement Award 2001* upon which the modern award is largely based" (underlining added).[11]

[53] These historical contextual matters permit the ambiguity in the text of the current award to be resolved. We conclude that in respect of both clause 23.1 and clause 23.4(d), the casual loading is not payable on overtime. As with the *Aluminium Industry Award*, if the AWU wishes that position to change, it will need to make an application for a variation to the award and present a substantive case in support of the change.

[54] The *Amusement, Events and Recreation Award 2020* took effect on 18 June 2020. We will publish a draft determination to vary the 2020 award in a manner consistent with our conclusions and invite submissions in response within 21 days.

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[11] [2009] AIRCFB 826 at [92]

Black Coal Mining Industry Award 2010

[55] The issue in dispute with respect to the *Black Coal Mining Industry Award* is whether the 25% casual loading is payable when overtime is worked. Clause 10.4(b) of the award currently provides:

> **(b)** A casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus 25% instead of the leave entitlements under this award, with a minimum four hours payment on each engagement.

[56] Clause 17.2 sets out the overtime entitlements for employees as follows:

> **17.2 Payment for overtime**
>
> **(a)** Subject to the exceptions in clause 17.2(b), all time worked in excess of or outside the ordinary hours of any shift on the following days will be paid for at the following rates:

Day of week	Rate of pay
Monday to Friday	First 3 hours at time and a half
	After 3 hours at double time
Saturday	First 3 hours at time and a half
	After 3 hours at double time
Sunday	Double time

> **(b)** All time worked in excess of or outside the ordinary hours of any shift by employees:
>
> **(i)** who are six day roster employees or seven day roster employees;
>
> **(ii)** who work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays; or
>
> **(iii)** who work a roster which requires ordinary shifts on Saturday and Sunday where the majority of the rostered hours on the Saturday or Sunday shifts fall between midnight Friday and midnight Sunday;
>
> will be paid for at the rate of double time.

[57] The Ai Group submitted that the payment of the 25% casual loading is not payable during overtime. Under the award, only staff employees were permitted to be engaged on a casual basis, and the award did not permit the engagement of production and engineering employees on a casual basis. It submitted that clause 10.4(b) only required the payment of the loading for working ordinary hours, and neither it nor clause 17 created an entitlement to the loading during overtime. ABI made a submission to similar effect.

[58] The Association of Professionals, Engineers, Scientists and Managers (APESMA) contended that the proper interpretation of the award is that the casual loading applies on top of overtime rates. It submitted that the nature of work in the black coal mining industry was such that casual employees often relieve permanent employees who have taken periods of leave and, as such, they work the roster of a permanent employee without ceasing to be a casual employee. The APESMA submitted it was wrong in principle and logic to deny casual employees the benefit of the casual loading when working longer hours. The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) similarly contended that the proper interpretation of the award is that overtime is payable to casuals on top of casual loading, being that it is both payable and payable in a manner which is compounding, rather than cumulative.

[59] There is no doubt that clause 10.4(b), read in isolation, only operates to confer an entitlement to the casual loading in ordinary time. However clause 17.2 confers overtime entitlements expressed as "*time and a half*" and "*double time*" on employees without distinction, including casual employees. We see no reason why the Yallourn/Domain approach should not be applied to these provisions since there is no other indicator arising from the text or the historical industrial context which suggests that a different approach should be taken. We will publish a draft determination to vary the award consistent with this conclusion, and parties will have 21 days to file any submissions in response.

Broadcasting, Recorded Entertainment and Cinemas Award 2010

[60] The issue in respect of this award is whether the casual loading is to be applied in a cumulative or compounding manner in respect of overtime penalty rates. Clause 10.6(b) provides for the casual loading in the following terms:

> **(b)** A casual employee must be paid at the relevant minimum hourly wage plus a loading of 25%. Such loading is paid instead of all paid leave including annual leave, personal/carer's leave and public holidays not worked whether prescribed in this award or the NES.

[61] It should be noted that clause 10.7 provides that the above provision does not apply to employees in cinemas, who are dealt with discretely in Part 9 of the award. However clause 54.4 separately provides for the casual loading for cinema employees in terms identical to clause 10.6(b). The separate scale of minimum hourly rates for cinema employees upon which clause 54.4 operates are set out in clause 14.12.[12]

[62] Overtime is dealt with in separate provisions in each part of the award dealing with specific occupational groups (clauses 29, 39-40, 52, 58, 64, 71 and 76). Generally speaking, the rate of overtime is described using the expressions "*time and a half*" and "*double time*".

[63] ABI submitted that there is ambiguity as to whether clause 10.6(b) refers to all hours of work performed by a casual employee, or only to ordinary hours worked. It accepted that the current industry practice is that the casual loading is payable on overtime hours worked but did not accept that the overtime penalties are compounded on top of the casual loading. The AFEI submitted that the fact that a distinction is drawn in clause 10.6(b) between the hourly rate and

[12] See [2019] FWCFB 7608 and [2020] FWCFB 1511

the casual loading means that the casual loading is not to form part of an all-purpose rate, and that casual loading is payable during overtime on a cumulative basis. The Media, Entertainment and Arts Alliance (MEAA) submitted that it was not aware of any evidence in support of the cumulative methodology and that, absent such evidence, the award should not be altered in such a way as to enshrine (or confirm) the cumulative calculation of the loading.

[64] The application of the Yallourn/Domain approach in respect of the expressions used to describe the rate of overtime would suggest that the compounding approach is the correct one. This is supported by the text of clause 10.6(b), which provides that the loading is payable on the "*relevant minimum hourly wage*". That expression appears to us to refer to the hourly wage that would otherwise be applicable under the other provisions of the award, having regard not only to the employee's classification but whether the hourly rate is one which attracts a penalty rate. Thus, where a casual employee works overtime, the "*relevant minimum hourly wage*" is the hourly rate applicable under the overtime provisions, to which the loading of 25% must then be applied. We reach the same conclusion in respect of clause 54.4.

[65] We therefore conclude that the casual loading is payable on overtime on a compounding basis. We will publish a draft determination to vary the award consistently with this conclusion, and we will invite submissions in response in 21 days.

Business Equipment Award 2010

[66] In respect of the *Business Equipment Award 2010*, there is a dispute concerning whether the casual loading is payable on overtime. Clause 13.2 establishes the entitlement to a casual loading in the following terms:

> **13.2** A casual employee is one engaged and paid as such, and for working ordinary time will be paid, per hour, 1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 24%.

[67] Overtime entitlements under the award are conferred by clause 30.1, which provides:

> **30.1 Overtime rates**
>
> **(a)** An employee who works in excess of or outside the employee's ordinary hours established in accordance with clause 27— Ordinary hours of work and rostering or clause 28 – Special provisions for shiftworkers, of this award will be paid at the rate of time and a half for the first three hours and double time thereafter, until the completion of work.

[68] The Australian Municipal, Administrative, Clerical and Services Union (ASU) submitted that on the plain and ordinary meaning of the words in the above award clauses, overtime is payable on the ordinary time rate for a casual employee, which by definition includes the 24% casual loading, so that the overtime rate is calculated on a compounding basis. It submitted that there is no other ordinary rate of pay that applies to a casual employee covered by this award, and no express provision excluded casual employees from receiving both their casual loading and overtime rates. The ASU relied on the *Domain* and *Yallourn* decisions in support of this approach.

[69] The Ai Group and ABI submitted that on the plain reading of the text, the casual loading of 24% is payable during ordinary hours only and not during overtime. The Ai Group contends that the ASU's reading of the award disregards the nature, size, scope and scale of the award modernisation process conducted under Pt 10A of the *Workplace Relations Act 1996* (WR Act), which did not lend itself to adopting an approach to drafting modern awards in the manner suggested by the ASU. It says, contrary to the assertion of the ASU, that clause 13.2 does not term or denote the rate payable pursuant to it as the "*ordinary rate of pay*" or attribute any such other terminology to it.

[70] We consider that the ASU's position must be accepted. Clause 30.1 uses the expressions "*time and a half*" and "*double time*" to quantify the rates which are payable on overtime. In accordance with the Yallourn/Domain approach, the "*time*" referred to is the rate of pay that would be payable to the employee for ordinary hours which, in the case of casual employees, is inclusive of the casual loading. There is no other textual indicator which would cause us to depart from the Yallourn/Domain approach. That means that the casual loading is included in the overtime rate on a compounding basis.

[71] The *Business Equipment Award 2020* has now been published and took effect on 18 June 2020. We will publish a draft determination to vary the 2020 award in accordance with the conclusion we have stated, and any submissions in response may be filed within 21 days.

Contract Call Centres Award 2010

[72] The issue raised in respect of the *Contract Call Centres Award 2010* is in substance the same as that for the *Black Coal Mining Industry Award*. Clause 13.1 of the award provides that "*for working ordinary time*" a casual employee will receive 1/38th of the weekly wage prescribed for the relevant classification in clause 18 plus 25%. Clause 27.1(a) provides for overtime rates as follows:

> **27.1 Payment for working overtime**
>
> **(a)** Except as provided for in clause 12.5, for all work done in excess of the daily or weekly permissible number of ordinary hours an employee must be paid at the following rates:
>
> **(i)** overtime on Monday to Saturday—time and a half for the first three hours and double time thereafter; and
>
> **(ii)** overtime on Sunday—double time.
>
> Where hours are averaged over a four week period the maximum number of ordinary hours before overtime rates apply is to be calculated on a four weekly rather than weekly basis.

[73] The Ai Group submitted that clause 13.1 only applied the casual loading to ordinary time, and clause 27.1 did not require that the casual loading be payable in addition to the overtime rates it prescribes. ABI and the AFEI made the same submission. The CPSU submitted that the overtime rates are to be calculated on the basis of the loaded casual ordinary-time rate.

[74] We consider there to be no reason why the Yallourn/Domain approach would not be applicable here. The expressions "*time and a half*" and "*double time*" in clause 27.1(a) are to be construed, in relation to casual employees, as operating upon the loaded casual ordinary-time rate established by clause 13.1, so that the casual loading is included in the overtime rate on a compounding basis.

[75] The *Contract Call Centres Award 2020* has been published and commenced on 29 May 2020. A draft determination to vary the 2020 award in accordance with our conclusion above will be published, and parties will be given 21 days to file any submissions in response.

Dredging Industry Award 2010

[76] The CFMMEU has sought a variation to this award in order to "clarify" the overtime entitlements of casual employees. The current position is that clause 10.4(b) of the award provides:

> **(b)** A casual employee working within the ordinary hours of work (pursuant to clause 20—Ordinary hours of work and rostering) will be paid per hour for the work performed plus a 25% loading which incorporates the casual employee's entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances.

[77] The overtime entitlements in clause 22.1 are expressed in the following way:

> **22.1 Overtime**
>
> Employees will be entitled to be paid a loading of 100% of the ordinary hourly base rate of pay for any time worked outside of ordinary hours on a Monday to Sunday, except for public holidays.

[78] The expression "*ordinary hourly base rate of pay*" is not defined in the award. The rates of pay in clause 14 of the award are all expressed as weekly amounts.

[79] The CFMMEU has sought the insertion of a new clause which would provide that casual employees working outside the span of ordinary hours of work are entitled to the prescribed overtime rates plus the 25% casual loading. It submitted that such a variation would be consistent with the current terms of the award. Maritime Industry Australia Limited (MIAL) opposed the proposed new provision on the basis that there is no ambiguity in the current award, and submitted that the words of clause 10.4(b) are clear and unambiguous in their meaning that a casual employee is entitled to overtime payments in addition to the 25% casual loading.

[80] We disagree with the CFMMEU as to the meaning of the current provisions. Clause 10.4(b) only provides for the payment of the casual loading during ordinary hours. Clause 22.1, which applies to all employees including casuals, makes the calculation of the overtime rate referable to the undefined expression "*ordinary hourly base rate of pay*". We do not consider that a "*base rate of pay*" is apt to describe a rate of pay which includes the casual loading in the absence of any provision which indicates that the loading is payable for all purposes.

[81] We have examined the historical industrial context of this award. The award was made in the award modernisation process conducted by the AIRC to replace three preceding awards,

the *Maritime Industry Dredging Award 1998*, the *Dredging Industry (AWU) Award 1998* and the *Marine Engineers (Non Propelled) Dredge Award 1998*.[13] None of these awards clearly provided for the payment of the loading on overtime. The first award did not clearly provide for casual employment at all, and the latter two awards prescribed that the rate of overtime was to be calculated as "*twice the weekly rate divided by 38*". This context does not support the position of the CFMMEU or MIAL as to the existing position.

[82] We conclude that under this award, the casual rate is not payable on overtime. The CFMMEU's proposed variation would constitute a substantive variation to the award, and we are not prepared to make that variation in the absence of any substantive case for change being advanced. If the CFMMEU wishes to make such a case, it should do so by way of separate application.

[83] The *Dredging Industry Award 2020* has been published and took effect on 18 June 2020. Although the drafting of the 2020 award is entirely consistent with our conclusion, we will vary the award to put the issue beyond doubt. Interested parties may respond to the draft determination we will publish within 21 days.

Educational Services (Schools) General Staff Award 2010

[84] There is an issue outstanding from our decision of 8 October 2019 concerning whether the casual loading is or should be payable on overtime under the *Educational Services (Schools) General Staff Award 2010*.[14] Clause 10.5(b) of the award currently provides for the payment of a casual loading in the following terms:

> **(b)** A casual employee will be paid an hourly rate of 1/38th of the weekly rate for the employee's classification, plus 25%.

[85] Overtime entitlements are provided for in clause 27.1(a) as follows:

> **27.1 Overtime rates**
>
> **(a)** An employee will be paid overtime for all authorised work performed outside of or in excess of the ordinary or rostered hours as follows:

Time worked	**Overtime rate**
Monday–Friday	150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that
Saturday	150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that
Sunday	200% of the ordinary hourly rate of pay

[13] [2009] AIRCFB 450 at [120]

[14] [2019] FWCFB 6953 at [39]

Public holidays	250% of the ordinary hourly rate of pay

(b) Except that a nursing services employee rostered to work overtime on a Saturday or Sunday will be paid the ordinary time rate of pay plus a penalty of 50% of the ordinary time rate for all time worked.

[86] Ordinary hours are provided for in clause 22.1 as follows:

22.1 Subject to this clause, a full-time employee's ordinary hours of work will be 38 per week. The ordinary hours of work for a part-time or casual employee will be in accordance with clause 10—Types of employment.

[87] As was identified in our 8 October 2019 decision, there was a difficulty with the above provision in that clause 10 does not specify any ordinary hours of employment for casual employees, leaving doubtful the circumstances in which the overtime entitlements for casual employees were applicable. For that reason, we determined to vary the award pursuant to an application made by United Voice (as it then was) to vary clause 22 to add a new subclause specifying ordinary hours for casual employees as follows (with consequential variations to the rest of the clause):

22.2 Subject to this clause, a casual employee's ordinary hours of work will be a maximum of 38 hours per week.[15]

[88] However we indicated that we would not issue a determination effecting the above variation until the issue of the applicability of the casual loading on overtime was resolved.

[89] At the hearing in relation to this matter on 30 July 2019, the Independent Education Union (IEU) initially indicated that it had reached agreement with the Association of Independent Schools (AIS) on a draft determination to vary the award which clarified that the casual loading payable on overtime on a cumulative rather than compounding basis,[16] but it was left unclear by the AIS as to whether there was in fact any agreement,[17] and the proposition that the casual loading was payable on overtime was opposed outright by ABI.[18] The parties were consequently directed to engage in further discussions and to file draft determination reflecting their positions.

[90] The IEU filed a determination which would modify clause 27 by confining the application of clauses 27.1(a) and (b) to full-time and part-time employees only and adding the following new clauses 27.1(c) and (d) directed to casual employees:

(c) Subject to clause 27.1(d), a casual employee will be paid overtime for all authorised work performed outside of or in excess of the ordinary or rostered hours as follows:

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[15] Ibid at [38]

[16] Transcript 30 July 2019, PN 1620

[17] Ibid, PNs 1640-1645

[18] Ibid, PNs 1695-1697

Time worked	Overtime rate inclusive of the casual loading as per clause 10.5(b)
Monday–Friday	175% of the ordinary hourly rate of pay for the first 3 hours and 225% of the ordinary hourly rate of pay after that
Saturday	175% of the ordinary hourly rate of pay for the first 3 hours and 225% of the ordinary hourly rate of pay after that
Sunday	225% of the ordinary hourly rate of pay
Public holidays	275% of the ordinary hourly rate of pay

(d) Except that a casual school operational services employee in the cooking/catering group, or a casual boarding supervision services employee, who is not working average hours in accordance with the provision of clause 22.2, who is rostered to work ordinary hours on a Saturday will be paid 150% of the ordinary time rate of pay and if rostered to work on a Sunday will be paid 200% of the ordinary time rate.

