

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

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Overtime for Casuals – Second Category of Awards

Submissions of the Australian Federation of Employers and Industries

Introduction

1. These submissions by the Australian Federation of Employers and Industries (AFEI) are made pursuant to the Directions by Vice President Hatcher on 14 October 2019, in relation to the following Awards in the Second Category of Awards mentioned in the directions:
 - a. *Broadcasting, Recorded Entertainment and Cinemas Award 2010;*
 - b. *Contract Call Centres Award 2010;*
 - c. *Labour Markets Assistance Industry Award 2010;*
 - d. *Telecommunications Services Award 2010;* and
 - e. *Textile, Clothing, Footwear and Associated Industry Award 2010.*
2. These submissions set out AFEI's interpretation of the interaction of the casual loading and overtime provisions of the above Awards. Specifically, whether casual loading is payable during overtime and if so, whether it applies on a cumulative or compounding basis.

Broadcasting, Recorded Entertainment and Cinemas Award 2010 (BREC Award)

3. AFEI submits that casual loading is payable during overtime on a cumulative basis under the BREC Award.
4. Casual loading is provided by clause 10.6 of the BREC Award:

10.6 Casual employment

(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.
5. The above provision does not specify whether the casual loading is to be paid on ordinary hours or on all hours worked. However, the clause is worded to the effect that the casual loading is an amount that is added onto the hourly rate. AFEI submits that the fact that a distinction was drawn between the hourly rate and the casual loading means that the casual loading is not to form part of an all-purpose rate.

Contract Call Centres Award 2010 (CCC Award)

6. AFEI submits that casual loading is not payable during overtime under the CCC Award.
7. Casual loading is provided in clause 13.1 of the CCC Award:

“13.1 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%.”
8. The clause above states that a casual employee only receives the casual loading for working ordinary time. Notably, the clause above does not make any reference to overtime, nor does it express the casual loading to form part of an all-purpose rate. On a plain reading of the clause, casual loading is clearly only payable on ordinary hours.
9. For completeness, we also consider the overtime provisions of the CCC Award, which are contained in clause 26.1. The Clause makes no reference to casual loading. This, together with the wording in clause 13.1, which expressly confines casual loading to ordinary time only, clearly indicates that the CCC Award does not provide for casual loading during overtime.

Labour Market Assistance Industry Award 2010 (LMA Award)

10. AFEI submits that casual loading is not payable during overtime under the LMA Award.
11. Casual loading is provided in clause 10.4(c) of the LMA Award:

“10.4 Casual employment
(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.”
12. The clause above states that a casual employee only receives the casual loading for hours worked during ordinary hours of work. Notably, the clause above does not make any reference to overtime, nor does it express the casual loading to form part of an all-purpose rate. On a plain reading of the clause, casual loading is clearly only payable on ordinary hours.
13. For completeness, we also consider the overtime provisions of the LMA Award, which are contained in clause 23.2. The Clause makes no reference to the casual loading. This, together with the wording in clause 10.4(c), which expressly confines casual loading to ordinary time only, clearly indicates that the LMA Award does not provide for casual loading during overtime.

Telecommunications Services Award 2010 (TS Award)

14. AFEI submits that casual loading is not payable during overtime under the TS Award.

15. Casual loading is provided in clause 11.3(b) of the TS Award:

“11.3 Casual employment

(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%.”

16. The clause above states that a casual employee only receives the casual loading for working ordinary time. Notably, the clause above does not make any reference to overtime, nor does it express the casual loading to form part of an all-purpose rate. On a plain reading of the clause, casual loading is clearly only payable on ordinary hours.

17. For completeness, we also consider the overtime provisions of the TS Award, which are contained in Clause 21.1. The Clause makes no reference to the casual loading. This, together with the wording in clause 11.3(b) which expressly confines casual loading to ordinary time only, clearly indicates that the TS Award does not provide for casual loading during overtime.

Textile, Clothing, Footwear and Associated Industry Award 2010 (TCFAI Award)

18. AFEI submits that casual loading is payable during overtime on a cumulative basis under the TCFAI Award.

19. Casual loading is provided by clause 14.3 of the TCFAI Award:

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%.

20. The above provision does not specify whether the casual loading is to be paid on ordinary hours or on all hours worked. However, the clause is worded to the effect that the casual loading is an amount that is added onto the hourly rate. AFEI submits that the fact that a distinction was drawn between the hourly rate and the casual loading means that the casual loading is not to form part of an all-purpose rate.
21. In addition to the above, clause 14.3 of the TCFAI Award was considered by the Full Bench earlier in the current 4 yearly review of Modern Awards. In that decision, the Full Bench expressly determined that the casual loading should be applied on a cumulative basis when calculating overtime payments. In coming to that decision, the Full Bench stated that “nowhere in the current award does it stipulate that the casual loading applies for all purposes”.¹

¹ 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 3802 at [419]