



IN THE FAIR WORK COMMISSION

AM2017/51

Four Yearly Review of Modern Awards

Common Issues

Overtime for Casuals

SUBMISSIONS

23/01/2018

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Introduction

1. The Health Services Union (HSU) makes these submissions in response to the Statement issued by the Full Bench on 4 December 2017¹ concerning the issue of the overtime entitlement for casuals in modern awards.
2. The Statement invited parties to:
 - a. provide a written response concerning the accuracy of the list of awards in Attachment A to that Statement; and
 - b. lodge a draft determination setting out the variation.
3. The HSU has an interest in the following awards which are listed in Attachment A:
 - a. Aboriginal Community Controlled Health Services Award ('ACCHS Award')
 - b. Aged Care Award
 - c. Ambulance and Patient Transport Industry Award ('APTI Award')
 - d. Health Professionals and Support Services Award ('HPSS Award')
 - e. Medical Practitioners Award
 - f. Nurses Award
 - g. Pharmacy Industry Award ('PIA Award')
 - h. Supported Employment Services Award ('SES Award')
4. Our submissions are accompanied by draft determinations reflecting our proposed variations.

Preliminary issues

5. The HSU welcomes the opportunity to provide submissions in this matter, to assist in ensuring that modern awards provide clear and unambiguous provisions in relation to casual employees' entitlements to overtime.
6. We note that the Full Bench in the *Casual and Part Time Common Issue*, in its decision of 5 July 2017,² set down two generally applicable propositions in support of the entitlement of casuals to overtime:
 - (1) Casual employees who work in excess of ordinary hours in a single day, or over 38 hours per week in a particular week or on average over the course of a roster cycle, are subject to the same disabilities as full time employees – that is, fatigue and a general restriction of opportunities to engage in family, social, community and other activities.

¹ [2017] FWCFB 6417

² [2017] FWCFB 3541



- (2) The standard casual loading of 25% in modern awards does not include any element of compensation for the disabilities associated with working overtime.³
7. We provide further, detailed submissions in relation to each Award below, but make a number of general submissions at the outset in relation to the the Awards in which the HSU has an interest.
 8. Firstly, it is our view that overtime clauses in these awards apply to casual as well as full-time and part-time employees, unless casual employees are clearly and specifically excluded. A casual employee is an ‘employee’ for the purposes of each Award, and in accordance with s 133 of the *FW Act*.
 9. We therefore do not agree with the Attachment A to the Statement of 4 December 2017 (‘Attachment A’) in so far as it assumes that it is ‘unclear whether overtime is payable to casuals’ where an Award refers to employees generally in its overtime clause.
 10. It is our view that for all of the awards listed in Attachment A in which we have an interest, it is abundantly clear that casual employees are entitled to overtime, and are entitled.
 11. Secondly, it is our view that casual employees are entitled to overtime in these awards in the same circumstances as all employees under these awards, unless they are clearly and specifically excluded from such provisions. Overtime payments will generally commence when ordinary hours are exceeded (either on a per day or per week basis), where rostered workers are unforeseeably retained beyond the completion of a rostered shift, or where work is performed outside the span of ordinary hours otherwise fixed by the award.
 12. Where provisions around overtime for casuals in an award are unclear, it is our view that at a minimum, casual employees should be paid overtime rates for work performed in the following circumstances:
 - a. in excess of the number of hours fixed for their shift;
 - b. in excess of 38 hours per week
 - c. in excess of 10 hours per shift/day
 13. As was observed in the Part-Time and Casuals Case,⁴ the meaning of ‘casual’ employment is far from clear or fixed,⁵ and neither is it defined in the *Fair Work Act*. Most modern awards simply define a casual employee as one who is engaged and paid as such. There is not a bright line between casual and so-called ‘permanent’ employment. Many casual employees work the same number of hours each week, and expect to stay in their jobs long term. Roster provisions in many modern awards still apply to casual employees. At a minimum a casual employee under an award is usually entitled to at least 24 hour notice before a change in shift.⁶
 14. We therefore submit that casual employees should be paid overtime for hours worked in excess of their shift or roster.