[91] The AIS submitted that it had been unable to reach agreement with the IEU as to a draft determination because of its concerns as to the potential cost implications of the payment of both the casual loading and overtime penalty rates on instructional services employees (primarily sports coaches) and boarding supervision services employees due to the nature of their work. It referred to oral submissions it had made at the hearing on 30 July 2019 in this connection, which included the following:

> In terms of cost impacts, there is certainly a great degree of sports coaches being covered by the modern award, the General Staff Award, that is, they are cut out of our multi-enterprise agreements and much of our enterprise agreements that cover such general staff employees, which is a largely historical point, but nonetheless that is how that is reflected in our instruments as they are at the moment. They do do a lot of Saturday and Sunday work, of course. They have ordinary hours on Saturdays, which is of course helpful to their engagement; however, Sundays, overtime would be payable for any work on that particular basis. So certainly the issue of how the casual loading and overtime were to be applied is very relevant to the employment of sports coaches.
>
> Boarding staff would be the other area, though there would not be many, if any, boarding schools who are directly under the terms of the General Staff Award. However, nonetheless, of course enterprise agreements are made based on those particular provisions, and certainly under our enterprise agreements there is a use of casuals within our boarding houses with our schools and this does incur overtime on and off due to the nature of that particular work, given that they're working through the night. Whilst there's sleepover allowance and other such things, it's still more likely to trigger overtime in that particular manner. So certainly, you know, as the IEU said, if they wanted to go into cost impact, we could provide further evidence on that basis.[19]

[19] Ibid, PNs1641-1642

[92] The AIS's draft determination was the same as the IEU except that, in respect of the new clause 27.1(d), it proposed the following:

> **(d)** Except that casual instructional services employees and casual boarding supervision services employees will be paid overtime for all authorised work performed outside of or in excess of the ordinary or rostered hours without the payment of the casual loading in clause 10.5(b). The overtime rates will be as follows:

Time worked	**Overtime rate**
Monday–Friday	150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that
Saturday	150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that
Sunday	200% of the ordinary hourly rate of pay
Public holidays	250% of the ordinary hourly rate of pay

[93] ABI supported the position of the AIS.

[94] We consider that the central position of the parties whereby the award should be varied to make clear that casual employees will receive the casual loading on overtime, calculated on a cumulative rather than a compounding basis, is appropriate and will be adopted. However we do not consider that the assertions as to the cost impact of rendering the casual loading payable on overtime with respect to two particular job functions, by itself, provides a proper foundation in principle for permanently excluding casual employees performing those functions from an entitlement which would be payable to all other casual employees. The assertions as to cost impact are in any event diminished by reason of the following factors:

- the vast majority of employers covered by this award are party to enterprise agreements, and thus would not be directly (although, in the longer term, there may be an indirect effect on future enterprise bargaining because of the operation of the better off overall test in s 193 of the FW Act);

- the number of employees performing the job functions in question who are casual and who would work more than occasionally in excess of 38 hours per week is likely to be very small;

- there is no suggestion of incapacity to pay; and

- the fact that there would be a cost impact at all would likely be the result of the rectification of the defect in the drafting of the overtime provisions identified in our decision of 8 October 2019 rather than any issue concerning the payment of the casual loading on overtime.

[95] The variation we would make to clauses 27.1(a) and (b) as they appear in the 2010 award to give effect to our conclusion as follows:

(a) Subject to clause 27.1(b), an employee will be paid overtime for all authorised work performed outside of or in excess of the ordinary or rostered hours as follows:

Time worked	**Overtime rate**
Monday–Friday	Full time and part-time employees: 150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that Casual employees: 175% of the ordinary hourly rate of pay for the first 3 hours and 225% of the ordinary hourly rate of pay after that
Saturday	Full time and part-time employees: 150% of the ordinary hourly rate of pay for the first 3 hours and 200% of the ordinary hourly rate of pay after that Casual employees: 175% of the ordinary hourly rate of pay for the first 3 hours and 225% of the ordinary hourly rate of pay after that
Sunday	Full time and part-time employees: 200% of the ordinary hourly rate of pay Casual employees: 225% of the ordinary hourly rate of pay
Public holidays	Full time and part-time employees: 250% of the ordinary hourly rate of pay Casual employees: 275% of the ordinary hourly rate of pay

(b) A nursing services employee rostered to work overtime on a Saturday or Sunday will be paid the following overtime rates:

(i) Full-time and part-time employees: 150% of the ordinary time rate for all time worked.

(ii) Casual employees: 175% of the ordinary time rate for all time worked.

[96] The *Educational Services (Schools) General Staff Award 2020* has now been published and commenced on 29 May 2020. We will publish a draft determination to vary the 2020 award in terms equivalent to the above and invite further submissions about the form of this variation, which shall be filed within 21 days. Having regard to the cost impact issue raised by the AIS, such submissions may also address what the date of effect of the above variation should be.

Fitness Industry Award 2010

[97] The AWU submitted that this award does not adequately prescribe the ordinary hours for casual employees, and thus raises doubt about the entitlement of casual employees to overtime. It has sought a variation to the ordinary hours provision of the award to make clearer what it contends is the existing overtime entitlement of casual employees. In addition, earlier exposure drafts for this award have proposed that the hours provisions of the award be modified so that they are applicable to casual employees.

[98] Currently, clauses 13.2 and 13.3 of the award prescribe the rates of pay in ordinary hours for casual employees as follows:

> **13.2** A casual employee for working ordinary hours on Monday to Friday must be paid per hour at the rate of 1/38th of the minimum weekly rate prescribed in clause 17—Minimum wages for the work being performed plus a casual loading of 25%.
>
> **13.3** A casual employee for working ordinary hours on a Saturday, Sunday or public holiday must be paid per hour at the rate of 1/38th of the minimum weekly rate prescribed in clause 17—Minimum wages for the work being performed plus a casual loading of 30%.

[99] However the award does not define what the ordinary hours for casual employees are. Clause 24.1 prescribes that the ordinary hours for a full-time employee may be worked over any five days of the week, between 5.00am and 11.00pm on Monday-Friday and between 6.00am and 9.00pm on Saturday and Sunday, and clause 24.2 provides that the ordinary hours for full-time and part-time employees must not exceed 10 hours on any one day. However there is no equivalent prescription made for casual employees.

[100] Clause 26.1 provides for overtime entitlements as follows:

> **26.1 Overtime rates**
>
> All time worked by an employee outside the spread of hours prescribed in clause 24.1, in excess of an average of 38 hours per week over a period of four weeks or in excess of 10 hours on any day is deemed to be overtime and must be paid at the rate of time and a half for the first two hours and double time thereafter from Monday to Saturday and at the rate of double time on a Sunday.

[101] Clause 12.6 separately provides that, in respect of part-time employees, all worked in excess of the agreed number of part-time hours to be worked is overtime and payable at the overtime rates prescribed in clause 26.

[102] "*Employee*" is defined in clause 3.1 of the Award to mean a "*national system employee within the meaning of the Act*" (unless a contrary intention appears).

[103] The AWU's proposed variations would confine the ordinary hours of casual employees to 10 hours in any one day and 38 hours in a week.

[104] A number of employer groups made submissions opposing any change to the hours provisions in respect of casual employees:

- The Australian Swimming Coaches and Teachers Association submitted that the award did not currently provide overtime entitlements for casual employees, and that it should not be varied to establish such entitlements. In the alternative, it submitted that any overtime entitlement for casual employees should apply only where a casual worked in excess of 38 hours per week averaged over 4 weeks.

- Tennis Australia and Gymnastics Australia submitted that the existing position should be retained under which, it contended, casual employees do not have restrictions on ordinary hours and do not have overtime entitlements. In the alternative, it submitted, if the Commission chose to vary the award to impose overtime rates for casual employees, then ordinary hours of 38 per week should be averaged over 4 weeks, casual employees should be able to work over 5 days per week, and overtime penalty rates should be payable in substitution for the casual loading.

- ABI and the AFEI supported the position of Tennis Australia and Gymnastics Australia.

- Swim Australia submitted that any clarification of the ordinary hours of casual employees should not result in them being conferred with overtime entitlements.

[105] The question at the outset is whether the award currently provides for overtime entitlements for casual employees, notwithstanding that the ordinary hours of casual employees are not defined. In our view, it is clear that it does. Clause 26.1 applies to employees generally, and no basis has been advanced to read the word "*employee*" in the provision as not including casual employees contrary to the definition in clause 3.1. Clause 26.1 does not depend in its application to casual employees upon any separate specification of the ordinary hours of employees, since the clause itself identifies the circumstances in which overtime penalty rates are payable. In any event, we consider that the references to ordinary hours in clause 13.2 and 13.3 imply the existence of non-ordinary hours to which different rates of pay apply, consistent with the existence of an overtime entitlement in clause 26.1.

[106] Accordingly, we consider that casual employees are currently entitled to overtime penalty rates in the circumstances prescribed in clause 26.1 – that is work performed outside the span of hours specified in clause 24.1, work in excess of 38 hours in a week averaged over 4 weeks, or work in excess of 10 hours in any one day.

[107] There is some difficulty however in identifying what the overtime penalty rate for casual employees is. The expressions "*time and a half*" and "*double time*" used to quantify the overtime penalty rates would, on the Yallourn/Domain approach, be applied to the ordinary-time rate for casual employees inclusive of the casual loading. However this award does not contain a single casual loading, since under clause 13.3 a higher casual loading is payable for ordinary hours worked on weekends and public holidays. This loading substitutes for the weekend and public holiday penalty rates for ordinary hours specified in clause 26.3, since the provisions of clause 26.3 are expressed to be subject to clause 13.3. We consider it to be unlikely that the overtime penalty rates in clause 26.1 were intended to incorporate differing levels of casual loading depending on the day on which overtime is worked. This causes us to conclude

that the most workable interpretation of clause 26.1 is that the specified penalty rates do not include the casual loading, either on a cumulative or compounding basis.

[108] The drafting of the current award, which provides for overtime entitlements for casual employees without specifying their ordinary hours, and which does not in clear terms specify the rate of overtime for casual employees, is unsatisfactory. We will publish in conjunction with this decision a draft determination varying the award consistently with our conclusions, and will invite submissions in response within 21 days.

Health Professionals and Support Services Award 2010

[109] The issue in respect of the *Health Professionals and Support Services Award 2010* concerns whether the casual loading is payable on overtime. Initially it appeared that interested parties had reached an agreement about this issue in that, as noted in submissions made by the Private Hospital Industry Employers' Association (PHIEA) dated 8 December 2017 and 4 April 2019, following discussions between the parties held with the assistance of former Commissioner Roe during 2015, the parties reach an agreed position which is reflected in clause 19.2(d) of the exposure draft published for this award on 15 February 2019. In that exposure draft, the clause is expressed in the following terms:

> **(d)** Overtime rates under this clause will be in substitution for and not cumulative upon the penalties and loadings prescribed in clause 18 – Penalty rates and shiftwork and the casual loading in clause 6.4(e).

[110] However in its submissions dated 23 January 2018, the HSU stated that it had made an error in earlier conceding that it had agreed that overtime rates would be paid in substitution of the casual loading. It submitted that it had never agreed to the inclusion of the words "*and the casual loading in clause 6.4(e)*" and submitted that this should be deleted. The PHIEA contends that in this respect the HSU sought to re-agitate a matter which had been resolved with the assistance of the Commission. However, the matter is ultimately one to be determined by the Commission regardless of whether there had been an agreement reached between the parties or not.

[111] Clauses 10.4(a) and (b) of the award currently provide:

> **10.4 Casual employment**
>
> **(a)** A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed-term employee, to work up to and including 38 ordinary hours per week.
>
> **(b)** A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements of full-time employees.

[112] Overtime entitlements are provided for by clause 28, which is relevant to the issue in contest provides:

> **28.1 Overtime rates**

> **(a)** An employee who works outside their ordinary hours on any day will be paid at the rate of:
>
> **(i)** time and a half for the first two hours; and
>
> **(ii)** double time thereafter.
>
> **(b)** All overtime worked on a Sunday will be paid at the rate of double time.
>
> **(c)** These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.

[113] The HSU relied upon the *Domain* decision to support the contention that the award currently provided for overtime to be paid on the casual hourly rate inclusive of the casual loading. The PHIEA submitted that expression of clause 19.2(d) in the exposure draft published on 15 February 2019 represented the correct position and relied on the earlier agreement of the HSU. ABI supported the position of the PHIEA. The AFEI submitted that clause 28.1 of the award prescribed overtime rates for all employees, including casuals, and made no mention of the casual loading being included in the overtime rate. In those circumstances, the AFEI submitted, it was open for the Commission to conclude that the provision dealing specifically with overtime rates (clause 28.1) should override the general provision dealing with hours of work for casual employees generally (clause 10.4). It was submitted that because clause 10.4 deals with an employee's rate per hour, and clause 28 deals with total rates that "all employees" are entitled to when working overtime, it is open for the Commission to conclude that the provision dealing specifically with overtime rates for all employees should override the general provision dealing with hours of work for casual employees generally.

[114] In our view, the Yallourn/Domain approach is squarely applicable here. Clause 28.1 uses the expressions "*time and a half*" and "*double time*" to quantify the overtime rate entitlement, and in accordance with their traditional industrial meaning assigned to these expressions, the "*time*" referred to is the rate payable in ordinary hours, which in the case of casual employees includes the casual loading. In this case, there is no textual contra-indicator; rather, clause 28.1(c) provides textual confirmation of the applicability of the Yallourn/Domain approach. Clause 28.1(c) specifically excludes shift loading from the calculation of overtime rates, and the fact the provision makes no mention of the casual loading implies that it was not intended to exclude it from the calculation of overtime rates.

[115] Regardless of whether the HSU agreed to it, the proposed clause 19.2(d) in the exposure draft published on 15 February 2019 did not represent the existing position and amounted to a substantive change. The *Health Professionals and Support Services Award 2020* has since been published and commenced on 18 June 2020. Clause 24.2(d) reflects clause 19.2(d) of the exposure draft. Accordingly it will be necessary for the 2020 award to be varied consistent with the conclusion we have stated. We will publish a draft determination to vary the 2020 award, and parties will have 21 days to file any submissions in response.

Labour Market Assistance Industry Award 2010

[116] In respect of this award, there is an issue as to whether the casual loading is payable on overtime. Clauses 10.4(c) and (d) provide for the payment of the casual loading in the following terms:

> **(c)** A casual employee will be paid for each hour worked during the ordinary hours of work provided in clause 21—Ordinary hours of work, a rate equal to 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid.
>
> **(d)** Where a casual employee is employed outside of the ordinary spread of hours provided in clause 21—Ordinary hours of work, the hourly rate (exclusive of the 25% loading) will be increased by the penalty rates provided in clause 23—Overtime and penalty rates.

[117] The spread of hours provided for in clause 21.2 is 6.00am - 8.00pm Monday to Friday, except for employees engaged and paid to work their ordinary hours in accordance with clause 23.7. Clause 23.7 provides for a scheme of loadings payable for ordinary hours worked outside of the span of hours and is evidently intended to operate as an analogue of shift work.

[118] Clause 23 concerns overtime generally and, relevant to casual employees, clause 23.1(c) provides:

> **(c)** A casual employee will be entitled to overtime if they work in excess of 38 hours in any one week or greater than 10 hours in any one day.

[119] Clause 23.2(a) and (b) prescribe the overtime rates that are payable as follows:

> **23.2 Overtime rates**
>
> **(a)** An employee who is required to work overtime will be paid at the rate of time and a half for the first two hours of overtime worked and double time thereafter for overtime worked Monday to Saturday.
>
> **(b)** An employee who is required to work overtime will be paid double time for all overtime worked on Sundays.

