



Fair Work Commission: 4 yearly review of modern awards

AM2017/51 OVERTIME FOR CASUALS

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

12 NOVEMBER 2019

1. BACKGROUND

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).

1.2 The submissions are filed in response to directions issued by the Full Bench on 14 October 2019 with respect to the Second Category of Awards mentioned in the Directions, namely:

- (a) *Aircraft Cabin Crew Award 2010*
- (b) *Black Coal Mining Industry Award 2010*
- (c) *Broadcasting, Recorded Entertainment and Cinemas Award 2010*
- (d) *Contract Call Centres Award 2010*
- (e) *Labour Market Assistance Industry Award 2010*
- (f) *Oil Refining and Manufacturing Award 2010*
- (g) *Telecommunications Services Award 2010*
- (h) *Textile, Clothing Footwear and Associated Industry Award 2010*
- (i) *Transport (Cash in Transit) Award 2010*
- (j) *Water Industry Award 2010*
- (k) *Wool Storage, Sampling and Testing Award 2010.*

2. NATURE OF THE ISSUES UNDER CONSIDERATION

2.1 As has previously been indicated to the Commission, ABI and NSWBC are not pursuing any claims in relation to these Awards.

2.2 Rather, ABI and NSWBC have advanced their interpretations of the existing Award provisions in order to assist the Commission with finalising the language of the Exposure Drafts of these Awards and to ensure that the Award entitlements

are clarified or may be more unambiguously expressed (where the existing drafting suffers from a level of ambiguity).

2.3 ABI's position with respect to the application of a casual loading during overtime in each of the Awards is as follows:

Modern Award	Is casual loading payable on overtime?	If payable, is the loading cumulative or compounding?
<i>Aircraft Cabin Crew Award 2010</i>	No position advanced - defer to other employer parties	
<i>Black Coal Mining Industry Award 2010</i>	No	-
<i>Broadcasting, Recorded Entertainment and Cinemas Award 2010</i>	Yes	Cumulative
<i>Contract Call Centres Award 2010</i>	No	-
<i>Labour Market Assistance Industry Award 2010</i>	No	-
<i>Oil Refining and Manufacturing Award 2010</i>	No	-
<i>Telecommunications Services Award 2010</i>	No	-
<i>Textile, Clothing, Footwear and Associated Industry Award 2010</i>	Yes	Cumulative
<i>Transport (Cash in Transit) Award 2010</i>	No	-
<i>Water Industry Award 2010</i>	No	-
<i>Wool Storage, Sampling and Testing Award 2010</i>	No	-

2.4 The basis for the positions advanced by ABI and NSWBC regarding the payment of a casual loading during overtime is four-fold:

- (a) Firstly, ABI and NSWBC contend that the natural and ordinary meaning of the words used in each Award align with the interpretation adopted by ABI and NSWBC. The basis for this conclusion will be outlined separately for each Award below.
- (b) Secondly, with respect to the *Textile, Clothing, Footwear and Associated Industry Award 2010*, the application of the casual loading to this Award has already been determined in this 4 Yearly Review.
- (c) Thirdly, where the Awards are silent with respect to the application of a casual loading during overtime hours, the history applicable to casual loading provisions and the reasoning behind their introduction generally favours an interpretation which does not apply a casual loading to any overtime penalty rates.
- (d) Finally, to the extent that union parties now seek to depart from the existing operation of the Awards, such changes are substantive and require a probative evidentiary basis and cogent reasons to support any new approach.

3. NATURAL AND ORDINARY MEANING OF WORDS USED SUPPORTS ABI & NSWBC POSITION

Black Coal Mining Industry Award 2010

- 3.1 The *Black Coal Mining Industry Award 2010* addresses the loading paid to casual employees at clause 10.4. The clause provides as follows

10.4 Casual employment

(a) A casual employee is one engaged and paid as such.

(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. (emphasis added).

- 3.2 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid during ordinary hours. This is the plain interpretation of clause 10.4(b).
- 3.3 There is no clause in the Award which provides that a casual loading applies during overtime hours.
- 3.4 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Broadcasting, Recorded Entertainment and Cinemas Award 2010

- 3.5 The *Broadcasting, Recorded Entertainment and Cinemas Award 2010* provides for a casual loading to be paid to employees at clause 10.6(b):

(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.