³ [2017] FWCFB 3541

⁴ [2017] FWCFB 3541

⁵ [2017] FWCFB 3541

⁶ See, eg *Aboriginal Community Controlled Health Award*, clause 22.2.



15. In addition, every award should also make clear that casual employees are entitled to, at a minimum, overtime for work performed in excess of the hours they are engaged to work over 38 hours per week and/or 10 hours a day/shift.
16. The NES provides, per s 62 of the FW Act, that an employee must not be required to work more than 38 hours per week, and an employee who is not a full-time employee must not be required to work more than the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's ordinary hours of work in a week.
17. We are therefore of the view that it should be made clear that for casual employees, overtime rates should always be paid on all work performed in excess of 38 hours per week.
18. We also believe that, at a minimum, all awards in which the HSU has an interest should make clear that casual employees are entitled to overtime for hours worked in excess of a maximum of 10 hours per day or shift. It is standard in many awards that an employee can only work 8 or 10 ordinary hours per day or shift. Working longer shifts than this can lead to fatigue and incapacity, and may be particularly harmful for casual employees who may not work predictable hours.
19. Finally, we submit that, in relation to the awards in which the HSU has an interest, overtime rates should be paid in addition to the casual loading.
20. It was clear when the health related Awards were created the Fair Work Commission intended casuals to be paid overtime and casual loading. The Full Bench in Award Modernisation decision 2009 AIRCFB 345 found, in regard to the Aged Care Award, Nurses Award, HPSS Award and Medical Practitioners Award:

Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.⁷

21. This is also consistent with the comments of the Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001.⁸ In that case, the Full Bench indicated support for the 'default approach' suggested by the Productivity Commission, whereby the 'rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non casual employees'.⁹

Awards under review

22. As mentioned above, we believe that Attachment A to the Statement of 4 December 2017 is not accurate. Of the awards in which the HSU has an interest, most contain overtime provisions that

⁷ 2009 AIRCFB 345, [150]

⁸ *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 ('*Penalty Rates Decision*')

⁹ [2017] FWCFB 1001 ('*Penalty Rates Decision*'), [335] – [337]



apply in general to employees, and we believe clearly also apply to casual employees. Unless casuals are specifically excluded from overtime entitlements in awards, we believe there is no reason why they should not apply.

23. We have provided some comments and draft determinations in relation the awards in which we have an interest below, where we believe there is value in clarifying the entitlements of casuals to overtime.

Aboriginal Community Controlled Health Services Award

Whether overtime applies to casuals

24. The HSU does not agree that it is unclear whether overtime applies to casuals under the ACCHS Award. The overtime clause in this award refers to employees in general, and therefore applies to all employees. Nowhere in the clause or award indicates that casuals should be specifically excluded from overtime provisions.

When overtime commences

25. The Award clearly provides in clause 24.2 (and see clause 19.1 of the most recent Exposure Draft) that overtime is payable for work performed (i) in excess of the number of hours fixed as a day's, week's or fortnight's work, or (ii) outside the span of hours of 7am - 7pm, Monday to Friday.
26. It seems clear that this clause applies to all employees. There is no indication anywhere in the award that this clause would not apply to casual employees.
27. However, this particular award does seem to be somewhat unclear about how overtime applies to work performed over 38 hours per week. This appears to be the case not only for casuals, but for full-time and part-time employees as well. Clause 21 Span of Hours (clause 13.3 in the ED) provides that: 'The ordinary hours of work for a full-time employee are an average of 38 hours per week over a fortnight.' But there is no indication of how this interacts with Clause 19.1 Overtime. It is our view that this is likely to be a drafting matter, and that the application of overtime for all employees, where they work more than 38 hours per week over a fortnight, should be clarified.
28. In relation to casual employees' entitlements to overtime, which are the subject of these submissions, we believe that it should at least be made clear that casuals employed under the ACCHS Award are entitled to overtime for all work performed in excess of 38 hours per week, as well as the other instances in clause 24.2. As discussed above, this is in accordance with s 62 of the *FW Act*.