[120] ABI has submitted that clause 10.4(c) provides that the casual loading is payable during ordinary hours, but nothing in clause 23.2 makes the casual loading applicable during overtime. AFEI has made the same submission. The CPSU submitted in response that the overtime rates prescribed are calculated by reference to the loaded casual ordinary-time rate in respect of the overtime entitlement established by clause 23.1(c), but in respect of the separate overtime entitlement established by clause 10.4(d), the overtime rates are to be calculated exclusive of the casual loading. The submissions of ABI and AFEI did not address clause 10.4(d).

[121] According to the Yallourn/Domain approach, the expressions "*time and a half*" and "*double time*" used in clause 23.2 are to be read as operating, with respect to casual employees, upon the loaded ordinary-time rate unless there is some provision to the contrary. There is no provision to the contrary with respect to the entitlement to overtime for casual employees

established by clause 23.1(c), so this would suggest that overtime is calculated inclusive of the casual loading on a compounding basis.

[122] However it is necessary to explain clause 10.4(d). This provision does not relate to overtime as such, but to work performed outside the span of ordinary hours. It provides that that for such work the casual employee is to be paid the penalty rates provided in clause 23—Overtime and penalty rates, exclusive of the casual loading. At first blush, this may be read as referring to the overtime penalty rates prescribed by clause 23.2, which may then be regarded as confusing the issue as to the calculation of overtime penalty rates for casual employees. However, the historical context makes it clear that this is not how clause 10.4(d) is to be understood as operating.

[123] In a decision issued on 25 September 2009, the AIRC award modernisation Full Bench said that the "*Employment Services Industry Award 2010*" which it intended to make would cover the provision of labour market assistance programs and group training services, and that its provisions were largely drawn from two pre-existing federal awards, the *Community Employment, Training and Support Services Award 1999* (CETSS Award)[20] and the *Group Training (Victoria) Award 1999*.[21] In a subsequent decision, the Full Bench said that it had been persuaded not to include the group training sector,[22] so the award that was ultimately made was the *Labour Market Assistance Industry Award 2010* (LMAI Award) and was solely based on the CETSS Award.

[124] Clause 18.2.1(b) of the CETSS Award provided for an entitlement to overtime in substantially the same terms as clause 23.1(c) set out above award, and the rate of overtime was expressed in the same way as currently in clause 18.4.1 of the CETSS Award. The equivalents in the CETSS Award of clauses 10.4(c) and (d) set out above were clauses 11.6.3 and 11.6.4. However clause 11.6.4 did not refer to the overtime clause; rather it provided:

> **11.6.4** Where a casual employee is employed outside of the aforementioned ordinary span of hours, the hourly rate (exclusive of the 25% loading) shall be increased by the appropriate non-standard working hours loading specified in 17.2.2 of this award.

[125] Clause 17.2.2 was contained in the hours clause of the CETSS Award, and provided for percentage loadings (ranging from 20% to 100%) for work performed outside the span of hours at various times throughout the week. The equivalent provision in the LMAI Award is clause 23.7(a), and it provides for the very same loadings. Accordingly it is apparent that the cross-reference in 10.4(d) of the LMAI Award should be to clause 23.7(a), not to clause 23 generally. Once this is understood, it becomes apparent that clause 10.4(d) has no bearing on the issue of the rate of overtime.

[126] Accordingly there is no reason not to apply the Yallourn/Domain approach. The casual loading is payable on overtime and is calculated on a compounding basis.

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[20] AP772299CRV

[21] [2009] AIRCFB 865 at [112]

[22] [2009] AIRCFB 945 at [77]

[127] A 2020 version of this award has now been published, and took effect on 4 May 2020. We will publish a draft determination to vary the award in terms of our conclusion and invite submissions in response within 21 days.

Live Performance Award 2010

[128] The issue in dispute in relation to this award is whether the casual loading is paid on overtime on a cumulative or compound basis. ABI has submitted that it is the former, while the MEAA has submitted that it is the latter.

[129] Clause 10.4(b) of the award provides:

> **(b)** A casual will be paid both the actual hourly rate paid to a full-time employee and an additional 25% of the ordinary hourly rate for a full-time employee.

[130] Overtime rates are prescribed for the categories of employees covered by the award in clause 28 (performers and company dancers), clause 34 (musicians), clause 41 (striptease artists) and clause 47 (production and support staff).

[131] The key to resolving this issue is the expression "*actual hourly rate*" in clause 10.4(b). Although it is not a familiar industrial expression, we consider that it must refer to the hourly rate that would be paid to a full-time employee for performing the same work as the casual employee. In the case of overtime hours, the "*actual hourly rate*" would be the hourly rate payable to a full-time employee under clause 28, 34, 41 or 47 as applicable. Clause 10.4(b) requires that the casual loading calculated on the full-time employee's *ordinary* hourly rate be added to the "*actual hourly rate*". The result of this is that the penalty rate is not applied to the loading, so that ABI's position that overtime rate is calculated cumulatively is correct.

[132] We will publish a draft determination to vary the award to clarify this position. Interested parties will be allowed 21 days to provide any submissions in response.

Local Government Industry Award 2010

[133] It was initially submitted by the Local Government Associations (LGAs) that the *Local Government Industry Award 2010* did not require further consideration in the current proceedings on the basis that the matter had previously been addressed by the Commission in the course of separate proceedings in the 4 yearly review. In summary, in matter AM2014/234, a conference before another member of the Commission on 18 May 2016 concerning an exposure draft of the award which had previously been published resulted in agreement about the payment of the casual loading on overtime being reached between the LGAs, the Ai Group and the ASU. The following points were agreed:

- the casual loading is not applicable on overtime hours;
- casual employees are entitled to penalties for working ordinary hours that attract a shift or weekend penalty;
- the casual loading (which applies to ordinary hours of work) is applied to employees' hourly ordinary time rate, and not to the loaded rate, as are applicable penalties (including overtime);

- it was clear when overtime applies to casual employees; and

- the exposure draft should be amended to reinstate the current wording of the award concerning the casual loading.

[134] The LGAs submitted that the common understanding at all points during and since the award modernisation in 2009 was that casual loading was not applicable on overtime hours. However, on 28 June 2019 the Fair Work Ombudsman published a pay guide for the award which, relevantly, included the casual loading in the overtime rates for casual employees. Accordingly, the LGAs sought a variation to the award which would make it clear that the casual loading was payable on overtime. This variation was supported by the ASU and the Ai Group.

[135] Clauses 10.5(b) and (c) deal with the payment of the casual loading as follows:

> **(b) Casual loading**
>
> Casual employees will be paid, in addition to the hourly ordinary time rate and rates payable for shift and weekend work on the same basis as a weekly employee, an additional loading of 25% of the hourly ordinary time rate for the classification in which they are employed as compensation instead of paid leave under this award and the NES.
>
> **(c) Penalties and overtime**
>
> Penalties, including public holiday penalties and overtime, for casual employees will be calculated on the hourly ordinary time rate for the classification in which they are employed exclusive of the casual loading.

[136] Overtime penalty rates are prescribed by clause 25.5 in the following terms:

> **25.2 Payment for overtime**
>
> **(a)** Except as otherwise provided, overtime will be paid at the rate of time and a half for the first two hours and double time thereafter.
>
> **(b)** Overtime worked from 12 noon on a Saturday and all day on a Sunday will be paid at the rate of double time.
>
> **(c)** The payment for overtime rates is calculated on the employee's hourly ordinary time rate.
>
> **(d)** In computing overtime, each day's work stands alone.

[137] The expression "*hourly ordinary time rate*" used in clause 25.2(c) is defined in clause 3.1 as follows:

> **hourly ordinary time rate** of an employee is 1/38th of the minimum weekly rate of pay specified in clause 14—Minimum wages for the employee's classification

[138] We agree with the joint position adopted by the LGAs, the Ai Group and the ASU. Although the expressions "*time and a half*" and "*double time*", on the Yallourn/Domain approach, might be taken to apply to the ordinary rate for casual employees inclusive of the casual loading, there are clear textual contra-indicators in the award. The first is that clause 10.5(c) provides that overtime penalties for casual employees will be calculated exclusive of the casual loading. The second is that 25.2(c), which applies equally to casual employees, provides that the payment for overtime rates is calculated on the employee's "*hourly ordinary time rate*", the definition of which expression makes it clear that it does not include the casual loading. No provision of the award makes the casual loading applicable to overtime. We also place weight upon the joint position of the parties as indicative of the common intention underlying the relevant provisions of the award.

[139] The casual loading is not payable on overtime. We will publish a draft determination to vary the *Local Government Industry Award 2020*, which commenced on 29 May 2020, to confirm this conclusion, and invite further submission in response within 21 days.

Marine Tourism and Charter Vessels Award 2010

[140] The CFMMEU has proposed that this award be varied to add a provision to the effect that casual Overnight Charter employees are entitled to be paid overtime rates plus the 25% casual loading when working outside the span of ordinary hours.

[141] The current position is that clause 10.3(a) of the award provides for casual employment in respect of an "*Overnight Charter Employee or Non-overnight Charter Employee*". Clause 10.3(a)(iv) provides that such employees are to be paid "*the applicable loading as defined in clause 13—Minimum wages*".

[142] Clause 13 prescribes the minimum rates of pay for employees covered by the award. Clause 13.1(a) prescribes minimum daily rates of pay for full-time and part-time Overnight Charter Employees. Clause 13.1(c) provides:

> **(c)** An Overnight Charter Employee employed on a casual basis will be paid at the rate of the daily rate plus 25% for all work performed within the ordinary hours of work prescribed by clause 20—Ordinary hours of work and rostering.

[143] Clause 13.2(a) prescribes minimum weekly rates of pay for Non-overnight Charter Employees. Clause 13.2(b) provides:

> **(b)** A Non-overnight Charter Employee engaged on a casual basis will be paid at the rate of ordinary time plus 25% for all work performed within the ordinary hours of work prescribed by clause 20.

[144] The overtime entitlements of Non-overnight Charter Employees and Overnight Charter Employees are set out in clause 22.1 and 22.2 respectively. In the first provision the rate of overtime is expressed as "*one and a half times the employee's ordinary rate for the first two hours and double time thereafter*" and, in the second, "*one and a half times the employee's ordinary rate for the first two hours and double the ordinary rate thereafter*".

[145] The CFMMEU submitted that the variation it proposes would clarify the entitlement to overtime for casuals and was consistent with the current terms of the award. The AFEI submitted that the proposed clause should be rejected on the basis that the award is clear on the subject of the entitlement to overtime for casual employees, the proposed clause would compound upon casual loading and therefore be inconsistent with current terms and an increase in employment costs would be the likely outcome.

[146] In our view, the "*ordinary rate*" for a casual Non-overnight or Overnight Charter Employee to which the overtime multiplier is to be applied is the rate prescribed by clause 13.1(c) or clause 13.2(b) respectively for work within ordinary hours. The overtime rates for casual employees under the award therefore include the casual loading, calculated on a compounding basis.

[147] In order to confirm the position, a draft determination to vary the *Marine Tourism and Charter Vessels Award 2020*, which took effect on 18 June 2020, in terms of this conclusion will be published. Parties are invited to file any submissions in response within 21 days.

Marine Towage Award 2010

[148] The CFMMEU has also sought a variation to this award to clarify the overtime entitlement of casual employees. The effect of the variation is again that casual employees are entitled to be paid overtime rates plus the 25% casual loading when working outside the span of ordinary hours.

[149] The current position is that clause 13.3(a) of the award provides for the payment of the casual loading in the following terms:

> **(a)** For each hour worked, a casual employee will be paid no less than the hourly rate of pay for their classification in clause 13.1, plus a casual loading of 25%.

[150] It may be noted that clause 13.1 does not actually provide for any hourly rate of pay, but rather for daily and weekly rates of pay, so that an hourly rate must be derived by calculation from those rates. Clause 22.1 of the award provides for overtime entitlements, and such entitlements are quantified by the expressions "*the rate of time and a half for the first two hours and double time thereafter*". Clause 22.2 also provides for a penalty rate for work pursuant to clause 13.2 (which concerns "*extended hours*" worked continuously in excess of 16 hours), which is quantified as "*the rate of double the employee's hourly rate*".

[151] The CFMMEU again submitted that its proposed variation would clarify the entitlement to overtime for casuals and be consistent with the current terms of the award. MIAL disputed that the proposed clause was consistent with the current award on the basis that the award does not contain a provision specifying that the casual loading is not in compensation for overtime payments, and no provision of the award confirms that clause 13.1 applies to employees regardless of whether they are casual. MIAL submitted that it is unclear if it was intended that payment of overtime in addition to a casual loading was a feature of the award, and that the variation should only be made if necessary to achieve the modern awards objective.

[152] We consider that the application of the Yallourn/Domain approach would lead to the conclusion that the rates of overtime prescribed by clause 22.1 operate, with respect to casual employees, upon the hourly rate of pay inclusive of the casual loading for which clause 13.3(a)

provides. Clause 22.2 is expressed differently but in our view had the same meaning: a casual employee is to be paid double the hourly rate prescribed by clause 13.3(a).

[153] Accordingly our conclusion is that the casual loading is payable on overtime on a compounding basis. The *Marine Towage Award 2020* has now been published and took effect on 18 June 2020. We will publish a draft determination to vary the 2020 to confirm our conclusion, and interested parties will have 21 days to file any submissions in response.

Medical Practitioners Award 2010

[154] The *Medical Practitioners Award 2010* provides for the casual employment of medical practitioners in clause 10. Overtime entitlements under the award are dealt with in clause 24.1 as follows:

> **24.1 Overtime rates**
>
> **(a)** For all Medical Practitioners, except Senior Doctors, hours worked in excess of 38 per week will be deemed overtime. Such hours between Monday and Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.
>
> **(b)** Overtime worked on a Sunday will be paid at the rate of double time.
>
> **(c)** Overtime worked on a public holiday will be paid at the rate of double time and a half.

[155] The HSU contends that casuals are entitled to overtime under clause 24.1 and that it is abundantly clear that overtime is payable for work in excess of 38 hours per week in addition to the casual loading. It sought an amendment to the clause which would make overtime applicable to casual medical practitioners, excluding senior doctors, who work in excess of 10 hours per day. To that end it proposed an amendment to the award which would delete the existing clause 24.1 and replace it with the following:

> **24.1 Overtime rates**
>
> **(a)** For all Medical Practitioners, except Senior Doctors, overtime applies for hours worked in excess of:
>
> **(i)** 38 per week; or
>
> **(ii)** 10 hours per day/shift; or
>
> **(iii)** in excess of the number of hours fixed for their shift.
>
> **(b)** Such hours between Monday and Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.
>
> **(c)** Overtime worked on a Sunday will be paid at the rate of double time.

(d) Overtime worked on a public holiday will be paid at the rate of double time and a half.

[156] ABI opposed the proposed variation on the basis that the entitlements in the proposed clause 24.1(a)(ii) and (iii) are not currently conferred by the award and the variations would constitute a substantial change to the award for which no evidence or cogent basis has been proffered in support. It otherwise agreed that the current entitlements of casual medical practitioners to overtime is clear.

[157] There is *prima facie* some merit in the proposal advanced by the HSU. A daily outer limit on the number of ordinary hours that may be worked in a day by a casual employee would usually be appropriate, and we note that clause 25.3(c) provides that doctors in training will be paid overtime for all time worked in excess of 10 hours on any one shift. However we have no evidence or information before us concerning the way in which casual medical practitioners covered by this award are typically utilised and rostered, and we therefore have no understanding of the potential impact of the proposed variation upon employers and their operations. Further, the variation is not confined to casual employees, but would extend to all medical practitioners except senior doctors, and thus goes beyond the scope of the current proceedings. Accordingly we do not propose adopt the HSU proposal.

[158] A 2020 version of the *Medical Practitioners Award* has been published and took effect on 4 February 2020. We will publish a draft determination to vary the 2020 award to give effect to our conclusion, and invite submissions in response, which are to be filed within 21 days.

Nurses Award 2010

[159] The outstanding issue in relation to this award concerns the circumstances in which casual employees become entitled to overtime and, in particular, whether a casual employee who, in any one day, works beyond the rostered hours of work but not beyond 10 hours in total, is entitled to overtime.

[160] Clause 10.4 sets out the basic incidents of casual employment under the award, but says nothing about the overtime entitlements of casual employees. Clause 10.3 provides for part-time employment, and clause 10.3(b) requires agreement at the commencement of employment as to "*the guaranteed minimum number of hours to be worked and the rostering arrangements which will apply to those hours*". Hours of work are provided for in clause 21 as follows:

21. Ordinary hours of work

21.1 The ordinary hours of work for a full-time employee will be 38 hours per week, 76 hours per fortnight or 152 hours over 28 days.

