

8th December 2017

The Associate to Vice President Hatcher
Fair Work Commission
Level 10 Tower Terrace
80 William St
East Sydney 2011

By email: amod@fwc.gov.au

Dear Associate,

Re: AM2017/51 – Overtime for Casuals

We write concerning the above and the Full Bench Statement of 4th December 2017 inviting parties to provide any written response concerning the accuracy of the list awards in the Attachment A of that Statement.

The Australian Meat Industry Council (AMIC) provides this letter of response only in relation to the Meat Industry Award 2010 (MIA 2010).

In the Attachment to the 4th December Statement, the only issue in relation to the Meat Industry Award 2010 relates to 'Unclear when overtime commences'.

The Statement of the Full Bench refers to a research paper by the Fair Work Ombudsman (FWO), which was submitted to the FWC on 11th April 2014. On page 19 of this research paper it refers to the clause 36.1 of the MIA 2010 and states:

'Clause 36.1 of the above award provides that all time worked outside ordinary working hours will be deemed to be overtime and paid accordingly. Where an employee works in excess of the daily maximum one day and exceeds the weekly maximum on the next day, it is not clear whether the payment of overtime for the first three hours should start again on the second day.'

In further FWO correspondence dated 9th May 2014, which was also submitted to the FWC, it contained a table relating to a number of awards, including the MIA 2010 (copy attached). In relation to the MIA 2010, the only issue mentioned refers to the same issue.

I also refer to the AMIC Submission dated and uploaded onto the Fair Work Commission website on 20th June 2014, outlining the reasons and history of this issue and the dealings with the Fair Work Ombudsman, in which the FWO accepted the AMIC's interpretation of the 'each day stands alone' treatment of overtime under the Meat Industry Award 2010.

Reference is also made to the AMIC submission dated and uploaded on 9th July 2014, which confirms the agreement between the AMIC and the AMIEU on this issue.

In a decision of a Full Bench of the FWC dated 3rd March 2015 (copy attached), regarding the MIA 2010, a number of substantive issues were determined. One of the issues contained on page three of the decision related to a variation to reinsert wording to clarify the manner in which overtime is calculated. As the decision states, this was agreed by all parties.

As a consequence, it addresses the above ambiguity raised in the FWO Research paper of April 2014. Therefore, we seek that the MIA 2010 should be removed from the list of awards for matter AM2017/51.

Yours sincerely

A handwritten signature in black ink, appearing to read 'K. McKell', written in a cursive style.

Ken McKell

Australian Meat Industry Council (AMIC)



Australian Government

Fair Work OMBUDSMAN

9 May 2014

The Associate to Hon Justice Iain Ross AO
Fair Work Commission
11 Exhibition Street
Melbourne Victoria 3000

By email: amod@fwc.gov.au

Dear Associate,

Award Stage, Group 1 Modern Awards

I refer to paragraph 18 of the Fair Work Commission's (**Commission's**) Guide to Award Stage which requested parties provide a short outline of issues relevant to the Group 1 Modern Awards.

Please find **attached** a table referring to specific award provisions within the Group 1 Modern Awards. These provisions have been identified through enquiries about modern awards made to the Fair Work Ombudsman (**FWO**) by employers, employees and their representatives.

The FWO provides this information to assist the Commission and relevant parties to achieve the modern award objectives, in particular, the need to ensure a simple easy to understand modern award system under subsection 134(1)(g) of the *Fair Work Act 2009*.

Unless otherwise requested to do so, the FWO does not intend to provide further comment or submissions on the attached information. Further, the FWO does not intend to appear at the hearings for the Group 1 Modern Awards.

