

*Fair Work Act 2009*  
FAIR WORK COMMISSION  
s. 156 – 4 yearly review of modern awards – Overtime for casuals

AM2017/51

## AWU POSITION ON VARIOUS AWARDS

### BACKGROUND

1. On 15 March 2019, the Fair Work Commission Full Bench constituted to deal with 'Overtime for casuals' common issues in various modern awards issued directions for the filing of material and the further conduct of the proceedings.
2. The directions included that the parties provide definitive advice concerning whether there are outstanding issues with a large number of awards listed in a Schedule to the Directions.
3. The position of The Australian Workers' Union ("**AWU**") concerning awards listed in the Schedule that the AWU has an interest in appears below.

### GENERAL POINT – *DOMAIN AGED CARE*

4. Subsequent to the directions hearing on 25 February 2019 in these proceedings, a Full Bench decision was published in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 ("**Domain Aged Care**") that appears relevant to a number of awards being considered by this Full Bench.
5. In *Domain Aged Care*, the Full Bench<sup>1</sup> was required to interpret the casual employment conditions in the *Nurses Award 2010* ("**Nurses Award**") for the purposes of conducting the better off overall test for the relevant enterprise agreement.
6. Clause 10.4(b) of the Nurses Award is in very similar terms to corresponding provisions in a number of modern awards and states:

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<sup>1</sup> A separate decision was issued by Commissioner McKenna, but she agreed with the majority decision in terms of interpreting the relevant award.

*A casual employee will be paid an hourly rate equal to 1/38<sup>th</sup> of the weekly rate appropriate to the employee's classification plus a casual loading of 25%.*

7. The overtime penalty rates in the Nurses Award are found in clause 28.1 and again use the very common terminology of "time and a half", "double time" and "double time and a half" when prescribing overtime penalty rates.

8. The Full Bench interpreted the above provisions to mean:

(i) "the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'<sup>2</sup>; and

(ii) "overtime penalties are ... paid on the loaded casual rates of pay" because "the relevant 'time earnings' for a casual under clause 10.4 include the casual loading".<sup>3</sup>

9. Admittedly, clause 10.4(d) of the Nurses Award was also relevant as a point of distinction for shift allowances, it reads:

*A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.*

10. However, the Full Bench appears to have viewed this distinction as merely confirming its view about the ordinary meaning of the relevant terms:

*... It is already clear that the ordinary rate for casuals is the loaded rate. Clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would have been subject to the general position that penalties are applied to the loaded casual rate, and this was not intended to be the case for shift allowances...<sup>4</sup>*

11. *Domain Aged Care* appears helpful in terms of establishing the current applicable overtime rate of pay for casual employees under a number of modern awards which contain wording which is relevantly the same or very similar to that appearing in the Nurses Award.

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<sup>2</sup> *Domain Aged Care* - Gostencnik DP and Colman DP at [17].

<sup>3</sup> *Ibid* at [19].

<sup>4</sup> *Ibid* at [18].

12. Establishing the current applicable rate is important in these proceedings because it allows the Full Bench to consider whether or not a position advanced by a party constitutes a variation to the current terms.

### **AWU POSITION ON SPECIFIC AWARDS**

#### *AIRLINE OPERATIONS GROUND STAFF AWARD 2010*

13. Clause 11.5(b) and 32.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

14. On that basis, the AWU does not seek a variation to the current terms.

#### *ALUMINUM INDUSTRY AWARD 2010*

15. Applying *Domain Aged Care*, clause 10.4(a) establishes a casual ordinary hourly rate of pay that includes the 25% casual loading. The overtime rates in clause 21.1(a) are applied to the ordinary hourly rate of pay meaning the casual loading is included in overtime calculations on a compounding basis.

16. On that basis, the AWU does not seek a variation to the current terms.

#### *AMUSEMENT, EVENTS AND RECREATION AWARD 2010*

17. Applying *Domain Aged Care*, clause 10.4(d) establishes a casual ordinary hourly rate of pay that includes the 25% casual loading. The overtime rates in clause 23.1(a) are “time and a “half” and “double time” meaning the casual loading is included in overtime calculations on a compounding basis.