21.2 The shift length or ordinary hours of work per day will be a maximum of 10 hours exclusive of meal breaks.

21.3 An accrued day off (ADO) system of work may be implemented via an employee working no more than 19 days in a four week period of 152 hours.

21.4 Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28-day cycle.

Where practicable, such days off must be consecutive. For the purposes of this sub-clause, duty includes time an employee is on call.

21.5 The hours of work will be continuous, except for meal breaks. Except for the regular changeover of shifts, an employee will not be required to work more than one shift in each 24 hours.

[161] Overtime entitlements are provided for in clause 28.1:

28.1 Overtime penalty rates

(a) Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21—Ordinary hours of work, are to be paid as follows:

(i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;

(ii) Sunday—double time; and

(iii) Public holidays—double time and a half.

(b) Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.

(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26—Saturday and Sunday work and clause 29—Shiftwork.

(d) Part-time employees

All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be overtime and will be paid as prescribed in clause 28.1(a).

[162] The HSU submitted that the award was unclear, and for that reason should be varied to make clear that an employee is entitled to overtime when the employee: (1) works in excess of 10 hours per shift; and/or (2) works in excess of 38 hours per week; and/or (3) works in excess of their rostered daily ordinary hours. The Australian Nurses and Midwifery Federation (ANMF) supported the HSU's position, and submitted that because casuals might be engaged on part-time hours, they should like part-time employees be entitled to overtime if they worked hours in excess of the shift for which they are rostered.

[163] The PHIEA opposed the variation proposed by the HSU, and submitted that casual employees are entitled to the overtime on the same basis as full-time employees – that is, where they work in excess of 10 hours in a day or 38 hours in a week or 76 hours in a fortnight. The PHIEA submitted that an entitlement for casual employees to receive overtime for work in excess of rostered hours on the basis that this would be entirely novel, that casual employees did not receive guaranteed rostered shifts, and that it would reduce the flexibility of casual employment.

[164] ABI also opposed the variation proposed by the HSU. It submitted that overtime is only payable where work is performed outside the circumstances prescribed in clauses 21.2-21.5 (but not clause 21.1, which only applies to full-time employees).

[165] We do not consider that clause 28.1(d) has any applicability to casual employees. It is in terms only applicable to part-time employees, and is clearly referable to the requirement in clause 10.3(b) for the rostering arrangement of the guaranteed hours of part-time employees to be agreed at the commencement of employment. Accordingly casual employees do not currently have any entitlement to overtime for work in excess of "rostered hours" where this does not exceed 10 hours in a day, and no proper basis has been advanced to establish a new entitlement in this respect. To that extent, the HSU's proposed variation is rejected.

[166] We consider that the PHIEA submission correctly represents the current position. Clauses 28.1(a)-(c) apply equally to all categories of employees, and provide that overtime will be payable where overtime is worked in excess of the hours prescribed by clause 21.1 (that is, 38 in a week, 76 in a fortnight or 152 in a 4-week period) and clause 21.2 (10 hours in a single day). That clause 21.1 applies in terms only to full-time employees does not affect this approach, since clause 21.1 uses it as the reference point to establish the overtime entitlements for all employees. The ABI submission on this point is rejected.

[167] In summary therefore, we consider that casual employees are entitled to overtime when they work in excess of 38 hours per week, 76 hours per fortnight or 152 hours in a 4-week period, or where they work in excess of 10 hours in one day. We will publish a draft determination to vary the award consistent with this conclusion, and provide interested parties with a period of 21 days to provide submissions in response.

Oil Refining and Manufacturing Award 2010

[168] The issue concerning this award is whether the casual loading is payable on overtime. Clause 10.3(b) of the *Oil Refining and Manufacturing Award 2010* provides:

> **(b)** For each hour worked, a casual employee will be paid no less than 1/35th of the minimum weekly rate of pay for their classification in clause 14—Minimum wages, plus a casual loading of 25%.

[169] Clause 24.1(a) of the award prescribes overtime penalty rates in the following terms:

> **24.1 Overtime payments—employees other than continuous shiftworkers**
>
> **(a)** Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work the employer requires them to perform in addition to their ordinary hours:
>
> **(i)** 50% of the ordinary hourly base rate of pay for the first two hours and 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until Saturday;
>
> **(ii)** 100% of the ordinary hourly base rate of pay for overtime worked at any time on a Sunday; and

(iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.

[170] Clause 24.2 provides for an additional payment of 100% for overtime worked by continuous shiftworkers.

[171] Clause 24.3 provides for the method of calculation of overtime payments as follows:

24.3 Method of calculation

(a) When computing overtime payments, each day or shift worked will stand alone.

(b) Any payments under this clause are in substitution of any other loadings or penalty rates.

[172] Clauses 24.5, 24.6 and 24.7 go on to provide for penalty rates for shiftwork, weekend work and public holiday work respectively. Like clauses 24.1(a) and 24.2, they all provide for additional payments, expressed a percentage amount to be added to the "*ordinary hourly base rate of pay*". That expression is not defined in the *Oil Refining and Manufacturing Award 2010.*

[173] The Ai Group submitted, firstly, that clause 10.3(b) requires that a casual employee, for each hour of work, must be paid *no less than* the hourly rate plus the casual loading or, in other words, a casual employee must be paid, for each hour of work, at least 125% of the hourly rate. This, it was said, did not mandate the payment of the casual loading on all hours of work. Secondly, the Ai Group pointed to clause 24.3(b) as being applicable to the casual loading. It submitted that this provision made it clear that overtime penalty rates are payable in substitution for the casual loading. To the extent that there was any contradiction between clause 10.3(b) and clause 24.3(b), the latter was the specified provision which should prevail over the former general provision. ABI made submissions to similar effect.

[174] The AWU submitted that clause 10.3(b) made the casual loading payable on all hours worked in express terms, and this necessarily included overtime hours. The overtime rates in clause 24.1(a) are expressed as "*additional payments*", and thus were payable in addition to entitlements prescribed in other parts of the award, including the casual loading. Clause 24.3(b) applied to "*payments under this clause*", and was a reference to payments under clause 24, and was not directed at the casual loading in clause 10. Additionally, the AWU submitted, on the interpretation advanced by the Ai Group and ABI, clause 24.3(b) was to be read as equally applicable to shiftwork, weekend work and public holiday work penalty rates. This would lead to a manifestly unfair outcome with respect to the night shift loadings for afternoon and night shift, which are lower than the casual loading and would thus mean, on the Ai Group/ABI approach, that a casual employee would earn less for working an afternoon or night shift than a day shift. The Australian Manufacturing Workers' Union (AMWU) made submissions to similar effect.

[175] The Ai Group submitted in reply that the absurd outcome identified by the AWU and the AMWU would not arise because clause 10.3(b) would ensure that casual employees would always receive at least 125% of the hourly rate.

[176] We consider that clause 10.3(b) is to be interpreted as meaning that a casual employee will receive for all hours worked:

(1) *At least* 1/35th of the weekly rate for the relevant classification for all hours worked. The expression "*at least*" contemplates that there will be penalty rates payable in respect of overtime, shift work, weekend and public holidays hours that are worked.

(2) The 25% casual loading.

[177] The relevant effect of clause 10.3(b) is therefore that the casual loading is payable on overtime.

[178] Clauses 24.1(a) and 24.2 provide for additional percentage payments calculated on the "*ordinary hourly base rate of pay*". This expression, as earlier stated, is not defined, but the words "*base rate*" suggest that it refers to the weekly rates of pay prescribed in clause 14 divided by 35 to produce an hourly rate. We do not agree with the AWU that the "*ordinary hourly base rate of pay*" for a casual employee includes the casual loading, since a "*base rate*" would not be apt to describe a loaded rate. Therefore, clauses 10.3(b), 24.1(a) and 24.2, read together, indicate that when a casual employee works overtime, the employee is to be paid the hourly rate calculated by dividing the weekly rate by 35, and in addition the relevant penalty payment calculated on that hourly rate, and further in addition the 25% loading calculated on that hourly rate. That is to say, the total rate is calculated on a non-cumulative basis.

[179] However, it may be accepted that, on its face, clause 24.3(b) is capable of being read as contradicting this position by requiring that all the penalty payments in clause 24.3 (including overtime penalty payments) are in substitution for any other loadings or penalties payable under the award. However that approach, for which the Ai Group and ABI contend, leads to the problem of the manifestly absurd outcome identified by the AWU and the AMWU, whereby a casual employee will earn less on afternoon or night shift (except permanent night shift) than on a day shift. The Ai Group's response that under clause 10.3(b), the casual employee will always get the 25% loading pursuant to clause 10.3(b) in lieu of any lower shift loading cannot be accepted, because it contradicts its own submission that the effect of clause 24.3(b) is that payments under clause 24 are in lieu of the casual loading.

[180] This absurd outcome tends to demonstrate that clause 24.3(b) could not have been intended to be read as applicable to the casual loading. The alternative interpretation, advanced by the AWU and the AMWU, is that clause 24.3(b) is to be read as limited in its application to payment or loadings under clause 24 itself, so that it is read as "*Any payments under this clause are in substitution of any other loadings or penalty rates <u>under this clause</u>*". Although for the most part clause 24.3, read in this way, would not be strictly necessary because the overtime entitlements in clauses 24.1(a) and 24.2 are clearly expressed as applicable only to work in addition to ordinary hours, and the shift penalty, weekend and public holiday work entitlements in clauses 24.5-24.7 are only applicable to work in ordinary hours, it would have limited work to ensure that afternoon or night shifts worked on weekends or public holidays do not attract the shift penalty on top of the weekend or public holiday penalty. This alternative interpretation has the advantage of removing the any apparent conflict between clause 10.3(b) and clause 24.3(b).

[181] The Ai Group seeks to resolve the contradiction to which its preferred approach gives rise by the application of the *generalia specialibus non derogant* maxim of interpretation. However it is difficult to characterise clause 24.3(b) as the "special" provision and clause

10.3(b) as the "general provision" such as to give primacy to clause 24.3(b). If anything, clause 10.3(b) is the more "special" provision since it is specifically concerned with the payment of casual employees for any hours worked, whereas clause 24.3(b) is generally concerned with payment for all types of employment.

[182] The historical industrial context provides some assistance in resolving the interpretational problem. The propositions that may be stated about that context are as follows:

- the *Oil Refining and Manufacturing Award 2010* made as a result of the award modernisation process conducted pursuant to Pt 10 of the WR Act replaced a large range of preceding awards;

- an overview of the preceding awards indicates that they did not appear to contain any equivalent of clause 24.3(b);

- the AIRC award modernisation Full Bench did not say anything specific concerning the inclusion of clause 24.3(b) beyond noting that it was substantially based on a draft produced by the "*Oil Industry Industrial Committee*"[23] (OIIC), which consisted of a number of major oil companies;

- on 24 March 2009, the OIIC filed a set of tabulated notes which gave a brief explanation for each clause in its draft award. In respect of the casual employment clause, the note was: "*This clause follows the AIRC template and, as a matter of drafting is drawn from the Mining Industry Award 2010 although the provision in that award for abandonment of employment has been dealt with instead in clause 11 – Termination of employment. There is one error in the OIIC draft award – on the assumption that this is to be a conventional 38 hour week award, the casual loading should be the standard 25% rather than the suggested 20%*". In respect of the overtime and penalty rates clauses, the note was: "*This clause has been approached in a conventional manner. As a matter of drafting, this clause has been drawn from the Mining Industry Award 2010*".

[183] The OIIC's notes do not disclose any formed intention to exclude the casual loading in overtime hours, but rather emphasise that the drafting of the relevant provisions was largely modelled on the *Mining Industry Award 2010*. We discuss the similar but not identical equivalent provisions in that award in connection with the *Salt Industry Award 2010* later in this decision. Our conclusion, for reasons which are explained, is that those provisions do not exclude the payment of the casual loading on overtime. We consider therefore that the context favours the position advanced by the AWU and the AMWU.

[184] Our conclusion is that the casual loading is payable on overtime, but calculated on a cumulative, non-compounding basis.

[185] A 2020 version of the *Oil Refining and Manufacturing Award* has been published, and took effect on 4 February 2020. We will publish a draft determination to vary the 2020 award in terms of our conclusion, and any submissions in response may be filed within 21 days.

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[23] [2009] AIRCFB 450 at [148]

Pharmaceutical Industry Award 2010

[186] The issue with respect to the *Pharmaceutical Industry Award 2010* is whether the casual loading is payable during overtime. Clause 12.1 of the award provides for the casual loading in the following terms:

> **12.1** A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38th of the minimum weekly wage prescribed in clause 15—Classifications and adult minimum wages for the work being performed plus a casual loading of 25%.

[187] Clauses 25.1-25.6 provide for overtime and other penalty rates as follows:

> **25. Overtime and penalty rates**
>
> The following rates, based on 1/38th of the weekly wage rate, must be paid for all work done:
>
> **25.1** Outside the times of beginning and ending work in any one day—150% for the first two hours and 200% thereafter.
>
> **25.2** Within the times of beginning and ending work but in excess of eight hours in any one day—150% for the first two hours and 200% thereafter for a day worker and 150% for the first three hours and 200% thereafter for a shiftworker.
>
> **25.3** On Saturday—150% for the first two hours and 200% thereafter, with a minimum payment as for three hours' work.
>
> **25.4** On Sunday—200%, with a minimum payment as for three hours' work.
>
> **25.5** On a rostered day off—250% or a day off instead at some future date.
>
> **25.6** On a public holiday—250%.

[188] The Ai Group and ABI have submitted that clause 12.1 clearly creates an entitlement to the casual loading but limits it to ordinary hours of work. The AWU submitted that there was ambiguity as to whether the casual loading is payable on overtime because clauses 12.1 and 25 were silent on the issue. There was no express exclusion of the casual loading for overtime hours, and the ambiguity should be resolved by an amendment to the award which clarified that the loading was paid on a cumulative basis when overtime is worked.

[189] We do not consider the provisions of the award to be ambiguous. Clause 12.1 only applies to the working of ordinary time by casual employees. There is no dispute that the penalty rate provisions in clauses 25.1-25.6 apply equally to permanent and casual employees. The penalty rates prescribed by these provisions are expressed in percentage terms, and the chapeau to clauses 25.1-25.6 makes it clear that these percentages are to be applied to "*1/38th of the weekly wage rate*" - that is, an hourly rate which does not include the casual loading.

[190] We will publish a draft determination to vary the award to confirm this position. Any submissions in response are to be filed within 21 days.

Pharmacy Industry Award 2010

[191] Clause 26.2(a) of the *Pharmacy Industry Award 2010* provides:

> **26.2 Application of overtime**
>
> **(a)** An employer must pay an employee at the overtime rate, as specified in clause 26.3(a) for any hours worked at the direction of the employer:
>
> **(i)** in excess of 38 hours per week (or 76 ordinary hours over two consecutive weeks); or
>
> **(ii)** in excess of 12 hours per day as specified in clause 25.2 (maximum daily hours); or
>
> **(iii)** that are not continuous, except for rest breaks and meal breaks to which the employee is entitled under clause 28—Breaks; or
>
> **(iv)** between midnight and 7.00 am; or
>
> **(v)** outside the rostering arrangements as specified in clause 25.4.

[192] The HSU submitted that the award "*could be clearer*" as to when overtime for casuals commences and proposed the insertion of a separate new clause specifically concerned with the entitlement of casual employees to overtime as follows:

> **26.3** An employer must pay casual employees at the overtime rate, as specified in clause 26.2(a) for any hours worked at the direction of the employer:
>
> **(i)** in excess of 38 hours per week; or
>
> **(ii)** in excess of 10 hours per day; or
>
> **(iii)** that are not continuous, except for rest breaks and meal breaks as specified in clause 28—Breaks; or
>
> **(iv)** between midnight and 7.00 am; or
>
> **(v)** in excess of their rostered shift.

[193] The Pharmacy Guild of Australia (the Guild) does not support the proposed clause, submitting that it is a significant change which would result in more stringent obligations relating to casuals than those that exist under the current award, and was unsupported by any submission addressing the legislative framework or evidence supporting the variation. Further, the Guild contends that the HSU is attempting to re-argue a matter which has been decided by the Commission previously. ABI similarly submitted that the award does not contain any ambiguity as to when overtime commences and that subclauses (i) to (iv) of the clause 26.1(a)

can have application to casuals, whereas subclause (v) would not. It contends that the proposed clause goes beyond the entitlements conferred by clause 21.1 of the award and constitutes a substantive change which has not been supported by probative evidence.