What rate overtime is paid

29. We are of the view that the casual loading should be paid in addition to the overtime payment provided in clause 19.1. As discussed above, this is in accordance with the approach of the Full Bench in *the Penalty Rates Case*. If the overtime payment were to be paid in substitution for the casual loading, this would need to have been made clear in the provisions of the Award.



Proposed variation:

Insert new sub-clauses 24.2(e) and (f) as follows:

(e) In addition to the above circumstances, casual employees will also be paid at 150% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter for all work performed in excess of:

(i) 38 hours per week, or;

(ii) 10 hours per day/shift.

(f) Overtime rates are payable in addition to casual loading.

Aged Care Award

When overtime commences

30. Attachment A does not list this award as having unclear provisions around when overtime commences for casual employees. However, we are of the view that the clause should be amended to make clear that casuals always receive overtime for work in excess of 38 hours per week.
31. Clause 25.1(b)(i) provides that:

All time worked by a part-time or casual employee in excess of 38 hours per week or 76 per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturdays and Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.
32. We do not believe that the intention of the clause when drafted was to allow casual employees to be paid overtime for work performed in excess of 76 hours per fortnight. Rather, it seems more likely that this part of the clause is only relevant to part-time employees whose part-time arrangements allow for such an averaging of hours over a fortnight. This can be ascertained from the fact that clause 10.4 in that same award provides that a casual employee is one engaged ‘*to work up to and including 38 hours per week*’.
33. Additionally, we believe that it is impractical and unfair for overtime to only apply after 76 hours per fortnight for a casual employee. Casual employees have, in general, irregular hours compared to part-time and full-time employees, and less protection around changes to shifts and rosters.

What rate overtime is paid

34. The HSU does not agree that the overtime rate payable to casuals is unclear in the Aged Care Award. Clause 25.1(b) provides for overtime rates for casual and part-time employees.
35. There is no clause in this Award indicating that overtime rates are in substitution for casual loading. Clause 10.4(b) makes clear that the casual loading of 25% is payable to casual employees in addition to their weekly rate.



36. We are of the view that it should be inferred from the current version of the Award that the casual loading is always payable in addition to other penalty and overtime payments, unless specifically excluded.
37. We have provided a draft determination which clarifies the entitlements for casual employees in accordance with these views.

Proposed variation:

Amend Clause 25.1 as follows:

Delete references to casual employees in sub-clause 25.1(b)

Insert new sub-clause 25.1(c) Casual employees:

25.1(c) Casual employees

i) All time worked by a casual employee in excess of 38 hours per week will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturdays and Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by a casual employee which exceeds 10 hours per day or shift, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) All time worked in excess of their rostered hours on any one day will be overtime and paid at the rates prescribed by clause 25.1(c).

(iv) Overtime rates are payable in addition to casual loading.

Ambulance and Patient Transport Industry Award

Unclear whether overtime applies to casuals

38. The HSU does not agree that it is unclear whether overtime applies to casuals under the APTI Award. The overtime clause in this award refers to ‘all work done’, and therefore must be read as applying to all employees. Nowhere in the clause or award indicates that casuals should be excluded from overtime provisions.

Unclear when overtime commences

39. Clause 24.1 in this award clearly outlines how and when overtime is paid to all employees, and nowhere suggests that the clause does not apply to casual employees.



Unclear at what rate overtime is paid

- 40. Clause 10.5(d) excludes weekend and public holiday penalty rates from attracting casual loading, but not overtime. The casual loading of 25% should therefore apply in addition to overtime rate.
- 41. We propose the casual entitlement to overtime could be clearly expressed by amending the table in clause 14.1 of the Exposure Draft, by adding a column to the right titled ‘Overtime rate for casual employees’.