18. On that basis, the AWU does not seek a variation to the current terms.

#### *ASPHALT INDUSTRY AWARD 2010*

19. Clause 10.4(b) states the “casual loading constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

20. On that basis, the AWU does not seek a variation to the current terms.

#### *BUILDING AND CONSTRUCTION AWARD 2010*

21. A separately constituted Full Bench is dealing with this award.

#### *CEMENT AND LIME AWARD 2010*

22. Clause 10.5(b)(i) and 23.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

23. On that basis, the AWU does not seek a variation to the current terms.

#### CEMETERY INDUSTRY AWARD 2010

24. Clause 10.3(b) and 23.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

25. On that basis, the AWU does not seek a variation to the current terms.

#### CONCRETE PRODUCTS AWARD 2010

26. Clause 11.5(b)(i) and 24 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

27. On that basis, the AWU does not seek a variation to the current terms.

#### COTTON GINNING AWARD 2010

28. It does not appear casual loading is included in overtime calculations due to clause 13.4(b).

29. The AWU has not sought to vary this term but supports the claim submitted by M Ferguson on 26 June to the effect that casual loading should be paid in addition to shift penalties.

#### ELECTRICAL POWER INDUSTRY AWARD 2010

30. It does not appear casual loading is included in overtime calculations due to clause 10.4(e).

31. The AWU has not sought to vary this term

#### FOOD, BEVERAGE AND TOBACCO MANUFACTURING AWARD 2010

32. Clause 13.1 states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

33. On that basis, the AWU does not seek a variation to the current terms.

FUNERAL INDUSTRY AWARD 2010

34. Applying *Domain Aged Care*, clause 10.4(b) establishes a casual ordinary rate of pay includes the 25% casual loading. The overtime rates in clause 24.1 are applied to the ordinary rate meaning the casual loading is included in overtime calculations on a compounding basis.

35. On that basis, the AWU does not seek a variation to the current terms.

GARDENING AND LANDSCAPING SERVICES AWARD 2010

36. Clause 10.4(b) and 22.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

37. On that basis, the AWU does not seek a variation to the current terms.

GAS INDUSTRY AWARD 2010

38. Clause 10.6(b) and 23.3 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

39. On that basis, the AWU does not seek a variation to the current terms.

HAIR AND BEAUTY INDUSTRY AWARD 2010

40. The overtime penalty rates for casual employees are identified in clause 31.2. The AWU has not sought to vary the current terms.

HORSE AND GREYHOUND TRAINING AWARD 2010

41. Clause 10.4(c) states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

42. On that basis, the AWU does not seek a variation to the current terms.

HORTICULTURE AWARD 2010

43. The overtime penalty rates for casual employees were recently inserted as part of the award review and appear in clause 24.3. The AWU has not sought to vary the current terms.

HYDROCARBONS INDUSTRY (UPSTREAM) AWARD 2010

44. The casual overtime rates payable pursuant to clause 10.4(b) and 26 are not entirely clear. On balance, it appears the casual loading is paid on a cumulative basis when overtime is worked.

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS  
AWARD 2010

45. Clause 14.1 states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

46. On that basis, the AWU does not seek a variation to the current terms.

MINING INDUSTRY AWARD 2010

47. Clause 10.3(b) states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

48. On that basis, the AWU does not seek a variation to the current terms.

NURSERY AWARD 2010

49. Applying *Domain Aged Care*, clause 10.4(b) establishes a casual ordinary rate of pay that includes the 25% casual loading. The overtime rates in clause 26 refer to a percentage of the “appropriate minimum wage” – which must include the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

50. On that basis, the AWU does not seek a variation to the current terms.

OIL REFINING AND MANUFACTURING AWARD 2010

51. The casual overtime rates payable pursuant to clause 10.3(b) and 24 are not entirely clear. On balance, it appears the casual loading is paid on a cumulative basis when overtime is worked.