[194] We do not consider that there is any difficulty in clause 26.2(a) of the 2010 award which requires resolution by way of an amendment. There does not appear to be any dispute between the parties as to what the current provision means. The HSU's proposal plainly involves substantive changes to the current provision – in particular, the removal of the capacity to average non-overtime hours over a period of two weeks. No evidence or submission has been advanced to support this substantive change. The HSU proposal is accordingly rejected. The *Pharmacy Industry Award 2020* has now been published, and took effect on 18 June 2020. Clause 21.2(a) is relevantly in the same terms as clause 26.2(a) of the 2010 award and accordingly does not require amendment.

Port Authorities Award 2010

[195] The CFMMEU has proposed that this award be varied to add a provision to the effect that casual employees are entitled to be paid overtime rates plus the 25% casual loading when working outside the span of ordinary hours.

[196] Clause 10.3(b) and (c) of the *Port Authorities Award 2010* provide for the payment of the casual loading in the following terms:

> **(b)** 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, plus a casual loading of 25%.
>
> **(c)** The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment. The loading constitutes part of the casual employee's all purpose rate.

[197] Penalty rates for overtime, as well for ordinary hours worked on weekends and public holidays, are prescribed in clauses 21.1, 21.5 and 21.6 of the award. In each case, the penalty rate is described as a percentage loading (50%, 100% or 150%) of the "*ordinary hourly minimum rate of pay*". This expression is not defined. Minimum rates of pay are prescribed in clause 13.1 as weekly amounts.

[198] The CFMMEU has submitted that its proposed variation would clarify and confirm the position which currently applies under the *Port Authorities Award 2010*. No submissions were filed by any interested party opposing the CFMMEU's proposed variation.

[199] We consider that the designation of the casual loading as part of the casual employee's "*all-purpose rate*" makes it clear that the loading must form part of the "*ordinary hourly rate*" to which the percentage penalty rate is to be applied. The casual loading is therefore included in the overtime rate on a compounding basis.

[200] A 2020 version of this award has now been published and took effect on 4 February 2020. We will publish a draft determination to vary the award to confirm the current position. Any submissions in response may be filed within 21 days.

Ports, Harbours and Enclosed Water Vessels Award 2010

[201] As with the previous award, the CFMMEU has sought a variation to the *Ports, Harbours and Enclosed Water Vessels Award 2010* to the effect that casual employees are entitled to be paid overtime rates plus the 25% casual loading when working outside the span of ordinary hours.

[202] Clause 10.3(b) of the award provides for the payment of the casual loading as follows:

> **(b)** A casual employee working within the ordinary hours of work pursuant to clause 18 will be paid per hour for the work performed plus 25% loading which incorporates the casual employees' entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award except overtime and shift allowances.

[203] Clauses 20.1, 20.3 and 20.4 provide for overtime penalty rates (as well as penalty rates for ordinary hours worked on weekends and public holidays) in a similar way as the previous award – that is, as percentage loadings (50%, 100% or 150%) of the "*ordinary hourly base rate of pay*". This expression is not defined. Clause 13 of the award provides for minimum rates of pay expressed as weekly amounts.

[204] The CFMMEU had submitted that its proposed variation would clarify the entitlement to overtime for casuals and be consistent with the current terms of the award. MIAL has opposed the making of the proposed variation on the basis that there is no ambiguity in the award. It submitted that clause 10.3(b) makes it clear that a casual employee is entitled to the overtime penalty payment in addition to the 25% casual loading, and no additional changes are needed to clarify this position.

[205] The AFEI also opposed the making of the proposed variation, but on the basis that the award currently provides that the casual loading is payable only on ordinary time and not on overtime. It accordingly submitted that the CFMMEU's proposed variation was inconsistent with the current terms of the award because its outcome would be an increase of a further 25% to the current overtime rates.

[206] We reject the AFEI's submission. Although the expression "*ordinary hourly base rate of pay*" in clause 20 is not defined, we consider that in respect of casual employees it must be understood as including the casual loading because clause 10.3(b) provides that the loading incorporates "*entitlements to annual leave, annual leave loading and any other rates and allowances contained in this award <u>except overtime and shift allowances</u>*" (underlining added). Despite the fact that clause 10.3(b) only prescribes the payment of the casual loading in ordinary hours, the only meaning which can be ascribed to the underlined words is that it is intended for the loading to be payable on overtime and shiftwork as part of the "*ordinary hourly base rate of pay*". We therefore conclude that the casual loading is payable as part of the overtime rate, calculated on a cumulative basis.

[207] The *Ports, Harbours and Enclosed Water Vessels Award 2020* has now been published and commenced on 18 June 2020. We will publish a draft determination to vary the 2020 award to confirm the position stated above. Any submissions in response may be filed within 21 days.

Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010

[208] In respect of the *Professional Diving Industry (Industrial) Award 2010* and the *Professional Diving Industry (Recreational) Award 2010*, the CFMMEU initially sought the same variations as it has sought with respect to the other maritime awards in which it has an interest. However, in submission dated 26 April 2019, the CFMMEU indicated that it no longer pressed for these variations to be made on the basis that the existing position was clear. No other party raised any issue in respect of these awards.

[209] We agree that the existing position is clear. Both awards designate the casual loading to be "*part of the casual employee's all purpose rate*" (in clauses 10.3(d) of the former award and clause 10.4(c) of the latter). It is therefore clear that the loading is payable as part of the overtime penalty rate, calculated on a compounding basis. The 2020 version of these awards have now been published, and both took effect on 13 April 2020. We will publish draft determinations to vary the *Professional Diving Industry (Industrial) Award 2020* and the *Professional Diving Industry (Recreational) Award 2020* to confirm the current position. If any party wishes to make and submissions in response, they shall be filed within 21 days.

Salt Industry Award 2010

[210] The initial issue with respect to this award was whether a casual employee is entitled to the casual loading during the performance of overtime. Additionally, pursuant to the Report issued by the President, Justice Ross, on 29 November 2019, it is necessary for us to determine the following issue identified in that Report:

> The issue of whether casual employees are entitled to the casual loading and if so, the basis upon which the relevant rates are to be calculated, during the performance of ordinary hours on a weekend, ordinary hours on a public holiday and shiftwork under the *Salt Industry Award 2010*.

[211] Clause 10.3 of the Award provides for the casual loading in the following terms:

> **10.3 Casual employment**
>
> **(a)** A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. The minimum engagement for a casual is four hours.
>
> **(b)** 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 14—Minimum wages, plus a casual loading of 25%. The loading constitutes part of the casual employee's all-purpose rate.
>
> **(c)** The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.

[212] Entitlements to overtime are provided for in clauses 23.1-23.3 as follows:

23.1 Overtime payments—employees other than continuous shiftworkers

(a) Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work done in addition to their ordinary hours:

(i) 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until Saturday;

(ii) 100% of the ordinary hourly base rate of pay for any overtime worked on a Sunday; and

(iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.

(b) An employee recalled to work overtime after leaving the employer's premises (whether notified before or after leaving the premises) will be engaged to work for a minimum of four hours or will be paid for a minimum of four hours work in circumstances where the employee is engaged for a lesser period.

23.2 Overtime payments—continuous shiftworkers

A continuous shiftworker will be paid an additional payment for all work done in addition to ordinary hours of 100% of the ordinary hourly base rate of pay.

23.3 Method of calculation

(a) When computing overtime payments, each day or shift worked will stand alone.

(b) Any overtime payments are in substitution of any other loadings or penalty rates.

[213] Provision for shiftwork, weekend and public holiday penalties is made in clauses 23.7-23.9 as follows:

23.7 Shiftwork penalties

(a) A shiftworker whilst on afternoon or night shift must be paid a loading of 15% of the ordinary hourly base rate of pay.

(b) A shiftworker on permanent night shift must be paid a loading of 30% of the ordinary hourly base rate of pay.

23.8 Weekend work

A shiftworker must be paid the following loadings for ordinary hours worked on a Saturday or Sunday:

(a) 50% of the ordinary hourly base rate of pay for ordinary hours worked on a Saturday; and

(b) 100% of the ordinary hourly base rate of pay for ordinary hours worked on a Sunday.

23.9 Public holidays

A shiftworker must be paid a loading of 100% of the ordinary hourly base rate of pay for any ordinary hours worked on a public holiday.

[214] The expression "*ordinary hourly base rate of pay*" used in clauses 23.1, 23.2, 23.7, 23.8 and 23.9 is defined in clause 3.1 as follows:

ordinary hourly base rate of pay means the ordinary base rate of pay contained in the appropriate classification in clause 14.1 divided by 38

[215] Clause 14.1 specified weekly rates of pay for all adult classifications under the award.

[216] The AWU submits that an ordinary reading of the words "*for each hour worked*" at the beginning of clause 10.3(b) strongly suggests it is intended that the 25% loading is paid for all hours worked including overtime and that, in any event, the reference to the casual loading being part of the "*all-purpose rate*" removes any doubt about how the 25% interacts with other payments. The AWU contended that clause 23.3(b) only applied to the loading and penalties that were provided for in clause 23 itself, and not to the casual loading.

[217] ABI submitted that the AWU analysis of the casual loading in the award ignored clause 23.3, which clearly applied to the casual loading and, on any conventional interpretation, resulted in the casual loading not being payable on overtime.

[218] The designation in clause 10.3(b) of the casual loading as part of the "*all-purpose rate*" for casual employees would, considered in isolation and in accordance with the traditional industrial meaning of that expression, be read as a requirement that the loading is payable on a compounding basis in respect of overtime, shiftwork, and work on weekends and public holidays.[24] However clause 23 contradicts this position in two respects and thereby creates ambiguity.

[219] Firstly, clause 23.3(b) provides that any overtime payments are in substitution of "*any other loadings or penalty rates*". Again, read in isolation, the words "*any other loadings*" would, on their ordinary meaning, result in the casual loading not being payable on overtime. However, this results in the provision contradicting clause 10.3(b).

[220] The historical industrial context assists in resolving this ambiguity. The current award was made as a result of the award modernisation process conducted by the AIRC. Initially, it appears that the salt production industry was treated by the AIRC award modernisation Full Bench as part of the mining industry, so that it would ultimately be covered by the modern

[24] See [2015] FWCFB 4658 at [40]

award that would be made to cover the mining industry.[25] However it was subsequently decided to make a separate award for the salt production industry.[26] The award replaced a federal award, the *Salt Industry (Victoria) Award 2001* (2001 Award), a federal superannuation award, and a number of industry and enterprise-specific NAPSAs.[27] It is apparent that the Full Bench constructed the award based on competing drafts provided by the AWU and the Australian Mines and Metals Association (AMMA). The 2001 Award contained an equivalent to the current clause 10.3(a) and (b) in the following terms (underlining added):

> **13.5.1** A casual employee is to be one engaged by the hour. A casual employee for working ordinary time shall be paid an hourly rate calculated on the basis of one thirty eighth of the weekly award wage prescribed in clause 17 for the work being performed plus a casual loading of 25%. The loading constitutes part of the casual employee's all purpose rate.

[221] Both the AWU and AMMA drafts for the salt industry award to be made included equivalent provisions to the above.

[222] Clause 27 of the 2001 Award was entitled "*Overtime*" and, in clause 27.1.1, provided for penalty rates for overtime, weekend work and public holiday work in a way broadly similar to the current clauses 23.1, 23.8 and 23.9, except that the penalty rates are expressed as "*time and a half*", "*double time*" and "*double time and a half*" rather than as additional percentage amounts. Clause 27.1.3 of the 2001 Award provided, like the current clause 23.3(a), that each day stands alone on the calculation of overtime, but clause 27 of the 2001 Award contained no equivalent to the current clause 23.3(b). Nor did any of the other processor awards, including the enterprise-specific *Dampier Salt Award 2004* which covered the largest producer in the industry (and did not even provide for casual employment). Accordingly the historical position, pre-award modernisation, was that casual employees, to the extent they were permitted at all in the salt production industry, were entitled to the casual loading on overtime, as well as for work on weekends and public holidays and for shiftwork.

[223] It is apparent that the current clause 23.3(b) and indeed most of the provisions of clause 23 had their origin in the AMMA draft award. A review of the documentation shows that in including what ultimately became clause 23.3(b), the AMMA simply reproduced what it had placed in its earlier draft for the award to cover the mining industry. The AWU draft contained no such provision, but adhered closely to the terms of the 2001 Award. In its initial exposure draft and in the *Salt Industry Award* that was made, the AIRC award modernisation Full Bench adopted the AMMA draft clause in respect of overtime and penalty rates without ever giving any indication that it intended to depart from the pre-existing position we have described.

[224] Because the AIRC award modernisation Full Bench adhered closely to the AMMA draft awards in respect of both the mining industry and the salt production industry, the overtime and penalty rate clauses of the *Mining Industry Award 2010* and the *Salt Industry Award* are highly similar and, in particular, both provide that overtime payments "*are in substitution for any other loadings or penalty rates*" (in the former case, in clause 20.4(b)). That is the case

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[25] See [2008] AIRCFB 550 at Attachment B

[26] [2009] AIRCFB 865 at [241]-[242]

[27] See [2009] AIRCFB 641 at Attachment B and [2009] AIRCFB 865 at [242]

notwithstanding that the *Mining Industry Award 2010* also provides, in clause 10.3(b), that the casual loading "*constitutes part of the employee's all-purpose rate*".

[225] The position applying in the *Mining Industry Award 2010* has been considered earlier in the 4 yearly review, in a decision issued on 28 June 2018.[28] The Full Bench considered a submission by the Ai Group that, under that award, the casual loading was not payable for overtime, shiftwork or in respect of any other penalties. The Full Bench rejected this submission on the basis that clause 10.3(b) made it clear that the casual loading was an all-purpose payment.[29] In light of this decision there is now agreement that, under the *Mining Industry Award 2010*, the casual loading is payable on overtime on a compounding basis.[30]

[226] In summary:

(1) prior to the making of the current award, where pre-existing instruments allowed for casual employment, the casual loading was payable on overtime, weekend work, public holiday work and shiftwork;

(2) both the AWU and AMMA sought in the award modernisation process that the modern Salt Industry Award retain the provision in the 2001 Award that the casual loading formed part of the all-purpose rate;

(3) the current clause 23.3(b) has its origins in an AMMA draft award which reproduced a draft clause for the Mining Industry Award;

(4) although the AIRC award modernisation Full Bench adopted this aspect of the AMMA draft, it gave no indication in its decision leading to the making of the Salt Industry Award 2010 that it intended to change the pre-existing position which we have described, and retained the requirement that the casual loading formed part of the all-purpose rate; and

(5) the equivalent provisions in the Mining Industry Award 2010 have been treated by another Full Bench in the 4 yearly review as requiring that the casual loading been paid on overtime, shiftwork and other work attracting a penalty rate.

[227] Having regard to this context, we consider that under the current award the casual loading is payable in respect of overtime, work on weekends and public holidays, and shiftwork. To resolve the apparent inconsistency between clause 10.3(b) and clause 23.3(b), the latter provision should be interpreted, as submitted by the AWU, as referring only to the loadings and penalties for which clause 23 provides. This gives the provision a rational field of operation, since it would ensure that a weekend or public holiday penalty or shiftwork loading was not payable in addition to an overtime loading. Clause 23.3(b) will be amended to clarify that this is its effect.

[228] The second ambiguity is that although, as earlier stated, the designation of the casual loading as part of the all-purpose rate in clause 10.3(b) would suggest that the penalties and

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[28] [2018] FWCFB 3802

[29] Ibid at [252]-[253]

[30] See [2019] FWC 8318 at [22]

loading in clause 23 are calculated on a compounding basis upon the loaded ordinary casual hourly rate, the provisions of clause 23 specifying the rate to be paid indicate that the contrary position is the case. In respect of the overtime rates in clause 23.1(a), the shiftwork loadings in clause 23.7, the weekend penalties in clause 23.8, and the public holiday penalties in clause 23.9, the penalty or loading is expressed in each case as an additional percentage amount of the "*ordinary hourly base rate of pay*". This expression is defined in clause 3.1 to mean "*the ordinary base rate of pay contained in the appropriate classification in clause 14.1 divided by 38*". Clause 14.1 specifies the weekly rates of pay for full-time employees. Accordingly, the "*ordinary hourly base rate of pay*" upon which the penalties and loading in clause 23 are to be calculated do not include the casual loading.