Amend table at clause X by adding a column to the right as follows:

For overtime worked on	Overtime rate % of ordinary hourly rate	Overtime rate for casual employees % of ordinary hourly rate
For any work exceeding the number of hours fixed as a day’s, week’s, or fortnight’s work on:		
Monday to Friday—first 2 hours	150%	175%
Monday to Friday—after 2 hours	200%	225%
Saturday all day	200%	225%
Sunday all day	200%	225%
Work in excess of an employee’s rostered hours on a public holiday	250%	275%
Work outside a spread of 12 hours from the commencement of the last previous rostered period of duty, provided that the overtime is not continuous with the next succeeding rostered period of duty	200%	225%

Health Professionals and Support Services Award

- 42. The most recent Exposure Draft of the HPSS Award clarifies the entitlements of casual employees to overtime.
- 43. However, clause 19.2(d) in the Exposure Draft provides that overtime rates are paid in substitution for casual loading. This is a departure from the current clause in the HPSS Award which does not mention casual loading being substituted, and was not a change which the HSU agreed to.
- 44. We submit that casual loading is payable as well as overtime rates in the HPSS Award. This is consistent with the Award Modernisation decision 2009 AIRCFB 345, as well as the Penalty Rates Case, as discussed above.



45. The reference to casual loading should therefore be removed from clause 19.2(d) of the Exposure Draft.

Medical Practitioners Award

Whether overtime applies to casuals

46. Clause 24.1 states that overtime rates should apply to all medical practitioners, excluding senior doctors, for hours worked in excess of 38 hours per week. It seems clear that casuals are entitled to overtime under this clause too.

When overtime commences

47. The Award makes it abundantly clear that overtime is payable for work in excess of 38 hours per week. We would support including an amendment to the Award indicating that overtime also applies to casual medical practitioners, excluding senior doctors, who work in excess of 10 hours per day.

What rate overtime is paid

48. We submit that overtime is paid in addition to the casual loading.

Proposed variation:

Delete clause 24.1 and replace as follows:

24.1 Overtime rates

(a) For all Medical Practitioners, except Senior Doctors, overtime applies for hours worked in excess of:

(i) 38 per week; or

(ii) 10 hours per day/shift; or

(iii) in excess of the number of hours fixed for their shift.

(b) Such hours between Monday and Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.

(c) Overtime worked on a Sunday will be paid at the rate of double time.

(d) Overtime worked on a public holiday will be paid at the rate of double time and a half.



Nurses Award

Whether overtime applies to casuals

49. As stated above, we do not agree that it is unclear whether casuals are entitled to overtime under this Award. We submit that casuals are entitled to overtime.

When overtime commences

50. We do agree that it is somewhat unclear when overtime commences for casual employees, as clause 21 does not adequately define ordinary hours of work for a casual employee. As reflected in our draft determination below, we submit that the award should be amended to make clear that overtime is payable where a casual employee:

- (1) works in excess of 10 hours per shift; and/or
- (2) works in excess of 38 hours per week; and/or
- (3) works in excess of their rostered daily ordinary hours

What rate overtime is paid

51. We submit that overtime is paid in addition to the casual loading.

Proposed variation:

Insert new Clause 28.1(e) as follows:

(e) Casual employees

Overtime rates as prescribed in clause 28.1(a) are payable where a casual employee:

- (i) works in excess of 10 hours per shift; and/or*
- (ii) works in excess of 38 hours per week; and/or*
- (iii) works in excess of their rostered shift.*

Pharmacy Industry Award

When overtime commences

52. We agree that the Award could be clearer on when overtime commences for casual employees. We propose a clause containing the following, adapted from clause 26.1:

Proposed variation:

Insert clause 26.3:

26.3 An employer must pay casual employees at the overtime rate, as specified in clause 26.2(a) for any hours worked at the direction of the employer:



- (i) in excess of 38 hours per week; or
- (ii) in excess of 10 hours per day; or
- (iii) that are not continuous, except for rest breaks and meal breaks as specified in clause 28—Breaks; or
- (iv) between midnight and 7.00 am; or
- (v) in excess of their rostered shift.

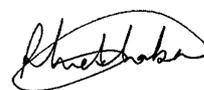
Supported Employment Services Award

Whether overtime applies to casuals

53. We do not agree with Attachment A that it is unclear whether overtime applies to casual employees under this Award. Clause 21 – Overtime applies to all employees, including casuals. Moreover, Clause 10.5 provides that casual employees will be paid overtime payments in addition to casual loading, from which it can be readily inferred that overtime applies to casual employees.