PASTORAL AWARD 2010

52. Clause 10.4(c), 31.2, 36.1 and 42.2 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

53. On that basis, the AWU does not seek a variation to the current terms.

PEST CONTROL INDUSTRY AWARD 2010

54. Clause 10.5(c) and 22.1(a) are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

55. On that basis, the AWU does not seek a variation to the current terms.

PHARMACEUTICAL INDUSTRY AWARD 2010

56. The casual overtime rates payable pursuant to clause 12.1 and 25 are not entirely clear. On balance, it appears the casual loading is paid on a cumulative basis when overtime is worked.

PREMIXED CONCRETE AWARD 2010

57. Clause 10.5(b) and 23.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

58. On that basis, the AWU does not seek a variation to the current terms.

QUARRYING AWARD 2010

59. Clause 13.2(a) and 28.1 are to the same effect as the provisions interpreted by the Full Bench in *Domain Aged Care* meaning the casual loading is included in overtime calculations on a compounding basis.

60. On that basis, the AWU does not seek a variation to the current terms.

RACING CLUBS EVENTS AWARD 2010 (other than liquor employees)

61. Applying *Domain Aged Care*, clause 13.2 establishes a casual ordinary rate of pay that includes the 25% casual loading. The overtime rates in clause 29.1 refer to a percentage of the “relevant minimum wage” – which must include the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

62. On that basis, the AWU does not seek a variation to the current terms.

RACING INDUSTRY GROUND MAINTENANCE AWARD 2010

63. Applying *Domain Aged Care*, clause 10.3(b) establishes a casual ordinary rate of pay that includes the 25% casual loading. The overtime rates in clause 23.1 refer to a percentage of the “relevant minimum wage” – which must

include the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

64. On that basis, the AWU does not seek a variation to the current terms.

#### SALT INDUSTRY AWARD 2010

65. Clause 10.3(B) states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

66. On that basis, the AWU does not seek a variation to the current terms.

#### SEAFOOD PROCESSING AWARD 2010

67. Clause 12.1 states the casual loading “constitutes part of the casual employee’s all purpose rate”. Therefore, the casual loading is included in overtime calculations on a compounding basis.

68. On that basis, the AWU does not seek a variation to the current terms.

#### SILVICULTURE AWARD 2010

69. Applying *Domain Aged Care*, clause 10.4(b) establishes a casual ordinary rate of pay that includes the 25% casual loading. The overtime rates in clause 26 refer to a percentage of the “appropriate rate” – which must include the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

70. On that basis, the AWU does not seek a variation to the current terms.

#### STORAGE SERVICES AND WHOLESALE AWARD 2010

71. Applying *Domain Aged Care*, clause 11.4(b) establishes a casual ordinary time rate of pay that includes the 25% casual loading. The overtime rates in clause 24.1 use the terms “time and a half” and “double time”– the reference to “time” must include the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

72. On that basis, the AWU does not seek a variation to the current terms.

#### SUGAR INDUSTRY AWARD 2010

73. The casual overtime rates payable pursuant to clause 11.3(a) and 31 are not entirely clear. On balance, given the sentence appearing at the end of clause

11.3(a), it appears the casual loading is paid on a cumulative basis when overtime is worked.

WASTE MANAGEMENT AWARD 2010

74. The overtime penalty rates for casual employees are identified in clause 14.5. The AWU has not sought to vary the current terms.

WATER INDUSTRY AWARD 2010

75. The overtime penalty rates for casual employees are identified in clause 10.5(c). The AWU has not sought to vary the current terms.

WINE INDUSTRY AWARD 2010

76. Applying *Domain Aged Care*, clause 13.2 establishes a casual ordinary time rate of pay that includes the 25% casual loading. The overtime rates in clause 30 only refer to a percentage – the percentages must be applied to the employee's regular rate which includes the casual loading for a casual employee. This means the casual loading is included in overtime calculations on a compounding basis.

77. On that basis, the AWU does not seek a variation to the current terms.

WOOL STORAGE, SAMPLING AND TESTING AWARD 2010

78. The casual overtime rates payable pursuant to clause 10.3(b) and 25 are not entirely clear. On balance, it appears the casual loading is paid on a cumulative basis when overtime is worked.



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