Yours sincerely,

Janine Webster
Chief Counsel

TABLE OF PROVISIONS RELEVANT TO THE AWARD STAGE, GROUP 1 MODERN AWARDS

Issue	Clause(s) Number	Description of issue
Asphalt Industry Award 2010 [MA000054]		
1	22.3, 22.5(a), 24.1(a)	The overtime rates payable pursuant to subclause 22.5(a) and 24.1(a) may be inconsistent. Subclause 22.5(a) provides that work done by shift workers in excess of and outside the ordinary hours in subclause 22.3 is paid at <u>double time</u> . Subclause 24.1(a) provides for payment an overtime entitlement for shift workers at the rate of <u>time and a half</u> for the first two hours and <u>double time</u> thereafter.
Ambulance and Patient Transport Industry Award 2010 [MA000098]		
2	10.5(e), 20.1, 24.1	Subclause 24.1(a) states that overtime applies “for any work exceeding the number of hours fixed as a day’s, week’s, or fortnight’s work”. The provision does not specify whether this means hours fixed by the award or hours fixed by the roster. Further, in respect of casual employees, clause 24.1 does not state: <ul style="list-style-type: none"> • whether casuals are entitled to overtime (‘overtime’ is not listed as an excluded casual entitlement in clause 10.5(e)); and • if so, when overtime applies (the ordinary hours in clause 20 and the rostering arrangements in clause 21 do not refer to casual employees).
3	10.5, 25.2	Subclause 25.2 does not specify whether a casual employee who is called out for duty is entitled to be paid at their base rate of pay or the rate of pay inclusive of the casual loading contained in subclause 10.5(c).
Black Coal Mining Industry Award 2010 [MA000001]		
4	27.4(a) and(b)	Despite clauses 27.4(a) and (b) adopting different wording, the rates for working ordinary hours and overtime on a public holiday contained in these clauses appear to be same. The reference to 'in addition to the prescribed rate' in clause 27.4(a) appears to state that the rate of double time is added to the ordinary rate, with the result being that the employee receives treble time. Therefore, both subclauses 27.4 (a) and (b) appear to provide for treble time for working <u>both</u> ordinary hours and hours in excess of ordinary hours on public holidays.
Cleaning Services Award 2010 [MA000022]		
5	12.4(a), 12.4(b)(iii)	Subclause 12.4(b)(iii) states that a part time employee receives an allowance of 15% of the hourly rate which ‘allows the employer to roster a part-time employee to work up to 7.6 hours per day, 5 days per week or 38 ordinary hours per week without the payment of overtime’. The Fair Work Ombudsman (FWO) has received enquiries as to whether this entitlement is payable for all hours worked by a part time employee, regardless of whether the employer exercises its option to change the employee’s rostered hours. For example, whether a part time employee who has an agreed rostered pattern of 20 hours per week pursuant to subclause 12.4(a) is still entitled to be paid the 15% allowance for these 20 hours even if the employer does not roster the employee to work outside the employee’s agreed rostered pattern of hours.

Issue	Clause(s) Number	Description of issue
6	17.1, 24.4	In the absence of a definition of a 'day', subclauses 17.1 and 24.4 are difficult to apply in practice where shifts are worked across two separate calendar days. For example, depending on when a shift starts and finishes, the broken shift allowance or overtime may be payable.
7	17.6, CSE2 and CSE3 in D.2.1 and D.2 in Schedule D	Subclause 17.6 provides for a leading hand allowance which is payable when an employee is placed in charge of other employees. The FWO has received queries in relation to whether this allowance applies to the classification 'Cleaning Services Employee 3' (CSE3) given that the listed classification duties do not refer to the duties of a 'leading hand'. This is in contrast to the classification of a 'Cleaning Services Employee 2' (CSE2) which specifically states that the CSE2 duties include 'carrying out the roles expected of a leading hand (and is paid the allowance as stipulated in clause 17.6)'.
8	20.3	Subclause 20.3 provides that an employee left waiting for their cash or EFT payment will be paid ordinary rates until such time as the wages are paid. However, as a practical matter, subclause 20.3 does not specify how the payment will be calculated. For example, it is not clear whether an employee kept waiting for payment would be entitled to be paid ordinary hours for each hour kept waiting (i.e. all hours in a 24 hour period).
9	24.1, 24.2 and 28.6	Subclauses 24.1 and 24.2 state that an employee cannot work more than 7.6 hours in a day. In the absence of a definition of 'day', it may be difficult to calculate whether overtime is payable pursuant to clause 28.6 in circumstances where work is performed across two calendar days (for example, where a shift is completed across two days such as from 10.00pm to 6.00am) as 7.6 hours of work has not be completed within one single 'day' if the calendar definition of day is adopted.
10	24.2(c)(d), (e) and (f)	Subclauses 24.2(c)-(f) do not specify whether the minimum engagement periods apply in respect of each shift or each day. Accordingly, it is not clear whether the minimum engagement applies for each part of a broken shift (see subclause 17.1).
11	24.2, 27.1	Subclauses 24.2 and 27.1 do not specify whether the shift loadings payable under subclause 27.1 are payable on those hours paid to an employee by an employer to satisfy the minimum engagement requirements set out in subclause 24.2.
12	27.1(a) and (b), 27.3	Subclause 27.1(a) does not state whether an employee would be entitled to the higher penalties payable to an employee for working early morning, afternoon and non-permanent night shifts on public holidays under subclauses 27.3. In addition, subclause 27.1(b) does not state whether an employee would be entitled to the higher penalties payable to an employee for working permanent night shift on Saturdays, Sundays and public holidays under clauses 27.2 and 27.3.
Manufacturing and Associated Industries and Occupations Award 2010 [MA000010]		
13	32.4(e)(i)	Subclause 32.4(e)(i) addresses the rate of pay for travelling time, however, the clause does not specify whether time spent travelling contributes to the calculation of other hourly based entitlements (such as ordinary time and overtime).

