

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Reply Submission**

Overtime for Casuals -  
*Hair and Beauty Industry Award 2010*  
(AM2017/51)

**9 April 2021**

**Ai**  
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS**  
**OVERTIME FOR CASUALS**  
**– HAIR AND BEAUTY INDUSTRY AWARD 2010**

1. This submission is filed on behalf of the Australian Industry Group, Hair and Beauty Australia and the Australian Hair Council. It relates to submissions filed by the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Workers' Union (**AWU**) (collectively, **Unions**) in relation to the *Hair and Beauty Industry Award 2010* (**Award**) and in response to a decision<sup>1</sup> issued by the Fair Work Commission (**Commission**) on 5 March 2021 (**Decision**).

**Overtime for Work Performed Outside the Spread of Hours**

2. The Unions argue that work performed by full-time and part-time employees outside the spread of hours prescribed by clause 28.2(a) of the Award is overtime and that employees should be entitled to payment at overtime rates for such work.
3. The same issue was raised by the Unions in the context of the plain language re-drafting of the Award (AM2016/15), prior to the Decision being issued. In the context of those proceedings, the parties have agreed that through that process, the Award should be varied to require the payment of overtime rates in the relevant circumstances. Submissions to this effect have been made by the parties to the Commission in the context of that matter.
4. In our submission, this matter should be dealt with by the Full Bench constituted to deal with AM2016/15, given that detailed consideration has already been given and submissions have already there been filed by the parties in relation to this issue.

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<sup>1</sup> 4 yearly review of modern awards – Overtime for casuals [2021] FWCFB 1121.

## Overtime for Work Performed in Excess of Daily Maximum Ordinary Hours

5. The Unions contend that full-time and part-time employees should be entitled to overtime rates of pay for work performed in excess of the maximum number of ordinary hours that may be worked in a day, pursuant to clause 28.3 of the Award. We oppose such a variation to the Award.
6. Any contention that the Award already requires the payment of overtime rates in such circumstances is misguided. Clause 31.2(a) of the Award requires the payment of overtime rates for work performed *'in excess of the ordinary number of hours of work prescribed in clause 28.2'*. There is very clearly no entitlement to overtime rates for work performed in excess of the maximum number of ordinary hours prescribed by clause 28.3 of the Award. In its Decision, the Commission also observed that clause 31 of the Award *'does not appear'* to require the payment of overtime rates for such work.
7. Similarly, the proposition that the absence of a requirement to pay overtime rates for work performed in excess of the daily maximum number of hours results in a prohibition against the performance of such work is a misnomer. Although the Award does not prescribe payment at a higher rate, it does not preclude the performance of such work.
8. The variations to the Award proposed by the Unions would amount to a significant substantive change, that is not *necessary* to achieve the modern awards objective. In particular:
  - (a) There is no evidence before the Commission associated with the *'relative living standards and the needs of the low paid'*. At its highest, the AWU submits that the proposed change *'may'* result in a *'small improvement to the relevant living standards and needs of the low paid'*.
  - (b) There is no basis for concluding that the proposed change would *'promote social inclusion through increased workforce participation'*.

- (c) To the extent that the proposed change would result in employers altering the way in which they arrange their employees' hours of work; the proposed change may be inconsistent with the promotion of *'flexible modern work practices and the efficient and productive performance of work'*.
  - (d) The *'need to promote additional remuneration for employees working overtime'* is but one of many countervailing considerations that must be taken into account. It is not a determinative matter.
  - (e) The *'likely impact on business'* will clearly be negative. It will likely increase employment costs in a sector that has suffered significantly in the context of the COVID-19 pandemic.
9. The comparisons made by the SDA to the *Fast Food Industry Award 2010* and the *General Retail Industry Award 2020* do not advance the matter.

#### **Overtime for Work Performed *'Outside Rostering Principles'***

10. The SDA submits that the Award should be varied in order to 'clarify' that overtime rates are payable for work performed *'outside roosting principles'* prescribed by the Award.
11. The proposed change does not constitute a clarification of the Award. It would amount to a significant substantive change. Currently, the Award imposes various constraints on how and when an employer can roster a full-time or part-time employee to perform their ordinary hours of work. A failure to comply with those provisions would amount to a breach of the Award. An employee is not entitled to overtime rates for such work and a case has not been made out for altering the Award to require as such. Accordingly, no such variation should be made.