- 3.6 The Award provision does not distinguish between overtime and ordinary hours, but rather generally provides that casual employees must be paid at the relevant minimum hourly wage plus 25%.
- 3.7 As this is the only clause addressing casual rates of pay, there appears to be a degree of ambiguity as to how the loading is to be paid. On one view, clause 10.6(b) could be construed as referring to all hours of work by a casual. On another view, the clause could be construed as applying only to the ordinary hours of work.

3.8 ABI and NSWBC have taken some instructions regarding industry practice and do not press any interpretation with respect to this Award that the casual loading is not payable during overtime.

3.9 ABI and NSWBC accordingly do not oppose the Award being construed so as to confer a casual loading being paid on all hours. However, as the casual loading is not prescribed as an “*all purpose rate*”, but is a separate payment, ABI and NSWBC do not accept that the overtime penalties variously prescribed at Parts 6 to 12 of the Award are compounded on top of the casual loading.

Contract Call Centres Award 2010

3.10 Clause 13.1 of the *Contract Call Centres Award 2010* provides as follows:

“A casual employee is an employee who is engaged on a casual basis. A casual employee for working ordinary time will be paid per hour 1/38th of the weekly wage prescribed by clause 18—Classifications and minimum wage rates for the work performed, plus 25%.” (emphasis added)

3.11 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid for working ordinary time hours. This is the plain interpretation of the clause.

3.12 There is no clause in the Award which provides that a casual loading applies during overtime hours. This includes the overtime clause (clause 26.1).

3.13 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Labour Market Assistance Industry Award 2010

3.14 Clause 10.4(c) of the *Labour Market Assistance Industry Award 2010* confers the casual loading on employees and provides as follows:

“(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.” (emphasis added)

- 3.15 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid during the ordinary hours of work. This is the plain interpretation of the clause.
- 3.16 There is no clause in the Award which provides that a casual loading applies during overtime hours. This includes the overtime clause (clause 23).
- 3.17 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Oil Refining and Manufacturing Award 2010

- 3.18 Clause 10.3 of the *Oil Refining and Manufacturing Award 2010* confers the casual loading on casual employees and provides as follows:

***(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%.*

- 3.19 On its face, this clause purports to apply the casual loading to all hours worked by the employee, which might feasibly include overtime. However, overtime is not expressly referenced in this clause.
- 3.20 Importantly, however, the clause must be read in conjunction with the overtime provisions of the Award at clause 24.
- 3.21 Clause 24.1 specifies the overtime penalties as follows:

(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.” (emphasis added)

3.22 The penalties are clearly calculated on the ordinary hourly base rate of pay.

3.23 Clause 24.3 then proceeds to confirm that the overtime penalties are to be substituted in lieu of all other penalties and loadings contained in the Award:

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.

3.24 It should be uncontroversial that the casual loading is a loading otherwise prescribed by the award. The plain effect of this clause is to render all loadings (including the casual loading) not payable when overtime is paid.

Telecommunications Services Award 2010

3.25 Clause 11.3(b) of the *Telecommunications Services Award 2010* confers the casual loading on employees and provides as follows:

(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%. (emphasis added)

- 3.26 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid during ordinary time hours. This is the plain interpretation of clause 11.3(b).
- 3.27 There is no clause in the Award which provides that a casual loading applies during overtime hours.
- 3.28 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Textile, Clothing, Footwear and Associated Industry Award 2010

- 3.29 Clause 14.3 of the *Textile, Clothing, Footwear and Associated Industry Award 2010* confers the casual loading on employees and provides as follows:

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%.

- 3.30 This provision was considered in 2018 during the 4 Yearly Review in *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [417] – [419].
- 3.31 In these proceedings, a 5-member Full Bench of the Commission expressly held that the casual loading operates on a cumulative basis together with overtime provisions in this Award.
- 3.32 Given the recency of this decision, there does not appear to be any substantive basis articulated for the Commission to arrive at a different conclusion on the same Award interpretation matter within this 4 Yearly Review.

Transport (Cash in Transit) Award 2010

3.33 The *Transport (Cash in Transit) Award 2010* addresses the loading paid to casual employees at clause 11.5(c). The clause provides 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. (emphasis added).

3.34 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid during ordinary hours as well as during shift work and weekend work. This is the plain interpretation of clause 11.5(c).

3.35 There is no clause in the Award which provides that a casual loading applies during overtime hours.

3.36 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Water Industry Award 2010

3.37 The *Water Industry Award 2010* addresses the loading paid to casual employees at clause 10.5. The clause provides as follows:

(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.