Issue	Clause(s) Number	Description of issue
14	36.2 (c)	Subclause 36.2(c) allows for the variation of the spread of hours for day workers of up to one hour at <u>either</u> end of the spread in certain circumstances. The word 'either' in this clause could potentially be interpreted as allowing for the spread of hours to be altered by: <ul style="list-style-type: none"> • up to one hour at only one end of the span; or • one hour at both ends of the span.
15	37.2	Subclause 37.2 allows for the variation of the spread of hours for shift workers of up to one hour at <u>either</u> end of the spread in certain circumstances. The word 'either' in this clause could potentially be interpreted as allowing for the spread of hours to be altered by: <ul style="list-style-type: none"> • up to one hour at only one end of the span; or • one hour at both ends of the span.
Marine Tourism and Charter Vessels Award 2010 [MA000093]		
16	14.6	Subclause 14.6 provides for an allowance payable for 'outer reef' work, however, the award does not define the term 'outer reef work'.
Meat Industry Award 2010 [MA000059]		
17	36	Clause 36 does not specify whether overtime is calculated on a daily or weekly basis. By way of example, if an employee works a 58 hour week and works 38 hours at the end of their shift on Wednesday, the overtime hours on Thursday and Friday could arguably be calculated as either: <ul style="list-style-type: none"> • Option 1 - Daily basis: Thursday (10 hours) - 150% for the first three hours and 200% for the remaining seven hours. Friday (10 hours) - 150% for the first three hours and 200% for the remaining seven hours; or • Option 2 - Weekly basis: 150% for the first three hours on Thursday and then 200% for all remaining hours worked on Thursday and Friday that week.
Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]		
18	14.3, 39.3	Subclauses 14.3 and 39.3 do not state whether the overtime payable to casual employees is calculated on the casual employee's base rate of pay or the rate of pay inclusive of the casual loading.
19	24.5, 40.1	Subclauses 24.5 and 40.1 both contain conditions upon when meal allowances are payable which may be inconsistent. Subclause 40.1 states that a meal allowance will be payable when an employee works in excess of one and a half hours overtime. Subclause 24.5 states that a meal allowance will be payable when an employee is required to work overtime during a week day for more than one hour after their usual finishing time or after 6.00pm, whichever is later.
20	34.1	Day shift is defined in subclause 34.1 as a shift worked between 7.00am and 7.00pm. Afternoon shift is defined as a shift finishing after 6.00pm, but not later than midnight. There is an apparent overlap of day/afternoon shift where an employee finishes their shift between 6.00pm and 7.00pm.

Issue	Clause(s) Number	Description of issue
Timber Industry Award 2010 [MA000071]		
21	21.4	Subclause 21.4 does not expressly state whether the leading hand allowance is payable on overtime hours.
22	27 and 30	Subclause 30.1 states that overtime is payable when an employee works outside the spread of hours or in excess of the <u>ordinary daily number of hours</u> in clause 27. The absence of a definition of daily ordinary hours and/or a method for determining such hours in subclause 27 makes it difficult to determine the calculation of overtime in accordance with subclause 30.1. Further, the absence of this definition in clause 30 makes it difficult to calculate the overtime entitlement for casuals pursuant to clause subclause 12.2(b) because the clause cross-references clause 30.
Vehicle Manufacturing, Repair, Services and Retail Award 2010 [MA000089]		
23	19.2	Subclause 19.2 expresses the leading hand allowance as a percentage of the standard weekly amount. The clause does not specify if this allowance would be converted to an hourly amount for casuals and part time employees who work less than 38 hours in a week.
24	28.1(b), 37, 41.1	Subclause 41.1 includes a table setting out the overtime rates that apply to casual employees employed under the repair services and retail section of the award. The overtime provision at subclause 28.1(b) states that overtime does not apply to casuals covered by clause 41. Given this express exclusion and the lack of any reference in clause 41 to clause 37 (which deals with ordinary hours of work and rostering), it is not immediately clear when casual employees employed in the repair services and retail section of the award are entitled to overtime.
25	33.1, 33.4, 33.5, Schedule B	Clause 33 states that adult employees covered by Section 1 Vehicle RS&R must be classified according to the structure set out in clause 33.4. It also states that the skill level definitions, according to which employees are to be classified, are set out in Schedule B. However, the driver classifications only appear in clause 33.5 and not in Schedule B.
26	33.4, 37.1	The award does not specify whether vehicle salespersons are entitled to be paid at ordinary rates for each hour worked in excess of 38 hours per week. Subclause 28.1(a) states that vehicle salespersons are not entitled to overtime. Subclause 37.1 (which deals with ordinary hours of work and rostering) expressly excludes vehicle salespersons. Notwithstanding these provisions, the award does not specify that these employees are not entitled to be paid ordinary rates for each hour worked in excess of 38 hours per week.
27	33.4, 44.9,	Subclause 44.9 sets out a procedure allowing for employers and employees to make an agreement for the payment of commission to vehicle salespersons. Subclause 44.9(a)(viii) states that any sum payable pursuant to a commission agreement made under subclause 44.9 is deemed to be payable under the award. Whilst there is no express provision in the award that provides for the ability to offset entitlements against those amounts of commission payable under subclause 44.9, the FWO is aware that there may be uncertainty in the industry as to whether subclause 44.9(a)(viii) would make such a practice permissible.

