IN THE FAIR WORK COMMISSION

Matter No: AM2016/15

s.156 4 yearly review of modern awards

Plain language re-drafting – reasonable overtime

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied

Services Union of Australia Submissions in respect of the draft determinations for

reasonable overtime model term

<u>Introduction</u>

On 16 November 2018 the Full Bench issued a Statement and Directions (Statement)¹

and a schedule of the draft determinations (Schedule)² inviting parties to file

submissions in support of any proposed variations to the draft determinations.

2. Specifically, the Full Bench referred to paragraph [25] of the Full Bench Decision [2018]

FWCFB 6680 which states:

Our provisional view will only be displaced in respect of any particular

award if it is demonstrated that there are matters or circumstances

particular to that award which compel the conclusion that the

achievement of the modern award objective for that award does not

necessitate the variation of the award to insert the model term. One such

matter may be the interaction between the model term and other

provisions in that award

3. The Schedule concerns, *inter alia*, the following modern awards:

• Building and Construction General On-site Award 2010 [MA000020];³

Electrical, Electronic and Communications Contracting Award 2010 [MA000025];⁴

and

¹ [2018] FWCFB 7006.

² https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201516-schedule-draft-

determination.pdf

https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-draft-det-ro-building.pdf

4 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-draft-det-ro-electrical.pdf

Manufacturing and Associated Industries and Occupations Award 2010 [MA000010].⁵

(collectively, **the Awards**)

- 4. The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) has an interest in each of these Awards.
- 5. The CEPU submits that subsection (a) of the draft determinations for the Awards should be varied on the basis that it is inconsistent with other provisions in these Awards. Subsection (a) of the draft determination for the Awards states:
 - (a) Subject to s62 of the Act and this clause, an employer may require an employee **-other than a casual-** to work reasonable overtime hours at overtime rates
- 6. Subsection (a) explicitly excludes casual employees' entitlement to work reasonable overtime.
- 7. See **Annexure A** for CEPU's proposed variations to the draft determinations of the Awards.

Subsection (a) of the draft determinations for the Awards

- 8. The Awards contain provisions that casual employees are entitled to overtime.
- 9. The Awards provide that "overtime" occurs when an employee is required to work outside of their ordinary hours.⁶ This includes casual employees who may be requested to work outside their span of hours.⁷
- 10. As detailed in the table below, each of the Awards contain:

⁵ https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-draft-det-ro-manufacturing.pdf

⁶Building and Construction General On-site Award 2010, cl 36.2; Electrical, Electronic and Communications Contracting Award 2010, cl 26.1; Manufacturing and Associated Industries and Occupations Award 2010, cl 40.1.

⁷ Building and Construction General On-site Award 2010, cl 14.6; Electrical, Electronic and Communications Contracting Award 2010, cl 10.3; Manufacturing and Associated Industries and Occupations Award 2010, cl 40.1.

- i) provisions that categorise casuals as employees;
- ii) provisions related to casual employees' entitlement to overtime; and
- iii) "reasonable overtime" provisions that do not exclude casual employees.

Modern Award	Clause No.	Clause Extract
Building and Construction General On-site Award 2010	10	10.1 Employees under this award will be employed in one of the following categories: (a) daily hire employees;
		(b) full-time weekly hire employees;(c) part-time weekly hire employees; or(d) casual employees.
	14.6	[] 14.6 A casual employee required to work overtime or weekend work will be entitled to the relevant penalty rates prescribed by clauses 36—Overtime, and 37—Penalty rates, provided that: []
	36	36.1 Requirement to work reasonable overtime (a) Except as provided in this clause, an employer may require any employee to work reasonable overtime.
		(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
		(i) any risk to employee health and safety;
		(ii) the employee's personal circumstances including any family responsibilities;
		(iii) the needs of the workplace or enterprise;
		(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and

		(v) any other relevant matter.
		36.2 All time worked beyond an employee's ordinary time of work (inclusive of time worked for accrual purposes as prescribed in clauses 33—Ordinary hours of work and 34—Shiftwork), Monday to Friday, must be paid for at the rate of time and a half for the first two hours and at double time thereafter. []
Electrical, Electronic and	10	
		10. Types of employment
Communications Contracting Award 2010		An employee may be engaged on a full-time, part-time or casual basis.
		[]
		[]
	10.3	10.3 Casual employment
	10.0	[]
		(d) The overtime provisions of clause 26—Overtime and clause 24.13 apply to casual employees.
	26	26.1 Payment for working overtime
		(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.
		(b) Except as provided in clause <u>27.4</u> , in computing overtime each day's work will stand alone.
		26.2 Reasonable overtime
		(a) Subject to clause <u>26.2(b)</u> , an employer may require <u>an employee</u> to work reasonable overtime at overtime rates.
		(b) An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
		(i) any risk to the employee's health and safety;
		(ii) the employee's personal circumstances including any family responsibilities;
		(iii) the needs of the workplace or enterprise;

