



## **ASU Submission to Fair Work Commission**

### **Four yearly review of modern awards**

#### **AM2017/51 – Overtime for Casuals Business Equipment Award 2010**

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**Submitter:** Robert Potter, Acting National Secretary

**Organisation:** Australian Services Union

**Address:** 116 Queensberry Street  
Carlton South, Victoria, 3053

**Phone:** 03 9342 1400

**Email:** [info@asu.asn.au](mailto:info@asu.asn.au)

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1. Further to the Directions of Vice President on 6 December 2019 in this matter the ASU makes this submission in relation to Overtime for Casuals in the *Business Equipment Award 2010* (“BE Award”).
2. The relevant BE award provisions in question are in clause 13. - Casual Employment as per the following extract:

**13. Casual employment**

**13.2** *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 24%.* (emphasis added)

and Clause 30. - Overtime as follows:

**30. Overtime**

**30.1 Overtime rates**

*(a) An employee who works in excess of or outside the employee's ordinary hours established in accordance with clause 27— Ordinary hours of work and rostering or clause 28 – Special provisions for shiftworkers, of this award will be paid at the rate of time and a half for the first three hours and double time thereafter, until the completion of work.* (emphasis added)

It is important to note that the above provisions are subject to change as per the Exposure Draft (AM2019/17) issued on 29 January 2020 in terms of numbering and different formatting but not materially in terms of drafting.

3. The plain and ordinary meaning of the underlined words in the BE award clauses above clearly provides for the payment of overtime on the ordinary time rate for a casual which by definition includes the 24% casual loading ie overtime is payable on a compounding basis. There is no other ordinary rate of pay that applies to a casual employee covered by this award and no express provision excluding casual employees from receiving both their casual loading and overtime rates. The ASU relies on the decisions in *ANMF v Domain Aged Care T/A /Opal* [2019] FWCFB 1716 and *AMWU v*

*Energy Australia Yallourn* [2017] FWCFB 381 particularly at [39] – [41] in similar circumstances albeit in relation to enterprise agreements otherwise underpinned by modern award provisions.

4. Apart from the increase of the casual loading from 20% to 24% through award modernisation there appears to have been little variation relevant to this matter in the drafting, and therefore, entitlement to overtime payment in the award modernisation transition from the predecessor *Business Equipment Industry – Clerical Officers – Award 2000* to the current modern BE award.
5. The Australian Business Industrial and the NSW Business Chamber Ltd ('ABI') on 7 February 2020 lodged submissions in relation to the BE award after the Directions of 6 December but only in passing and otherwise refer to earlier submissions lodged on 20 January 2020.
6. The ASU has also read this earlier submission and rejects the "four-fold" reasoning in paragraph 2.3 (a), (c) and (d) while (b) was specifically referring to the 4 yearly review of the *Health Professionals and Support Services Award 2010*.
7. The submission at 2.3 (a) refers to the "...*natural and ordinary meaning of the words used in each award*" including the BE award. The ASU agrees that the natural and ordinary meaning of the words used in each award should apply however disagree with ABI's interpretation. The ASU interpretation is to adopt the entitlement as originally clearly drafted which essentially has remained unchanged since the award was made.
8. The submission at 2.3 (c) refer to where awards are silent with respect to the application of a casual loading during overtime hours. ABI refers to the history applicable to casual loading provisions generally favouring an interpretation which does not apply a casual loading to any overtime penalty rates but this is not substantiated by any evidentiary material or relevant authority supporting their claim. Indeed there is no clear history of federal awards dictating whether overtime rates do not apply to the casual loading just because it may appear silent in any particular award. Further the BE award has it's own unique history such as a casual loading of 24% when the greater majority of modern awards have a common casual loading of 25%.

9. Finally in relation to the ABI submission claims that union parties seek to depart from the existing operation of the award claiming such changes are substantive and require a probative evidentiary basis and cogent reasons to support a new approach. Firstly the ASU rejects there is a new approach or any departure from the existing operation of the award which are continuous through it's pre modernisation and post modernisation history. Secondly even if there was any apparent change to interpretation any lack of probative evidence has not stopped employer organisations from making submissions, on behalf of employer interests, with conclusions they claim to be self-evident from the plain and ordinary meaning of award clauses determined by the award modernisation Full Bench.
  
10. AiG also lodged a submission in relation to the BE award on 18 January 2020 at [7] to [10]. The claim is that by clause 13.2's express terms it does not require payment of the casual loading during overtime. This is hardly determinative of the entitlement for reasons given previously. The ASU submits there is an express provision for ordinary time rates and overtime rates for casuals. There can at least be nothing less than an implied right for casuals to be paid overtime based on their casual loading. To claim otherwise is to rely on some unfair and unwritten implied rule for casuals and another for permanent and part time staff which under normal circumstances would be drafted in clear express terms e.g. paid personal/carers' leave exclusion. Such express terms for overtime has never existed in the history of the predecessor and post modernised BE award.