Issue	Clause(s) Number	Description of issue
28	53.1 (c)	<p>Subclause 53.1(c) allows for the variation of the spread of hours for up to one hour at <u>either</u> end of the spread in certain circumstances. The term 'either' in this clause could be interpreted as allowing for the spread of hours to be altered by:</p> <ul style="list-style-type: none">• up to one hour at only one end of the span; or• by one hour at both ends of the span.

[2015] FWCFB 579
FAIR WORK COMMISSION
DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

MEAT INDUSTRY AWARD 2010
(AM2014/78)

Meat industry

VICE PRESIDENT WATSON
DEPUTY PRESIDENT KOVACIC
COMMISSIONER ROE

MELBOURNE, 3 MARCH 2015

Four yearly review of modern awards - Meat Industry Award 2010 - Fair Work Act 2009
ss.134, 138, 156.

Introduction

[1] On 11 November 2014 the President issued a direction that this Full Bench hear and determine the substantive issues raised during the 2014 four yearly review of modern awards with respect of the Meat Industry Award 2010 (the Award). The award review is required to be conducted in accordance with s.156 of the *Fair Work Act 2009* (the Act).

[2] Other provisions of the Act are also relevant including s.138 and the modern awards objective in s.134.

[3] We have dealt with these provisions and the approach to matters of this type in relation to the four yearly review for the Security Services Industry Award. [1](#)

We apply the approach outlined in that decision to the determination of the issues in relation to this Award.

[4] The issues that we have been directed to determine are set out in Schedule A to the President's directions as amended on 18 November 2014. The issues concern the payment for work on public holidays, transfer from one category of employment to another, the calculation of overtime and shift allowances for short term shifts. We will consider each of these matters in turn.

Payment for work on public holidays

[5] This matter arises from a review of clause 40.2 of the Award which states:

“40.2 Payment for work on public holidays

Employees including casuals who work on:

(a) Christmas Day and Anzac Day will be paid at double the ordinary hourly rate for all time worked;

(b) Good Friday will be paid for all time worked at the rate of time and a half for the first four hours and double time thereafter based on the ordinary hourly rate; and

(c) any other public holiday will be paid at time and a half for the first two hours and double time thereafter based on the ordinary hourly rate.

For full-time employees, the above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate.”

[6] The genesis of the matter is a concern raised by The Australasian Meat Industry Employees Union about the reference to full time employees in the final paragraph of the clause. The Australasian Meat Industry Employees Union seeks to broaden the clause to cover all other categories of employees apart from casuals by rewording the final paragraph. The Australian Meat Industry Council accepts the extension of the clause to part-time employees and daily hire employees but contends that the clause should not apply to employees engaged under an incentive payment scheme as separate provision for public holidays for those employees is provided in clause 24. Other categories of workers were previously provided for in the pre-reform awards.

[7] The Australian Meat Industry Council submits that the wording of the final paragraph of the clause should be amended to read:

“For all employees other than casuals, the above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate, calculated by reference to the ordinary hourly rate as defined in clause 3.2(a).”