(emphasis added)

- 3.38 It should be apparent from the provisions outlined above that the Award requires a 25% loading to be paid during ordinary hours as well as during shift work and weekend work. This is the plain interpretation of clause 10.5(b). To the extent that this was not already clear, the point is made even more emphatically by clause 10.5(c), which confirms that penalties for overtime are calculated exclusive of the casual loading.
- 3.39 There is no clause in the Award which provides that a casual loading applies during overtime hours.
- 3.40 In the absence of any text which confers a casual loading during overtime, there is no warrant for reading such a loading into the overtime provisions, particularly given the historical matters further addressed at section 4 below.

Wool Storage, Sampling and Testing Award 2010

- 3.41 Clause 10.3 of the *Wool Storage, Sampling and Testing Award 2010* provides as follows:

*“(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%.”*

(emphasis added)

- 3.42 On its face, this clause purports to apply the casual loading to all hours worked by the employee, which might feasibly include overtime. However, overtime is not expressly referenced in this clause.

3.43 Importantly, however, the clause must be read in conjunction with the overtime provisions of the Award at clause 25.

3.44 Clause 25.1 specifies the overtime penalties as follows:

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:

(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.

(emphasis added)

3.45 The penalties are clearly calculated on the ordinary hourly base rate of pay. Clause 25.4 then proceeds to confirm that the overtime penalties are to be substitute in lieu of all other penalties and loadings contained in the Award:

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 of any other loadings or penalty rates.

3.46 It should be uncontroversial that the casual loading is a loading otherwise prescribed by the award. The plain effect of this clause is to render all loadings (including the casual loading) not payable when overtime is paid.

4. HISTORICAL JUSTIFICATION FOR THE IMPOSITION OF A CASUAL LOADING

4.1 ABI and NSWBC repeat and rely upon the sections 5 and 6 of the Submissions filed in these proceedings on 5 July 2019 (**5 July Submissions**). Copies of the 5 July Submissions may be located on the 4 Yearly Review of Modern Awards website at:

<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201741-sub-reply-abinswbc-050719.pdf>

4.2 The historical analysis outlined in the 5 July Submissions leads to the overwhelming inference that, in the absence of a contrary indication in any given modern award, the modern award casual loadings should be assumed as having the purpose of compensating casual employees for the following permanent employment entitlements:

- (a) annual leave;
- (b) personal leave;
- (c) public holidays;
- (d) notice of termination;
- (e) contingent liability for redundancy; and
- (f) some level of compensation for unreliable hours.

4.3 Once the purpose of the casual loading is understood having regard to the above historical context, it should be self-evident that, ordinarily, there is no basis or justification for the imposition of a casual loading with respect to the working of overtime hours.

4.4 This is because each of the permanent employment entitlements which are compensated for with respect to the casual loading are unrelated to overtime.¹

¹ The basis for this statement is outlined at paragraph 6.4 to 6.28 of the 5 July Submissions

- 4.5 The statistical data supplied at Figure ABI-1 of the 5 July 2019 Submissions identifies that the application of the existing casual loading to a range of working arrangements (including both the average working scenarios as well as other common scenarios) adequately compensates casual employees for all permanent entitlements forgone before any loading is applied to overtime hours.
- 4.6 If a further casual loading was conferred on employees with respect to overtime hours, Figure ABI-1 demonstrates that casuals would in fact receive a windfall gain. The cost of employing casuals would therefore exceed that applicable to employing permanent employees, with no identified justification.
- 4.7 These matters are raised in order to support ABI and NSWBC's primary submission that, in the absence of an express reference to casual loadings being payable during overtime, modern awards (including those subject of these proceedings) should not be construed as having been drafted so as to impose a casual loading in addition to overtime entitlements.

5. ANY CHANGES TO AWARD LOADING PROVISIONS IS A SUBSTANTIVE MATTER

- 5.1 Pursuant to the *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 (at [19]-[24]) and the *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 (at [254]) (**Penalty Rates Case**), it is uncontroversial that:
- (a) where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation; and
 - (b) cogent reasons will be required from departing from previous Full Bench decisions which have made the relevant modern award provisions.

5.2 Should the Commission accept the interpretation of the casual loading provisions in the Awards as they currently operate (pursuant to the submissions advanced at sections 2-4 above), then a substantive merit case supported by probative evidence would be required in order to justify departing from the existing award provisions which have been made by a Full Bench of the AIRC during award modernisation.

Filed on behalf of ABI and NSWBC by:

Luis Izzo

Managing Director - Sydney Workplace

Australian Business Lawyers & Advisors

12 November 2019