[229] Because the provisions in clause 23 we have referred to, and the definition in clause 3.1, are specifically concerned with the quantification of the penalties and loading for which they provide, we consider that they should prevail over the general provision in clause 10.3(b) in relation to this issue. Accordingly we consider that, while the casual loading remains payable in respect of overtime, work on weekends and public holidays, and shiftwork, the penalty rates and loading in clause 23 are calculated cumulatively on the casual loading and not on a compounding basis.

[230] We will publish a draft determination to vary the award in terms of this conclusion, and any submissions in response to this may be filed within 21 days.

[231] We also note that in the 2020 version of the *Mining Industry Award*, which has been published and took effect on 13 April 2020, retains (in clause 20.4(b)) a provision in the same terms as 23.3(b) of the *Salt Industry Award*, notwithstanding that the *Mining Industry Award* otherwise provides (in clause 11.4) that the casual loading forms part of the all-purpose casual rate. We will accordingly publish a draft determination to vary the *Mining Industry Award 2020* in equivalent terms to the *Salt Industry Award*, and similarly invite submissions in response thereto, to be filed within 21 days.

Sporting Organisations Award 2010

[232] The AWU seeks that this award be varied to make it clear that the ordinary hours of work for a casual employee are no more than 11 per day or 38 per week, so that it is clear that overtime penalty rates are applicable if work in excess of ordinary hours is performed.

[233] The *Sporting Organisations Award 2010* contains classifications for coaching staff and clerical and administrative staff. Clause 13.2 of the award provides for the payment of the casual loading in the following terms:

> 13.2 A casual employee must be paid per hour at the rate of 1/38th of the weekly rate prescribed for the class of work performed plus a loading of 25%. Such loading is paid instead of all paid leave including annual leave, personal/carer's leave and public holidays not worked whether prescribed in this award or the NES.

[234] Clause 22.1 of the award specifies the ordinary hours of work for clerical and administrative staff covered by the award. Clause 22.1(a) specified the hours of work for full-time coaching and administrative staff and, in summary, provides that:

- ordinary hours are an average of 38 per week (which may be worked as 38 hours in a week, a 4-day week, a 9-day fortnight or across 19 days in a 4-week period);

- the maximum number of ordinary hours in a day is 11;

- ordinary hours may be worked on any day of the week between 6.00am and 6.00pm.

[235] Clause 22.1(b) provides that the ordinary hours of part-time clerical and administrative employees must be agreed at the outset of the employment and may be changed by agreement or by the employer upon notice. Clause 22.2 provides that, for coaching staff, ordinary hours are as provided by the NES. There is no specification of ordinary hours for casual employees.

[236] Overtime entitlements are provided for in clause 24, and only in relation to clerical and administrative staff. Clauses 24.1-24.3 provide:

> **24.1 Overtime—clerical and administrative staff**
>
> **24.2** The hourly rate for overtime purposes will be calculated by dividing the relevant minimum weekly wage by 38.
>
> **24.3** Daily overtime will be compensated as follows:
>
> (a) up to and including the first hour of overtime will be paid for at the rate of time and a half; and
>
> (b) overtime in excess of one hour will be paid for at the rate of time and a half for the first two hours and double time thereafter.

[237] No provision is made for overtime entitlements for coaching staff.

[238] The AWU submitted that:

- the overtime provisions in the award are not ambiguous, but to the extent that they may be read as excluding casual employees from overtime, the award should be varied to make it clear that overtime is payable;

- the exclusion of casual employees from overtime entitlements would be contrary to the modern awards objective in s 134(1) of the FW Act;

- the pre-award modernisation award which applied, the *National and State Sporting Organisations Award 2001* (NSSO Award), contained ordinary hours for casual employees, and it was an error that this was not translated into the *Sporting Organisations Award 2010*.

[239] The AWU raised a separate issue about the exclusion of all categories of coaching staff from overtime altogether, but that is beyond the remit of the current proceedings.

[240] Tennis Australia and Gymnastics Australia submitted that the position with respect to ordinary hours and overtime rates needed to be clarified, and that there should be no restriction upon casual employees working more than 38 hours. They contended that the current position

was that casual clerical and administrative employees were not entitled to overtime. Their position in this respect was supported by the AFEI.

[241] The drafting of the above provisions of the *Sporting Organisations Award 2010* presents considerable difficulty. The heading contained in clause 24.1 suggests that the overtime provisions in clauses 24.2 and 24.3 apply to all clerical and administrative staff, including casual employees. However, there is no specification of any ordinary hours for casual clerical and administrative employees. More broadly, clause 24.3 does not specify the circumstances in which it operates with respect to any class of employees: it simply sets a penalty rate for "*Daily overtime*" – an expression which is not defined in the award. The overtime entitlements for all employees, including casual employees, is therefore ambiguous under the *Sporting Organisations Award 2010*.

[242] The historical industrial context assists in resolving some of these difficulties. It is clear that the AIRC award modernisation Full Bench which made the *Sporting Organisations Award 2010* based it upon the terms of the previous NSSO Award.[31] However although it is readily apparent that the two awards were, with respect to casual employment and overtime, intended to have the same substantive effect, there were significant changes in drafting in the *Sporting Organisations Award 2010* which have obscured the intended effect of the applicable provisions. Firstly, in the NSSO Award, there were separate casual employment provisions for coaching staff on the one hand and clerical and administrative staff on the other. In respect of the former category, clause 12.5 provided that they were to be paid an "*all up hourly rate*" for each hour worked, whereas for the latter category, clause 8.4 relevantly provided: "*A casual employee for working ordinary hours of work shall be paid one thirty-eighth of the total minimum rate prescribed herein, plus 15 per cent*". There is a clear contrast between the two provisions, in that casual clerical and administrative employees did not have an "*all up hourly rate*" but rather a rate for ordinary hours, which implies the applicability of an overtime rate. The hours provisions and overtime provisions for clerical and administrative employees are basically the same in the NSSO Award and the 2010 award, with the critical difference that the NSSO Award contained (in clause 3.8) a definition of "*daily overtime*": "***Daily overtime*** *represents all time worked outside an employee's ordinary hours of work, except for time worked on a rostered day off*". This definition, read together with clause 8.4, makes it reasonably apparent that it was intended that casual clerical and administrative employees be entitled to overtime when working in excess of their ordinary hours of work. However the NSSO Award did not define what those ordinary hours were.

[243] This context favours the conclusion that the *Sporting Organisations Award 2010* is to be understood as intended to confer overtime entitlements on casual clerical and administrative employees. However it does so in a defective fashion because it does not identify the circumstances in which overtime is payable to such employees. Our provisional view is that it is necessary for the award to be varied to remedy this in order for the modern awards objective in s 134(1) of the FW Act to be achieved, with the consideration in s 134(1)(da)(i) having determinative weight in that context. We provisionally consider that casual employees should be paid overtime for work performed in excess of 38 hours per week averaged over 4 weeks or in excess of 11 hours in a single day, or work performed outside the span of hours of 6.00am to 6.00pm, Monday to Friday. This would align their ordinary hours with that of full-time employees.

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[31] [2009] AIRCFB 450 at [73]

[244] As to the rate of overtime for casual clerical and administrative employees, we note that the NSSO Award provided in clause 8.4 that the casual loading was only payable in respect of ordinary hours, and that clause 22.1 provided that "*The hourly rate for overtime purposes shall be calculated by dividing the minimum weekly award rate of pay for the employee's classification by thirty eight*". Those two provisions, read together, indicate that the casual loading was not payable on overtime. There is no indication that the AIRC award modernisation Full Bench intended to change this position when it made the *Sporting Organisations Award 2010* based on the provisions of the NSSO Award, and the provision concerning the rate of overtime was retained as 24.2. Accordingly, we consider that the current position is that casual clerical and administrative employees do not receive the casual loading on overtime.

[245] The *Sporting Organisations Award 2020* has now been published, and took effect on 4 February 2020. We will publish a draft determination to vary this award consistent with our conclusions above (provisional and otherwise). Interest parties will be given an opportunity to make further submissions in response within 21 days.

Stevedoring Industry Award 2010

[246] As with the other awards in which it has an interest, the CFMMEU has proposed that the *Stevedoring Industry Award 2010* be varied to provide that casual employees are entitled to be paid overtime rates plus the 25% casual loading when working outside the span of ordinary hours, on the basis that this would clarify and confirm the existing effect of the award. No interested party filed any submission in opposition to the CFMMEU's submission.

[247] The pre-existing position is that clause 10.3(b) of the *Stevedoring Industry Award 2010* for the payment of the casual loading as follows:

> **(b)** A casual employee will be paid the hourly rate of pay for the relevant classification plus a loading of 25%. This loading is paid instead of entitlements which by virtue of the NES or this award do not apply to casual employees.

[248] Overtime penalty rates are provided for in clause 19.1, and are expressed as "*twice the ordinary rate*", "*two and a half times the ordinary rate*" or "*three times the ordinary rate*". The expression "*ordinary rate*" is not defined, but the similar expression "*ordinary hourly rate*" is given the following definition in clause 3.1:

> **ordinary hourly rate** means the minimum weekly rate prescribed in clause 13 divided by 35

[249] It is difficult to imagine that it was intended that the award give different meanings to the expressions "*ordinary rate*" and "*ordinary hourly rate*", and the purpose of clause 19.1 is to prescribe a penalty rate of pay which is an hourly rate, the "*ordinary rate*" upon which the clause operates must be an hourly rate. That leads us to conclude that the casual loading is not included in the calculation of the overtime rate as provided for by clause 19.1.

[250] However, clause 10.3(b) separately requires that a casual employee be paid the "*hourly rate of pay*" for the relevant classification "*plus 25%*". The provision is not confined to work in ordinary hours, nor is it expressed by reference to the "*ordinary hourly rate*". On its plain meaning, it provides for a loading of 25% to be added to whatever the hourly rate of pay would

otherwise be under the award. That means that where a casual employee is working overtime hours, the "*hourly rate of pay*" is the rate produced by clause 19.1, to which the loading of 25% must then be applied. The effect of this is that the casual loading is payable on overtime, and is added on a compounding basis to the overtime rate.

[251] The 2020 version of this award has been published and took effect on 13 April 2020. We will publish a draft determination to vary the *Stevedoring Industry Award 2020* in accordance with our conclusions above, and invite further submissions in response. Such submission shall be filed within 21 days.

Telecommunications Services Award 2010

[252] The issue with respect to this award is whether the casual loading is payable during overtime. Clause 11.3(b) of the award prescribes that casual employees are entitled to a casual loading in the following terms:

> **(b)** A casual employee is one engaged and paid as such, and for working ordinary time will be paid per hour 1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 25%.

[253] Overtime rates are prescribed in clause 21.1(a) as follows:

> **21.1 Overtime rates**
>
> **(a)** Except as provided for in clause 11.2(b), for all work done in excess of ordinary hours an employee will be paid at the rate of time and a half for the first three hours and double time thereafter.

[254] The Ai Group submitted that clause 11.3(b) and 21.1 clearly only require the payment of the casual loading during ordinary hours. It says that this also reflects the position under the *Telecommunications Services Industry Award 2002,* upon which the *Telecommunications Services Award 2010* is primarily based. The AFEI and ABI, for reasons substantially similar to the Ai Group also submit the casual loading is payable on ordinary hours only.

[255] The CPSU submitted that the overtime rates are to be calculated on the basis of the loaded casual ordinary-time rate for similar reasons as outlined in respect of the *Contract Call Centres Award* and the reasoning in the Yallourn and Domain decisions.

[256] The rate of overtime in clause 21.1 of the award is formulated by the use of the expressions "*time and a half*" and "*double time*". On the Yallourn/Domain approach, these expressions are to be understood as operating, in respect of casual employees, on the ordinary rate of pay inclusive of the casual loading. This is no textual contra-indicator in the award. The Ai Group's reliance on the pre-award modernisation *Telecommunications Services Industry Award 2002* does not assist its position, since in clause 24.1.1 of that award, the rate of overtime was expressed in the same way. Accordingly we conclude that the casual loading is included in the rate of overtime on a compounding basis. We will publish a draft determination to vary the award in accordance with this conclusion. Any submissions in response shall be filed within 21 days.

Textile, Clothing, Footwear and Associated Industry Award 2010

[257] The issue in respect of this award is whether the award requires that the casual loading is paid during overtime on a cumulative or compounding basis.

[258] Clause 14 of the award relates to casual employment, and relevantly provides:

> **14. Casual employment**
>
> …
>
> **14.3** A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.
>
> . . . .
>
> **14.5** Casual employees are entitled to penalty payments for overtime, shiftwork and work on public holidays in accordance with the provisions of this award as they apply to permanent employees.

[259] Clause 39.3 prescribes the overtime rates payable under the award as follows:

> **39.3 Payment for working overtime**
>
> **(a)** An employer must pay an employee overtime at the rate of:
>
> **(i)** 150% for the first three hours; and
>
> **(ii)** 200% thereafter.
>
> **(b)** For the purpose of calculating overtime each day must stand alone.
>
> **(c)** An employer must pay an employee who is paid under any system of payment by results for any overtime worked:
>
> **(i)** for the first two hours, at the rate of 150% of the award rate for their skill level; and
>
> **(ii)** for any subsequent hours, at the rate of 200% of the award rate for their skill level;
>
> in addition to the payment by results earnings earned by the worker.

[260] The Ai Group submitted that overtime rates for casual employees are to be calculated on the same basis as they are for permanent employees; that is, the overtime rates are to be calculated for all employees without application on the casual loading. The AFEI similarly submitted that clause 14 is worded such that the effect is that the casual loading is an amount that is added on to the hourly rate and that the casual loading is not to form part of an all-purpose rate.

[261] The CFMMEU submitted that the plain meaning of clause 14.2 of the award is that a casual employee is entitled to be paid a wage rate comprised of the minimum hourly rate for

the applicable classification, plus the 25% casual loading for each hour they work (the casual loaded hourly rate) and that where the award does not prescribe the method of calculation for overtime payments, the correct form of calculation is the compounding method.

[262] We consider that the position of the Ai Group is correct. Clause 14.3 makes it clear that the casual loading is calculated by reference to "*1/38th of the weekly award wage*" – that is, the ordinary hourly rate. Clause 39.3 is less than clear as to the basis upon which overtime penalty rates are to be calculated, but clause 14.5 clarifies this by providing that casual employees are to receive the same overtime penalty payments as permanent employees, which necessarily means that the penalty payments for casual employees under clause 39.3 must also be calculated by reference to "*1/38th of the weekly award wage*".

[263] Our conclusion in this respect is consistent with an earlier decision of a Full Bench in relation to the 4 yearly review,[32] which said:

> "[417] The TCFUA submits that the overtime and public holiday rates for casual employees in Schedule C were calculated cumulatively and they in fact should be based on a compounding method. ABI and Ai Group opposed the TCFUA submission.
>
> [418] We do not agree with the submission of the TCFUA. The application of the casual loading in the Textile Award is specified in clause 14 of the current award.
>
> > '14.3 A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.'
>
> [419] This clause has been reproduced in the Exposure draft in similar terms. Nowhere in the current award does it stipulate that the casual loading applies for all purposes. In such cases the loading should be applied using a cumulative method rather than compounding. The Exposure Draft applies such a method, consistent with the general rule. We see no reason to depart from this general approach in this instance."

[264] We will publish a draft determination for a variation of the award to confirm the current position. Any submissions in response shall be filed within 21 days.

Transport (Cash in Transit) Award 2010

[265] The issue with respect to the *Transport (Cash in Transit) Award 2010* is whether the casual loading is payable on overtime. Clause 11.5(c) of the award provides for the payment of the casual loading as follows:

> **(c)** Casual employees will be paid, in addition to the ordinary hourly rate and rates payable for shift and weekend work on the same basis as a weekly employee, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.

[266] Overtime entitlements are provided in clause 28.1:

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[32] [2018] FWCFB 3802

> **28.1 Payment for overtime**
>
> All work done outside ordinary hours will be paid at the rate of time and a half for the first two hours and double time after that. This double time rate will continue until the completion of the overtime work. Except as otherwise provided in this clause, in computing overtime each day's work will stand alone.

