

## 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**

### Introduction

1. On 16 November 2018 the Full Bench issued a Statement and Directions (**Statement**)<sup>1</sup> and a schedule of the draft determinations (**Schedule**)<sup>2</sup> 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]*;<sup>3</sup>
  - *Electrical, Electronic and Communications Contracting Award 2010 [MA000025]*;<sup>4</sup>and

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<sup>1</sup> [2018] FWCFB 7006.

<sup>2</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201516-schedule-draft-determination.pdf>

<sup>3</sup> <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201615-draft-det-ro-building.pdf>

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

*Manufacturing and Associated Industries and Occupations Award 2010*  
*[MA000010].<sup>5</sup>*

(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.<sup>6</sup> This includes casual employees who may be requested to work outside their span of hours.<sup>7</sup>
10. As detailed in the table below, each of the Awards contain:

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

<sup>6</sup> *Building 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.*

<sup>7</sup> *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
<b>Building and Construction General On-site Award 2010</b>	10	<p><b>10.1 <u>Employees under this award will be employed in one of the following categories:</u></b></p> <ul style="list-style-type: none"> <li>(a) daily hire employees;</li> <li>(b) full-time weekly hire employees;</li> <li>(c) part-time weekly hire employees; or</li> <li><b><u>(d) casual employees.</u></b></li> </ul>
	14.6	<p>[...]</p> <p><b>14.6 A <u>casual employee required to work overtime</u></b> or weekend work will be entitled to the relevant penalty rates prescribed by clauses <a href="#">36—Overtime</a>, and <a href="#">37—Penalty rates</a>, provided that:</p> <p>[...]</p>
	36	<p><b>36.1 Requirement to work reasonable overtime</b></p> <p>(a) Except as provided in this clause, an employer may require <b><u>any employee</u></b> to work reasonable overtime.</p> <p>(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:</p> <ul style="list-style-type: none"> <li>(i) any risk to employee health and safety;</li> <li>(ii) the employee's personal circumstances including any family responsibilities;</li> <li>(iii) the needs of the workplace or enterprise;</li> <li>(iv) the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and</li> </ul>





		<p><b>40.2 Requirement to work reasonable overtime</b></p> <p><b>(a)</b> Subject to clause <a href="#">40.2(b)</a>, an employer may require <b>an employee</b> to work reasonable overtime at overtime rates.</p> <p><b>(b)</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:</p> <p><b>(i)</b> any risk to employee health and safety;</p> <p><b>(ii)</b> the employee's personal circumstances including any family responsibilities;</p> <p><b>(iii)</b> the needs of the workplace or enterprise;</p> <p><b>(iv)</b> the notice, if any, given by the employer of the overtime and by the employee of their intention to refuse it; and</p> <p><b>(v)</b> any other relevant matter.</p> <p>[...]</p>
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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.<sup>8</sup> 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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<sup>8</sup>*WorkPac 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:

<b>Industrial Instruments</b>	<b>Reference</b>
<i>Building and Construction General On-site Award 2010</i>	Cl 19.4
<i>Electrical, Electronic and Communications Contracting Award 2010</i>	Cl 27.4
<i>Manufacturing and Associated Industries and Occupations Award 2010</i>	Cls 40.4(b), 41.1
<i>Fair Work Act 2009 (Cth)</i>	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
<a href="#">Building and Construction General On-site Award 2010</a>	<p><b>36.1 Reasonable overtime</b></p> <p>(a) Subject to s.62 of the Act and this clause, an employer may require an employee <del>—other than a casual—</del> to work reasonable overtime hours at overtime rates.</p> <p>[...]</p>
<a href="#">Electrical, Electronic and Communications Contracting Award 2010</a>	<p><b>26.2 Reasonable overtime</b></p> <p>(a) Subject to s.62 of the Act and this clause, an employer may require an employee <del>—other than a casual—</del> to work reasonable overtime hours at overtime rates.</p> <p>[...]</p>
<a href="#">Manufacturing and Associated Industries and Occupations Award 2010</a>	<p><b>40.2 Reasonable overtime</b></p> <p>(a) Subject to s.62 of the Act and this clause, an employer may require an employee <del>—other than a casual—</del> to work reasonable overtime hours at overtime rates.</p> <p>[...]</p>