When overtime commences

54. We submit that overtime commences in accordance with clause 20 – Ordinary hours of work and rostering. That is, overtime is payable for work performed in excess of:
- a. 8 hours a shift/ day
 - b. 38 hours a week
 - c. Outside the ordinary hours of 6am – 6pm, Monday to Sunday (subject to clause 21 Penalty Rates)
 - d. in excess of the starting and finishing times set for the shift.



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SCHEDULE A

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Aboriginal Community Controlled Health Services Award 2010

[MA000115]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Aboriginal Community Controlled Health Services Award 2010 be varied as follows.
- [2] By inserting new sub-clauses 24.2(e) and (f) as follows:
- (e) In addition to the above circumstances, casual employees will be paid at 150% of the minimum hourly rate for the first two hours and 200% of the minimum hourly rate thereafter for all work performed in excess of:*
- (i) 38 hours per week, or;*
- (ii) 10 hours per day/shift.*
- (f) Overtime rates are payable in addition to casual loading.*
- [3] The determination shall operate on and from <<date>>



DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Aged Care Award 2010

[MA000018]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Aged Care Award 2010 be varied as follows.
- [2] By deleting references to casual employees in sub-clause 25.1(b), and inserting new sub-clause 25.1(c) Casual employees:

25.1(c) Casual employees

i) All time worked by a casual employee in excess of 38 hours per week will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturdays and Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by a casual employee which exceeds 10 hours per day or shift, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) All time worked in excess of their rostered hours on any one day will be overtime and paid at the rates prescribed by clause 25.1(c).

(iv) Overtime rates are payable in addition to casual loading.

- [3] The determination shall operate on and from <<date>>



DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Health Professionals and Support Services Award 2010

[MA000027]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Health Professionals and Support Services Award **Exposure Draft** be varied as follows.
- [2] By deleting the following words from subclause 19.2(e):
‘and the casual loading in clause 6.4(e)’
- [3] The determination shall operate on and from <<date>>



DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Medical Practitioners Award 2010

[MA000031]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

[1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Medical Practitioners Award 2010 be varied as follows.

[2] By deleting clause 24.1 and replacing as follows:

24.1 Overtime rates

(a) For all Medical Practitioners, except Senior Doctors, overtime applies for hours worked in excess of:

(i) 38 per week; or

(ii) 10 hours per day/shift; or

(iii) in excess of their rostered shift.

(b) Such hours between Monday and Saturday will be paid at the rate of time and a half for the first two hours and double time thereafter.

(c) Overtime worked on a Sunday will be paid at the rate of double time.

(d) Overtime worked on a public holiday will be paid at the rate of double time and a half.

[3] The determination shall operate on and from <<date>>



DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Nurses Award 2010

[MA000034]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

[1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Nurses Award 2010 be varied as follows.

[2] Insert new Clause 28.1(e) as follows:

(e) Casual employees

Overtime rates as prescribed in clause 28.1(a) are payable where a casual employee:

(i) works in excess of 10 hours per day or shift; and/or

(ii) works in excess of 38 hours per week; and/or

(iii) works in excess of their rostered shift.

[3] The determination shall operate on and from <<date>>



DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

(AM2017/51)

Pharmacy Industry Award 2010

[MA000012]

Health and Welfare

VICE PRESIDENT HATCHER

MELBOURNE, JANUARY 2018

Review of modern awards to be conducted.

[1] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Pharmacy Industry Award 2010 be varied as follows.

[2] Insert new clause 26.3:

26.3 *An employer must pay casual employees at the overtime rate, as specified in clause 26.2(a) for any hours worked at the direction of the employer:*

(i) in excess of 38 hours per week; or

(ii) in excess of 10 hours per day; or

(iii) that are not continuous, except for rest breaks and meal breaks as specified in clause 28—Breaks; or

(iv) between midnight and 7.00 am; or

(v) in excess of their rostered shift.

[3] The determination shall operate on and from <<date>>