[267] The Ai Group submitted that the effect of clause 11.5(c) was that casual employees are entitled to the casual loading only in addition to the ordinary hourly rate and where rates for shift and weekend work are payable, and neither that clause nor any other provision of the award provided for the payment of the loading on overtime. ABI made a submission to substantially the same effect.

[268] The Transport Workers' Union (TWU) submitted that the *Domain Aged Care* decision supported its position that the loading was payable on overtime, since the provisions in this award were relevantly indistinguishable from the provisions of the *Nurses Award 2010* that were considered in that decision.

[269] We agree with the submission advanced by the TWU. On the Yallourn/Domain approach, the expressions "*time and a half*" and "*double time*" are to be understood, in relation to casual employees, as operating upon the rate of pay which applies to casual employees in ordinary hours. It does not matter therefore that clause 11.5(c), on one view, does not in terms apply the casual loading to overtime hours.

[270] The historical industrial context also provides some assistance. The *Transport (Cash in Transit) Award 2010* which was developed as part of the award modernisation process conducted pursuant to Part 10A of the WR Act, was largely based on the provisions of the previous *Transport Workers (Armoured Vehicles) Award 2004*.[33] That award contained the following specific provision concerning overtime for casual employees:

> **13.4.5** In addition to the normal overtime rates, a casual employee who works overtime or outside of ordinary hours will be paid on an hourly basis 1/38th of the appropriate all up weekly wage rate, plus 10 percent, and the appropriate allowance set out in clause 19.1.2 for work which is performed, paid on a pro rata basis.

[271] The "*normal overtime rates*" referred to are set out in clause 27.2 of the 2004 award, and are time and a half for the first two hours and double time thereafter.

[272] The same provision as clause 13.4.5 above was contained in clause 12.5.4 of the pre-award modernisation *Transport Workers Award 1998*, which was ultimately replaced as a result of the award modernisation process by the *Road Transport and Distribution Award 2010*. An exposure draft for the *Road Transport and Distribution Award 2010* was published by the AIRC as part of the award modernisation process on 23 January 2009 contained in clause 12.6(c) the following provision concerning the casual loading:

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[33] See [2009] AIRCFB 50 at [107]

> **(c)** A casual employee while working ordinary hours, must be paid on an hourly basis 1/38th of the appropriate weekly wage rate prescribed by the award, plus 25% of ordinary time earnings for the work performed. A minimum payment of four hours pay is to be paid.

[273] Clause 27.1 of the exposure draft provided for overtime rates of time and a half for the first two hours and double time thereafter.

[274] The Ai Group, although it did not make submissions in respect of the exposure draft for the *Transport (Cash in Transit) Award 2010*, made submissions dated 13 February 2009 in relation to (among other things) the proposed clause 12.6(c) and 27.1 of the draft *Road Transport and Distribution Award 2010*. The submission stated:

> "The terms of the RT&D Modern Award have the effect of conferring upon the casual employee an entitlement to a 25% loading when they work overtime in addition to their overtime rate. Ai Group submits that the provisions of the RT&D Modern Award, in relation to payment of casuals whilst working overtime, is in excess of current standards.
>
> We propose the retention of existing penalty arrangements for casual employees as set out in the Transport Workers Award 1998 as it provides for an adequate safety net. Furthermore, an increase to the casual loading payable when an employee works overtime clearly increases costs for employers in a manner contrary to the terms of the Modernisation Request."

[275] The AIRC award modernisation Full Bench appears to have accepted that the proposed provision would have that effect, because in the *Road Transport and Distribution Award 2010* which it ultimately made, the Full Bench restored (as clause 12.5(d)) a provision in the same terms as clause 12.5.4 of the pre-award modernisation *Transport Workers Award 1998*. However, the Ai Group maintained a concern that clause 12.5(c) of the award could be read as applying the 25% loading to overtime and consequently, during the 2 yearly review of modern awards, applied for a further variation to clarify the position. This variation was granted, by consent, in a decision issued by the Commission on 16 December 2013[34] as follows:

> "[17] Clause 12.5(c) of the Award states that a casual employee will be paid, on an hourly basis, 1/38th of the minimum weekly rate plus a loading of 25% for all ordinary hours of work. Clause 12.5(d) currently provides for a loading of 10% in addition to normal overtime rates for work performed by a casual employee outside of ordinary hours. Ai Group has made an application to vary clause 12.5(d) to make clear that a casual employee is not entitled to the 25% loading in addition to the 10% loading whilst working overtime. All of the parties consented to the variation sought and the terms in which it should be expressed. It was agreed by the parties that clarification of this matter was desirable. Additionally, during the conferences before me, the parties agreed that illustrative examples should be included that demonstrate how the casual loading under clause 12.5(d) is to be calculated. Specifically, the examples clarify that the casual loading and overtime penalty rate are not compounded. Ai Group's application is granted and the examples as to how casual loading should be calculated will be inserted in clause 12.5(d). These variations will serve to make the Award easier to understand."

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[34] [2013] FWC 9805

[276] In summary, the historical industrial context demonstrates the following:

- the pre-award modernisation *Transport Workers Award 1998* and *Transport Workers (Armoured Vehicles) Award 2004* both contained the same prescription for overtime rates for casual employees, namely the normal rates of overtime plus a loading of 10% calculated on the unloaded ordinary-time rate;

- the initial exposure draft for the *Road Transport and Distribution Award 2010* deleted the old prescription and replaced it with a provision requiring the payment of a 25% loading payable on the ordinary rate, with overtime rates of time and a half for the first two hours and double time thereafter;

- the exposure draft for the *Transport (Cash in Transit) Award 2010* varied the casual provision to the same effect, albeit the drafting of the provision was slightly different;

- the Ai Group objected to the proposed new provisions in the *Road Transport and Distribution Award 2010* on the basis that they would require the payment of the 25% casual loading on overtime, and this would be an additional cost impost on employers;

- in apparent response to this submission, the AIRC award modernisation Full Bench changed the relevant provisions in the *Road Transport and Distribution Award 2010* so that the former overtime prescription from the *Transport Workers Award 1998* was restored; and

- no objection was made by the Ai Group (or anyone else) to the new casual provisions in the exposure draft for the *Transport (Cash in Transit) Award 2010*, and consequently they were contained in the same form in the award which was ultimately made.

[277] The only reasonable inference that can be drawn from the above is that the casual provisions in the *Transport (Cash in Transit) Award 2010* were intended to have the same effect as the Ai Group submitted the equivalent provisions in the exposure draft for the *Road Transport and Distribution Award 2010* would have – namely, requiring the payment of the 25% casual loading on overtime. This confirms the interpretation of those provisions derived from the application of the Yallourn/Domain approach.

[278] For these reasons, we consider that under the *Transport (Cash in Transit) Award 2010*, the casual loading is payable on overtime on a compounding basis.

[279] The *Transport (Cash in Transit) Award 2020* has now been published, and took effect on 4 May 2020. We will publish a draft determination to vary the 2020 award to give effect to our conclusions. Any submissions in response shall be filed within 21 days.

Water Industry Award 2010

[280] The issue with respect to the *Water Industry Award 2010* is whether casual employees are entitled to receive the casual loading on overtime hours worked. Clause 10.5(b) and (c) of the award provide:

(b) Casual loading

Casual employees will be paid, in addition to the ordinary hourly rate and rates payable for shift and weekend work on the same basis as a full-time employee, an additional loading of 25% of the ordinary hourly rate for the classification in which they are employed as compensation instead of paid leave under this award and the NES.

(c) Penalties and overtime

Penalties (including public holiday penalties) and overtime for casual employees will be calculated on the ordinary hourly rate for the classification in which they are employed exclusive of the casual loading.

[281] Overtime penalty rates are provided for in clause 26.2 as follows:

26.2 Payment for overtime

(a) Except as otherwise provided, overtime will be paid at the rate of time and a half for the first two hours and double time thereafter.

(b) Overtime worked on a Saturday will be paid at time and a half for the first two hours and double time thereafter.

(c) Overtime worked on a Sunday will be paid at the rate of double time.

(d) The payment for overtime rates provided in this clause is calculated on the employee's hourly ordinary time rate.

(e) An employee who works overtime on a Saturday or on a Sunday will be afforded at least three hours' work or will be paid for three hours at the appropriate overtime rate.

(f) Overtime on a public holiday will be paid at double time and a half.

(g) In computing overtime, each day's work stands alone.

[282] The expression "*hourly ordinary time rate*" used in clause 26.2(d) is defined in clause 3.1 as follows:

hourly ordinary time rate of an employee is 1/38th of the minimum weekly rate of pay specified in clause 14—Minimum wages for the employee's classification

[283] It may be noted that the above provisions are relevantly identical to those in the *Local Government Industry Award* – a matter to which we will return.

[284] Both the Ai Group and ABI have submitted that casuals under this award are not entitled to receive the casual loading for overtime hours, and rely on clause 10.5(c) in support of that position.

[285] The AMWU submitted that the words "*exclusive of the casual loading*" in clause 10.5(c) are intended to do no more than clarify that the casual loading is not included when calculating overtime penalties, such that the casual loading is separately added to the overtime penalty rate, consistent with the *cumulative* approach. In support of this contention, the AMWU relied on the terms of the pre-award modernisation *Rural Water Industry Award 2001* and the *Regional Water Authorities Award 1999* and the process by which the modern award was developed, to support its contention that historically, employees have been entitled to both the casual loading and overtime penalty rate. In particular, it referred to the fact that the LGAs' proposed draft of the award included a provision which expressly stated that the casual loading was not payable on overtime, but this was not included in the award that was made.

[286] The AWU submitted that if, as contended by the Ai Group and ABI, clause 10.5(b) was intended to disentitle casual employees to the casual loading during overtime, the reference in clause 10.5(c) to the calculation of casual overtime rates would be superfluous.

[287] We do not accept the submissions of the unions. The interpretation of clause 10.5(c) advanced by the AMWU, to the effect that its intention was to make clear only that overtime penalties were not to be applied on a compounding basis to the casual loading, might be sustainable if there was some other provision which clearly rendered the casual loading payable on overtime. However there is no such provision. Clause 10.5(b) only applies the casual loading to ordinary hours, shift work and weekend work, and the juxtaposition of clauses 10.5(b) and (c) tends to demonstrate that the latter provision is intended to have the opposite effect with respect to overtime and other penalty rates. The expressions "*time and a half*" and "*double time*" used to describe the rate of overtime in clause 26.2 do not apply to a rate that includes the casual loading, because clause 26.2(d) and the definition of "*hourly ordinary time rate*" in clause 3.1 make it clear that it applies to an hourly rate derived from the award's minimum weekly rates which do not include the casual loading.

[288] The historical industrial context does not assist the unions' position, contrary to the AMWU's submission. Although the pre-award modernisation *Rural Water Industry Award 2001* and the *Regional Water Authorities Award 1999* appear to have applied the casual loading to overtime, those awards were not the source of the modern award's provisions. The AIRC award modernisation Full Bench, in publishing its first exposure draft for the *Water Industry Award 2010*, referred to the limited coverage of those existing instruments, said it had had some regard to enterprise awards and NAPSAs, but ultimately based the exposure draft on a draft award filed by the LGAs. The LGAs' draft award was in turn largely based on its draft for the *Local Government Industry Award 2010.*[35] Except for the hours clause, the award as made largely conformed to the LGAs' draft and as a result had the same provisions applying to casual employees as the *Local Government Industry Award 2010*.[36]

[289] We do not think that much significance can be attached to the fact that the LGAs' proposed award filed on 21 August 2009 contained a specific reference to the casual loading not being payable on overtime. The ASU's draft award filed on the same day contained a specific reference to the casual loading being part of the casual employee's all-purpose rate. In neither case were these provisions picked up in the final award that was made. Of greater contextual significance is the fact that, as discussed earlier in relation to the *Local Government*

[35] [2009] AIRCFB 865 at [263]-[268]

[36] [2009] AIRCFB 945 at [203]-[207]

Industry Award 2010, it is agreed between the LGAs and the ASU that the identical provisions in that award mean that the casual loading is not payable on overtime.

[290] For the above reasons, we conclude that the casual loading is not payable on overtime.

[291] The *Water Industry Award 2020* has now been published and took effect on 4 February 2020. A draft determination varying the 2020 award will be published to give effect to our conclusion, and any submissions in response shall be filed within 21 days.

Wool Storage, Sampling and Testing Award 2010

[292] There was an initial issue concerning whether casual employees under this award are entitled to the casual loading during the performance of overtime. It is now necessary for us to determine the following additional issue identified in the Report issued by the President, Justice Ross, on 29 November 2019:

> The issue of whether casual employees are entitled to the casual loading and if so, the basis upon which the relevant rates are to be calculated, during the performance of ordinary hours on a weekend, ordinary hours on a public holiday and shiftwork under the *Wool Storage, Sampling and Testing Award 2010*.

[293] Clause 10.3 of the award provides:

> **10.3 Casual employment**
>
> **(a)** A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.
>
> **(b)** 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%.
>
> **(c)** The casual loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment provided in this award.

[294] Clause 25 of the award relevantly provides for overtime, shift work, weekend work and public holiday penalties and loading as follows:

> **25. Overtime and penalty rates**
>
> **25.1 Overtime payments—employees other than continuous shiftworkers**
>
> Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work done in addition to their ordinary hours:

(a) 50% of the ordinary hourly base rate of pay for the first two hours and 100% of the ordinary hourly base rate of pay thereafter, for overtime worked from Monday to 12.00 pm Saturday;

(b) 100% of the ordinary hourly base rate of pay for overtime worked after 12.00 pm on a Saturday and at any time on a Sunday; and

(c) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.

25.2 An employee recalled to work overtime after leaving the employer's premises (whether notified before or after leaving the premises) will be engaged to work for a minimum of four hours or will be paid for a minimum of four hours work in circumstances where the employee is engaged for a lesser period.

25.3 Overtime—continuous shiftworkers

A continuous shiftworker will be paid an additional payment for all work done in addition to ordinary hours of 100% of the ordinary hourly base rate of pay.

25.4 Method of calculation

(a) When computing overtime payments, each day or shift worked will stand alone.

(b) Any payments under this clause are in substitution for any other loadings or penalty rates.

. . . .

25.6 Shiftwork penalties

(a) A shiftworker or continuous shiftworker whilst on afternoon shift or night shift must be paid a loading of 15% of the ordinary hourly base rate of pay.

(b) A shiftworker or continuous shiftworker whilst on permanent night shift must be paid a loading of 30% of the ordinary hourly base rate of pay.

25.7 Weekend work

An employee will be paid the following loadings for ordinary hours worked on a Saturday or Sunday:

(a) 50% of the ordinary hourly base rate of pay for the first two hours and 100% of ordinary hourly base rate of pay thereafter, for ordinary hours worked at any time on a Saturday; and

(b) 100% of the ordinary hourly base rate of pay, for ordinary hours worked at any time on a Sunday.

> **25.8** The rate of pay referred to in clause 25.7(a) and 25.7(b) does not apply where the time worked forms part of the normal continuous hours in a normal shift.
>
> **25.9 Public holidays**
>
> An employee will be paid at the rate of 250% of the ordinary base rate of pay for any ordinary hours worked on a public holiday.

[295] It may be observed that the above provisions are, for all relevant purposes, the same as those in the *Oil Refining and Manufacturing Award 2010* which we have earlier considered. The Ai Group, ABI and the AWU consequently made essentially the same submissions, and there is no need to repeat them. The historical industrial context may be summarised as follows:

- the pre-award modernisation awards in this sector did not contain any equivalent to clause 25.4(b), and appear to have provided for the payment of the casual loading on overtime;

- the award was made by the AIRC award modernisation Full Bench on the basis of a substantially agreed position between the Agribusiness Employers' Federation (AEF) and the National Union of Workers (NUW);[37] and

- the draft awards filed by the AEF and the NUW during the award modernisation process each contained an equivalent to the current clause 25.4(b), but neither party indicated that this was for the purpose of changing the status quo (or indeed identified its purpose at all).

[296] Our surmise is that AEF and the NUW copied the clause from another draft award during the award modernisation process, but the ultimate source of the clause cannot now be identified.

[297] We see no reason to draw any different conclusion for this award than for the *Oil Refining and Manufacturing Award 2010*. Accordingly we conclude that the casual loading is payable on overtime, but calculated on a cumulative, non-compounding basis. It is also payable on the same basis for shift work, weekend work and public holiday work.

