



26 August 2019

Associate to the Honourable Justice Iain Ross
President, Fair Work Commission
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Dear Associate

Re: Plain Language Redrafting review

I refer to the invitation from His Honour for an interested person to identify for review any term in a modern award that is ambiguous, uncertain or confusing.

I wish to identify **clause 37.3 of the Manufacturing and Associated Industries and Occupations Award 2010 (MA000010)** which reads (in part) as follows:

37.3 Afternoon and night shift allowances

- (a) An employee who works on afternoon or night shift must be paid 15% extra for such shift.
- (b) An employee who works on an afternoon or night shift which does not continue:
 - (i) for at least five successive afternoon or night shifts or six successive afternoon or night shifts in a six day workshop (where no more than eight ordinary hours are worked on each shift); or
 - (ii) for at least 38 ordinary hours (where more than eight ordinary hours are worked on each shift and the shift arrangement is in accordance with clauses [36.3](#) or [36.4](#)),must be paid for each shift 50% extra for the first three hours and 100% extra for the remaining hours.

The uncertainty relates to the first line of sub-clause (b). The phrase “an employee who works on an afternoon or night shift which does not continue (for at least five shifts or 38 hours)” has a very different meaning to “an employee who does not work” (at least five shifts or 38 hours).

In my opinion, it is the *duration of the shift itself* that is decisive in determining whether the shift allowance in subclause (a) or the overtime penalty in subclause (b) applies.

However, there is a view among several parties, including a Fair Work Commission member from whom I recently received correspondence, that the effect of the clause may be to require the payment of overtime if the *employee* does not continue on an afternoon or night shift for at least five successive shifts (or 38 hours if the daily shift is longer than 7.6 hours).

If this were true, and construed narrowly, this would have serious implications for the thousands of afternoon and night shift rosters across the country that do not involve employees working at least five consecutive shifts (or 38 consecutive hours) in their rotation.

For example, every 3 (x 12 hour) on, 4 off shift roster would require the payment of the overtime penalty, not the shift allowance. Every employee who ‘filled in’ for three or perhaps four days on any afternoon or night shift roster, regardless of the notice given, would be entitled to be paid overtime.



It would be helpful if clause 37.3 (b) was re-drafted to make it clear that the *shift roster on which the employee is engaged must operate* for at least one week for shift allowances to apply. A 'week' is then defined in different ways depending on the length of the daily shift. If the shift roster does not meet this condition, the employee must be paid overtime.

Such a re-drafting would more clearly reflect the intention of the clause i.e. as compensation for the dislocation to an employee of being moved onto a shift roster that the employer then operates for only a few days, and then being moved off shift again.

The above "temporary" or "short" shift penalty interpretation is consistent with the most common industry view, as demonstrated on the Australian Industry Group website:¹

We would like to temporarily run a night shift for three days and wanted to know how this should be paid. Our employees are usually day workers and will work day work on Monday and Tuesday, but on Wednesday, Thursday and Friday they will work night shifts. We operate under the Manufacturing award. How would employees who work on this shift be paid?

Employees who work in accordance with the proposed scenario will be paid a "short shift" loading for the three night shifts. This means that for each of the three night shifts that the employee works, they will be paid 150% for the first three hours and 200% thereafter for the ordinary hours on that shift.

Reasoning

Under the *Manufacturing and Associated Industries and Occupations Award 2010* (the Award), a night shift is any shift finishing after midnight and at or before 8.00am. For example a shift that ran from 10.00pm to 6.30am would be considered a night shift under the Award.

Generally, for an employee who works a night shift, the shift penalty will be 15% (or 30% in some circumstances*). However as this night shift only runs for three shifts, it will attract a much higher penalty. **Clause 37.3(b)** of the Award states:

"(b) An employee who works on an afternoon or night shift which does not continue:

- (i) for at least five successive afternoon or night shifts or six successive afternoon or night shifts in a six day workshop (where no more than eight ordinary hours are worked on each shift); or*
- (ii) for at least 38 ordinary hours (where more than eight ordinary hours are worked on each shift and the shift arrangement is in accordance with clauses 36.3 or 36.4),*

must be paid for each shift 50% extra for the first three hours and 100% extra for the remaining hours."

This means that instead of being paid a 15% loading¹ for the three night shifts, employees will be entitled to be paid an additional 50% loading for the first three hours and an additional 100% for the remaining ordinary hours of the shift. This loading (often called a "short shift" loading) is considered to be the shift loading and is not the same as overtime.



The above interpretation is also consistent with a 2010 decision in which a Full Bench described the interaction of the shift allowances (in (a)) and the penalty (in (b)) as follows.ⁱⁱ

“Clause 31.3 deals with shift allowances and is expressed to apply to “employees”. Clause 31.3(a) provides for a morning shift penalty of 12.5%. Clause 31.3(b) provides for an afternoon or night shift penalty of 15%. Clause 31.3(c) provides a penalty of 50% for the first three hours and double time thereafter for work on an afternoon or night shift **which is not part of a continuous shift pattern**. The BMIAA application sought to amend sub-clause (c) by inserting the words “other than a casual” after the word “employee”. (my emphasis added)

Thank you for your consideration.

Yours faithfully

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ⁱ https://www.aigroup.com.au/resourcecentre/hr/QA-HR/temporary-shift-work-under-the-manufacturing-award/?_sm_au_=iHVQWSKNJPjSsVNH as downloaded on 14 June 2019.

ⁱⁱ *Appeal by Baking Manufacturers' Industry Association of Australia* [2010] FWAFB 9596 at [6].