[8] In our view the problem identified by the parties and agreed to be remedied by way of a variation to the Award should be remedied. It appears to us that the variation will ensure that the Award meets the modern awards objective because it enhances the fairness and consistency of the Award. The wording proposed by the Australian Meat Industry Council is appropriate in our view because it achieves the extension of the entitlement only for those categories of employees not covered by other provisions. We approve the variation of the Award in line with the Australian Meat Industry Council’s proposal.

Transfer from one category to another

[9] The Australasian Meat Industry Employees Union seeks to amend clause 11.4 of the Award in order to place a restriction on the ability to transfer employment. It seeks to insert the following sentence at the end of the clause:

“Nothing in clause 11.4 authorises an employer to require an employee to transfer to casual employment.”

[10] The proposed variation was agreed to by the Australian Meat Industry Council during the private conferences held between The Australasian Meat Industry Employees Union and

the Australian Meat Industry Council. The Australian Industry Group supports the proposed variation.

[11] We are satisfied that the change will provide greater clarity and is necessary to achieve the modern awards objective.

Overtime provision

[12] The Australian Meat Industry Council seeks to amend clause 36.1(a) of the Award in order to clarify the manner in which overtime is calculated. It proposes that the words ‘on any day’ be inserted after the words ‘ordinary working hours’, so that the clause would then read:

“All time worked outside ordinary working hours on any day as prescribed in clause 31—Hours of work (or in the case of a shiftworker, outside the hours rostered as ordinary shiftwork hours in accordance with clause 34—Rostering) will be deemed to be overtime and be paid for at time and a half for the first three hours and double time thereafter.”

[13] The Australian Meat Industry Council submits that the words ‘on any day’ appeared in the overtime clauses in the relevant predecessor awards but were inadvertently omitted when the modern Award was released. Without the words, there is some ambiguity as to how and when the overtime provisions commence to operate. It is unclear whether they operate after ordinary hours are completed each day, or at the completion of ordinary hours for another period of time such as a week. The Australian Meat Industry Council submits that the variation is necessary to correct this oversight, will remove an ambiguity and adopt the longstanding position under the predecessor awards.

[14] The Australasian Meat Industry Employees Union supports the proposed amendment. The Australian Industry Group agrees to the proposed re-drafting of the clause.

[15] We are satisfied that the variation is necessary to achieve the modern awards objective.

Shift allowances for short term shifts in meat processing establishments

[16] The Australasian Meat Industry Employees Union seeks to delete the exclusion of meat processing establishments in clause 33.9(e) of the Award. The effect of this change would be to extend the higher shift allowances in the clause, when afternoon or night shifts do not continue for at least five successive shifts, to meat processing establishments. Currently this provision only applies to the other types of establishments, principally manufacturing and retail establishments. The Australasian Meat Industry Employees Union submits that there is no logical reason for this differentiation and suspects that the exclusion was the result of inadvertence. It has drawn our attention to a number of other manufacturing awards, including the Manufacturing and Associated Industries and Occupations Award 2010, which contain a clause of a similar nature with general application to operations covered by the Award.

[17] The Australian Meat Industry Council does not oppose the variation. However The Australian Industry Group, which primarily represents employers in the meat processing sector, opposes the variation and submits that the history of the clause explains why the higher shift penalty does not apply to the meat processing sector. It submits that the pre-

existing awards applying to that sector did not contain the higher rate and the Award Modernisation Full Bench made an obvious decision to confine its application to types of operations to which it previously applied. The Australian Industry Group submits that The Australasian Meat Industry Employees Union has not established that the variation is necessary to achieve the modern awards objective.

[18] In our view the clause under consideration is a common award clause and has commonly applied in the meat industry. The absence of the clause in meat processing awards appears to us to be somewhat anomalous, as apart from the history, there appears to be no logical reason for a different approach in such establishments. We are of the view that the adoption of a consistent position across all operations covered by the Award is appropriate and necessary to achieve the modern awards objective because it is consistent with a fair and relevant safety net of terms and conditions. We approve the variation sought by The Australasian Meat Industry Employees Union.

Conclusions

[19] We have determined that four variations to the Award are necessary to achieve the modern awards objective. The variations we have approved in this decision will be made by the Award Review Full Bench in due course.

VICE PRESIDENT

Appearances:

Mr C Buckley for The Australasian Meat Industry Employees Union.

Mr A Herbert of counsel for the Australian Meat Industry Council.

Mr B Ferguson for The Australian Industry Group.

Hearing details:

2014.

Melbourne—Video Conference Link to Sydney and Brisbane.

15 December.

[1](#) [\[2015\] FWCFB 620](#).

Printed by authority of the Commonwealth Government Printer

<Price code A, [MA000059](#), PR560358 >