[298] We consider that clause 25.4(b) should be varied to clarify its operation in accordance with our conclusion as to its meaning. We will publish a draft determination for this purpose. Any submissions in response shall be filed within 21 days.

CATEGORY 2 AWARDS

[299] The awards about which there is a "consensus" (in the sense discussed in paragraph [1] above) may (leaving aside the *Horticulture Award 2010*, discussed further below) be divided into the three subcategories referred to in paragraph [6] above. The awards in which there is a consensus that overtime penalty rates are payable in substitution for the casual loading are:

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[37] [2009] AIRCFB 345 at [66]; [2009] AIRCFB 800 at [114]

- *Ambulance and Patient Transport Industry Award 2010 (now Ambulance and Patient Transport Industry Award 2020)*[38]
- *Architects Award 2010 (now Architects Award 2020)*
- *Cotton Ginning Award 2010 (now Cotton Ginning Award 2020)*
- *Electrical Power Industry Award 2010 (now Electrical Power Industry Award 2020)*
- *Higher Education Industry – General Staff – Award 2010*[39] *(now Higher Education Industry – General Staff – Award 2020)*
- *Market and Social Research Award 2010 (now Market and Social Research Award 2020)*
- *Meat Industry Award 2010 (now Meat Industry Award 2020)*
- *Poultry Processing Award 2010 (now Poultry Processing Award 2020)*
- *Travelling Shows Award 2010 (now Travelling Shows Award 2020)*

[300] The awards where the consensus is that the casual loading and the overtime penalty rate are added separately to the minimum hourly rate (the cumulative approach) are:

- *Airline Operations - Ground Staff Award 2010 (now Airline Operations - Ground Staff Award 2020)*
- *Animal Care and Veterinary Services Award 2010 (now Animal Care and Veterinary Services Award 2020)*
- *Banking, Finance and Insurance Award 2010 (now Banking, Finance and Insurance Award 2020)*
- *Building and Construction General On-site Award 2010*
- *Car Parking Award 2010 (now Car Parking Award 2020)*
- *Cement and Lime Award 2010 and Quarrying Award 2010 (now Cement, Lime and Quarrying Award 2020)*
- *Cemetery Industry Award 2010 (now Cemetery Industry Award 2020)*
- *Children's Services Award 2010*
- *Clerks - Private Sector Award 2010 (now Clerks - Private Sector Award 2020)*
- *Commercial Sales Award 2010 (now Commercial Sales Award 2020)*
- *Educational Services (Post-Secondary Education) Award 2010 (now Educational Services (Post-Secondary Education) Award 2020)*
- *Fast Food Industry Award 2010*
- *Funeral Industry Award 2010*

[38] No party took issue with the provisional view we expressed in our decision of 8 October 2019, [2019] FWCFB 6953 at [27]-[30].

[39] The parties have proposed a variation to this award which would deal with the relationship between the casual loading and other types of penalty rates as well as overtime. The draft variation determination we will publish will not be in the terms proposed by the parties but will be consistent with the standard drafting format we proposed to adopt.

- *Gardening and Landscaping Services Award 2010 (now Gardening and Landscaping Services Award 2020)*
- *Gas Industry Award 2010 (now Gas Industry Award 2020)*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2010 (now Hydrocarbons Industry (Upstream) Award 2020)*
- *Legal Services Award 2010 (now Legal Services Award 2020)*
- *Joinery and Building Trades Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Nursery Award 2010 (now Nursery Award 2020)*
- *Pest Control Industry Award 2010 (now Pest Control Industry Award 2020)*
- *Plumbing and Fire Sprinklers Award 2010*
- *Premixed Concrete Award 2010 (now Premixed Concrete Award 2020)*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2010 (now Racing Industry Ground Maintenance Award 2020)*
- *Real Estate Industry Award 2010 (now Real Estate Industry Award 2020)*
- *Silviculture Award 2010 (now Silviculture Award 2020)*
- *Storage Services and Wholesale Award 2010 (now Storage Services and Wholesale Award 2020)*
- *Supported Employment Services Award 2010 (now Supported Employment Services Award 2020);*
- *Waste Management Award 2010 (now Waste Management Award 2020)*

[301] In respect of the *Wine Industry Award 2010*, the consensus is that the casual loading is only payable for overtime on Sundays and public holidays on a cumulative basis. It is otherwise not payable on overtime.

[302] The awards where the consensus is that the overtime penalty rate is applied to an ordinary hourly rate consisting of the minimum hourly rate and the casual loading (i.e. the compounding approach) are:

- *Asphalt Industry Award 2010 (now Asphalt Industry Award 2020)*
- *Concrete Products Award 2010 (now Concrete Products Award 2020)*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Horse and Greyhound Training Award 2010 (now Horse and Greyhound Training Award 2020);*
- *Manufacturing and Associated Industries and Occupations Award 2010 (now Manufacturing and Associated Industries and Occupations Award 2020);*

- *Mining Industry Award 2010 (now Mining Industry Award 2020)*
- *Pastoral Award 2010*
- *Seafood Processing Award 2010 (now Seafood Processing Award 2020)*
- *Sugar Industry Award 2010 (now Sugar Industry Award 2020);*
- *Surveying Award 2010 (now Surveying Award 2020)*

[303] In some but not all of the above awards (as referred to in the December Statement), the parties have agreed on variations to the terms of the award to confirm what they consider to be the existing position.

[304] We have decided to proceed in the basis of the consensus of interested parties in respect of the above awards. However, we have decided that all the awards should be varied in a standardised way to make unambiguous what the position is. To that end, we will publish draft determinations varying each award. Parties will be given the opportunity to file further submissions in response to the draft determinations within a period of 21 days.

[305] In respect of the *Horticulture Award 2010*, the parties agree that the issue of the payment of the casual loading on overtime should be treated as a drafting issue to be resolved in the course of the award finalisation stage of the 4 yearly review. Accordingly the issue as it pertains to this award is being dealt with by the Full Bench in matter AM2019/17, and we do not need to consider it further.

CATEGORY 3 AWARDS

[306] The awards which fall into this category are the *Coal Export Terminals Award 2010* (now *Coal Export Terminals Award 2020*), the *Mannequins and Models Award 2010* (now *Mannequins and Models Award 2020*) and the *State Government Agencies Award 2010* (now *State Government Agencies Award 2020*).

Coal Export Terminals Award 2010

[307] In relation to the *Coal Export Terminals Award 2010*, clause 10.3(b) provides that the casual loading is part of the all-purpose rate. Clause 18.1 quantifies the overtime rates using the expressions "*time and a half*", "*double time*" and "*double time and a half*". There is no doubt that the effect of these provisions is that the casual loading is payable on overtime on a compounding basis. The *Coal Export Terminals Award 2020* has now been published and took effect on 4 February 2020. Although clause 11.4 of the 2020 award still provides that the casual loading forms part of the casual employee's all–purpose rate, clause 19.1 does not incorporate the loading into overtime penalty rates on a cumulative basis for casual employees. Clause 19.1 provides:

> **19.1 Payment for overtime**
>
> All time worked in excess of or outside the ordinary hours of any shift on the following days will be paid for at the following rates:
>
> | Day | % of minimum hourly rate |
> |---|---|
> | Monday to Saturday—First 3 hours | 150 |

Monday to Saturday—After 3 hours	200
Sunday	200
Public holidays	250

[308] We will publish a draft determination to vary clause 19.1 to separately specify the percentage overtime rates for casual employees, inclusive of the casual loading on a compounding basis. Interested parties may file any submissions they wish to make in response in 21 days.

Mannequins and Models Award 2010

[309] Clause 13.2 of the *Mannequins and Models Award 2010* sets out a self-contained scheme of remuneration for casual employees under this award which is based on fixed payments for particular type of engagements, and includes payment for half-day and full-day engagements. Clause 23 of the award provides for overtime and penalty payments, and is entitled "*Overtime and penalty rates for full-time or part-time employees*". It is clear therefore that casual employees are not entitled to the overtime penalty rates provided for in clause 23, and indeed such rates are irrelevant to the mode of remuneration for casual employees established by clause 13.2.

[310] The *Mannequins and Models Award 2020* took effect on 13 April 2020. The regime of payment for casual employees is retained in clause 16.2 of the 2020 Award. However, the overtime provisions have been placed in a separate provision (clause 21) than the other provisions concerning penalty rates (clause 22). Clause 22 is entitled "*Penalties and penalty rates for full-time or part-time employees*", but clause 21 is simply entitled "*Overtime*". This makes unclear what was previously clear, namely that the overtime entitlements do not apply to casual employees.

[311] Accordingly we will issue a draft determination to vary the title of clause 21 to read "*Overtime for full-time or part-time employees*". Any party which opposes this course may file submissions in response within 21 days.

State Government Agencies Award 2010

[312] Clause 23 of the *State Government Agencies Award 2010* does not prescribe an actual rate of overtime; it simply requires an overtime rate to be paid where work is performed outside of ordinary hours provided that, first, employees with a salary higher than for the top of the classification of Administrative Officer Grade 6 are not entitled to overtime and, second, that the hourly rate of overtime cannot exceed the hourly rate calculated from the salary for the top of the classification of Administrative Officer Grade 4. This position is repeated in clause 20 of the *State Government Agencies Award 2020*, which took effect on 4 February 2020. In those circumstances, while it is clear that casuals may be entitled to overtime rates, those rates are not prescribed, and accordingly no issue of the quantification of the casual overtime rate arises.

CATEGORY 4 AWARDS

[313] This category consists of four awards: the *Electrical, Electronic and Communications Contracting Award 2010,* the *Passenger Vehicle Transportation Award 2010,* and the *Vehicle Manufacturing, Repair, Services and Retail Award 2010.*

Electrical, Electronic and Communications Contracting Award 2010

[314] On 11 March 2019, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) filed a submission in which it contended that, under this award, the casual loading was payable on overtime on a compounding basis. At a report-back hearing on 12 July 2019, the Ai Group stated that it did not agree with the CEPU's position. However neither party sought a variation to the award, nor did either party seek any modification to the exposure draft. On that basis, the matter was regarded as resolved.[40] Notwithstanding this, we have reviewed the position, and we consider that the exposure draft has left the position ambiguous. Accordingly, we propose to express a provisional view as to the proper meaning of the award as it currently stands and issue a draft determination that is consistent with this provisional view.

[315] Clause 10.3 of the award relevantly provides:

> **10.3 Casual employment**
>
> **(a)** A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.
>
> **(b)** For each hour worked, a casual employee will be paid no less than 1/38th of the all-purpose weekly wage rate of pay for their classification in clause 16—Classifications and minimum wages, plus a casual loading of 25%.
>
> **(c)** The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and the other attributes of full-time or part-time employment.
>
> **(d)** The overtime provisions of clause 26—Overtime and clause 24.13 apply to casual employees.
>
> . . . .

[316] In respect of the rate of overtime, clauses 26.1(a) and 26.4 provide:

> **(a)** For all work done outside ordinary hours, the rates of pay will be time and a half for the first two hours and double time thereafter.
>
> **26.4 Sunday and public holiday work**

[40] Transcript, 12 July 2019, PNs72-89

> Double time must be paid for work done on Sundays and double time and a half must be paid for work on any of the public holidays prescribed in this award.

[317] Clause 24.13, which is referred to in clause 10.3(d) above, provides for shift allowances.

[318] The use of the expressions "*time and a half*", "*double time*" and "*double time and a half*" in clauses 26.1(a) and 26.4, on the Yallourn/Domain approach, suggest that the overtime rate of a casual employees is to be calculated on the ordinary time rate, inclusive of the casual loading. Clause 10.3(d), which specifically applies clause 26 to casual employees, likewise suggests that the penalty rates provided for in clause 26 are to be applied to the casual rate established by clause 10.3. We cannot identify any textual contra-indicator which would displace the Yallourn/Domain approach.

[319] The updated exposure draft for this award published on 14 May 2020, provides for casual employment in clause 11, which in all relevant respects is drafted in the same way as the current clause 10.3. Clause 20.1 of the exposure draft is equivalent to the current clause 26.1(a), but expresses the penalty rates as 150% or 200% of the "*ordinary hourly rate*". Clause 20.4, which is the equivalent of the current clause 26.4, likewise expresses the penalty rates for Sundays and public holidays as 200% and 250%, respectively, of the "*ordinary hourly rate*". Clause 2.2 of the exposure draft defines the expression "*ordinary hourly rate*" as follows:

> **ordinary hourly rate** means the hourly rate for an employee's classification specified in clause 16.2, plus the industry allowance. Where an employee is entitled to additional all-purpose allowances, these allowances form part of that employee's ordinary hourly rate.

[320] The exposure draft does not identify that the casual loading is an all-purpose rate, meaning (it appears) that the casual loading is not included in the calculation of the penalty rates in clause 20.1 and 20.4. It is unclear whether the casual loading is then to be added to the calculated rate. This at least creates ambiguity and, on our provisional view as to the meaning of the current provisions, constitutes a substantive change to the current position.

[321] We will publish a draft determination that is consistent with our provisional view as to the meaning of the current provisions. This draft determination will specify that the overtime rates for casual employees are 187.5% of the hourly rate (plus any all-purpose allowance payable) for the first 2 hours and 250% thereafter, and are 250% on Sundays and 312.5% on public holidays, inclusive of the casual loading. Interested parties will then be allowed a period of 21 days to file any submissions they wish to make in response.

Passenger Vehicle Transportation Award 2010

[322] In respect of this award, we were advised on 25 February 2019[41] and 12 July 2019[42] by the Australian Public Transport Industrial Association (APTIA) that, under this award, the casual loading was not payable on overtime,[43] the exposure draft correctly reflected this, and

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[41] Transcript, 25 February 2019, PNs473-478

[42] Transcript, 12 July 2019, PNs89-91

[43] The transcript of 29 February 2019 at PN475 should read: "…The exposure draft is also very clear in relation to the payment for casuals for overtime, which does **not** include the casual loading..."

the TWU had agreed to this position. At the 12 July 2019 report-back, the APTIA referred to correspondence from the TWU dated 22 March 2019 as confirming this position. The TWU did not appear at either hearing to confirm or contradict this. On the basis described, we accepted this as an agreed position in the October statement.[44] The *Passenger Vehicle Transportation Award 2020* has now been made (effective from 13 April 2020), and it is drafted in terms consistent with the APTIA position. Clause 11.3(a) provides that the casual loading is payable during ordinary hours, and clause 19.2 provides that the overtime rates for all categories of employees are 150% of the minimum hourly rate for the first 3 hours and 200% thereafter. The minimum hourly rates are prescribed by clause 15.1, and do not include the casual loading.

[323] On review, however, it is apparent that the TWU's correspondence of 22 March 2019 did not confirm the position outlined by the APTIA, but in fact dealt with a different matter concerning what the ordinary hours for casual employees were. For more abundant caution therefore, we will invite the TWU to provide advice within 21 days confirming or contesting the earlier advice given by the APTIA. We do so because, on one view and having regard to the reasoning adopted with respect to some of the awards earlier dealt with, the relevant provisions of the 2010 award may be susceptible to a different interpretation.

Vehicle Manufacturing, Repair, Services and Retail Award 2010

[324] In respect of this award, the AMWU filed a draft determination for the variation of the casual overtime provisions of this award on 27 March 2019. At the report-back hearing on 12 July 2019, advice was given that this was no longer pressed and that, as between the Ai Group and the AMWU, there remained no issue concerning overtime rates for casual employees.[45] On this basis, this award was treated as resolved in the October Statement.[46]

[325] The *Vehicle Repair, Services and Retail Award 2020* commenced operation on 29 May 2020. Clause 11.4(a) sets out the penalty rates applicable to casual employees for overtime and work on weekends and public holidays, expressed as percentage of the appropriate minimum rate. It is clear that these incorporate the casual loading on a cumulative basis. Clause 11.4(a) reflects the previous position specified in clause 41.1 of the 2010 award, and is expressed in clear and unambiguous terms. No further action is required in respect of this award.

DRAFT DETERMINATIONS

[326] The insertion of the overtime rates tables into the hourly rates of pay schedules for casual employees will be dealt with in due course once the proposed variations in the draft determinations have been finalised.

[44] [2019] FWC 7087 at [2]

[45] Transcript, 12 July 2019 PNs124-128

[46] [2019] FWC 7087 at [2]

[327] A schedule of draft variation determinations will be published with this decision.

VICE PRESIDENT

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