		(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and(v) any other relevant matter.[]
Manufacturing and Associated Industries and Occupations Award 2010	Part 3 14	Part 3 Types of Employment and Termination of [] 14. Casual employment 14.1 A casual employee is one engaged and paid as such [] 40.1 Payment for working overtime (a) Except as provided for in clauses 40.1(d), 40.8, 40.9, and 40.13, for all work done outside ordinary hours on any day or shift, as defined in clauses 36.2, 36.3 and 36.4, the overtime rate is time and a half for the first three hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time. (b) For the purposes of clause 40—Overtime, ordinary hours means the hours worked in an enterprise, fixed in accordance with clause 36—Ordinary hours of work and rostering. (c) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week. (d) When not less than 7.6 hours notice has been given to the employer by a relief shiftworker that the relief shiftworker whom that person should relieve is not relieved and is required to continue work on their rostered day off the unrelieved shiftworker must be paid at the rate of double time. (e) In computing overtime each day's work stands alone.
		Sumus dione.

40.2 Requirement to work reasonable overtime

- **(a)** Subject to clause <u>40.2(b)</u>, an employer may require <u>an employee</u> to work reasonable overtime at overtime rates.
- **(b)** An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to:
- (i) any risk to employee health and safety;
- (ii) the employee's personal circumstances including any family responsibilities;
- (iii) the needs of the workplace or enterprise;
- **(iv)** the notice, if any, given by the employer of the overtime and by the employee of their intention to refuse it; and
- (v) any other relevant matter.

[...]

- 11. Casual employees are engaged and paid in accordance to the Award and where the employer and employee can refuse to offer or accept further work.⁸ However, there are concerns with subsection (a) of the draft determinations of the Awards.
- 12. Subsection (a) of the draft determinations of the Awards is ambiguous in that can be read as providing:
 - a) an employer cannot require a casual employee to work reasonable overtime;
 and/or
 - b) an employer can offer unreasonable overtime to a casual employee; and/or
 - c) an employer is not entitled to pay overtime rates to a casual employee if they work in excess of their ordinary hours
- 13. The CEPU is of the view that the Awards are clear that casual employees are entitled to overtime. However, subsection (a) of the draft determinations of the Awards will remove this right for casual employees as it expressly excludes them. The current reasonable overtime provisions should be taken, on its plain reading, to apply to

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⁸WorkPac Pty Ltd v Skene [2018] FCAFC 131 at [60].

casuals, as compared to various parts of the Awards and the *Fair Work Act 2009* that expressly excludes casual employees.

14. For example, the following parts of these industrial instruments expressly excludes casual employees:

Industrial Instruments	Reference
Building and Construction General On-site	Cl 19.4
Award 2010	
Electrical, Electronic and Communications	CI 27.4
Contracting Award 2010	
Manufacturing and Associated Industries	Cls 40.4(b), 41.1
and Occupations Award 2010	
Fair Work Act 2009 (Cth)	Ss 65(2)(a), 67(1)&(2), 86, 95, 106

- 15. On the basis of the above and that the Awards:
 - i) categorise casuals as employees;
 - ii) contain provisions that permits casual employees to work overtime; and
 - iii) contain reasonable overtime provisions that do not exclude casual employees the CEPU submits that subsection (a) of the draft determinations of the Awards is inconsistent with the other provisions in the Awards.
- 16. The CEPU proposes the deletion of the term "- other than a casual-" in subsection (a) of the draft determinations of the Awards, as provided in Annexure A.

END

28 November 2018

ANNEXURE A

Draft	
Determination	CEPU Amendments
Building and	36.1 Reasonable overtime
<u>Construction</u>	
General On-site	(a) Subject to s.62 of the Act and this clause, an employer may require an
Award 2010	employee - other than a casual - to work reasonable overtime hours at
	overtime rates.
	[]
Electrical,	26.2 Reasonable overtime
Electronic and	
Communications	(a) Subject to s.62 of the Act and this clause, an employer may require an
Contracting	employee - other than a casual - to work reasonable overtime hours at
Award 2010	overtime rates.
	[]
Manufacturing	40.2 Reasonable overtime
and Associated	
Industries and	(a) Subject to s.62 of the Act and this clause, an employer may require an
Occupations	employee – other than a casual – to work reasonable overtime hours at
Award 2010	overtime rates.
	[]