Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Reply Submission

Overtime for Casuals – Third Category of Awards (AM2017/51)

17 February 2020

4 YEARLY REVIEW OF MODERN AWARDS
OVERTIME FOR CASUALS – THIRD CATEGORY

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in relation to the following awards identified at paragraphs [12] and [14](1) of the statement[1] issued by the Fair Work Commission (**Commission**) on 6 December 2019 (**Statement**):

   (a) *Aluminium Industry Award 2010* (**Aluminium Award**);

   (b) *Business Equipment Award 2010* (**BE Award**);

   (c) *Pharmaceutical Industry Award 2010* (**Pharmaceutical Award**);

   (d) *Salt Industry Award 2010* (**Salt Award**); and

   (e) *Wool Storage, Sampling and Testing Award 2010* (**Wool Award**).

2. The submission responds to the written submission filed by the Australian Workers' Union (**AWU**), dated 7 February 2020, and the Australian Services Union (**ASU**), dated 14 February 2020.

[1] *4 yearly review of modern awards – Overtime for casuals* [2019] FWC 8318.

2. ALUMINIUM AWARD

3. The AWU's submissions do not raise any new matters that have not previously been addressed in our submissions of 18 January 2020 and 7 February 2020. We continue to rely on those submissions.

3. BE AWARD

4. Ai Group contends that under the BE Award, a casual employee is not entitled to the casual loading during the performance of overtime. Accordingly, we dispute the ASU's submissions in this regard, for the reasons that follow.

5. *First*, the ASU submits that the "plain and ordinary meaning" of clauses 13.2 and 30.1 of the BE Award "clearly provide for the payment of overtime on the ordinary time rate for a casual which by definition includes the 24% casual loading i.e. overtime is payable on a compounding basis".

6. There is self-evidently no basis for the ASU's submission. As set out in our submission of 18 January 2020, clause 13.2 of the award expressly limits the entitlement to the casual loading to the performance of ordinary hours of work. No other provision of the award extends the entitlement to the casual loading to overtime.

7. Although the award does not expressly state that the casual loading is not payable during overtime, it is clear from clause 13.2 that the casual loading is not payable during overtime. The absence of an "express provision excluding casual employees from receiving both their casual loading and overtime rates" is not a proper basis for finding that, notwithstanding the terms of clause 13.2, the casual loading is payable during overtime.

8. The ASU's submission in this regard and at paragraph 10 entirely disregards the nature, size, scope and scale of the Part 10A Award Modernisation Process, which did not lend itself to adopting an approach to drafting modern awards in the manner suggested by the ASU. In our submission, little if anything can be made of the absence of such a provision. It certainly cannot be inferred that in the absence of such a clause, the AIRC intended that casual employees receive the casual loading during overtime.

9. There is no basis for reading clause 13.2 as establishing an employee's "ordinary time rate" or for reading clause 30.1 as requiring the calculation of overtime rates on that "ordinary time rate". To accept the ASU's submission, one must read

various words into clause 13 and clause 30. There is no sound basis for doing so for the following reasons:

(a) As is obvious, clause 13.2 does not term or denote the rate payable pursuant to it as the "ordinary rate of pay" or attribute any such other terminology to it.

(b) Clause 13.2 prescribes the rate payable to a casual employee only during ordinary hours. Accordingly, even if it were to establish the "ordinary rate of pay", however defined or described, it expressly entitles an employee to that rate only during ordinary hours of work.

(c) As is also clear, clause 30.1 does not require the calculation of overtime rates on the amount payable pursuant to clause 13.2. It does not mandate the calculation of the rates by reference to that clause, the "ordinary time rate" or any other such amount that is derived pursuant to clause 13.2. Rather, it operates to the exclusion of clause 13.2; clause 13.2 applies to ordinary hours of work and clause 30.1 applies to overtime.

10. An acceptance of the ASU's submission would in fact result in the calculation of the overtime rates prescribed by clause 30.1 on a rate of 124% of 1/38th of the minimum weekly rate prescribed by the award. This is self-evidently absurd and, in any event, not the outcome sought by the ASU.

11. *Second*, the ASU's reliance on *Australian Nursing and Midwifery Foundation v Domain Aged Care (Qld) Pty T/A Opal Aged Care*[2] (***Domain Aged Care)*** is misplaced. That decision turned on the terms of the *Nurses Award 2010* (**Nurses Award**), which are materially different to the relevant provisions of the BE Award. For instance, clause 10.4(b) of the Nurses Award, which prescribes the casual loading, does not confine the entitlement to the casual loading to ordinary hours of work. Further, the Full Bench's decision regarding the proper interpretation of the Nurses Award turned, in part, on other textual considerations such as clause 10.4(d) of the award; which do not arise in the context of the BE Award. The

[22] *Australian Nursing and Midwifery Foundation v Domain Aged Care (Qld) Pty T/A Opal Aged Care* [2019] FWCFB 1716.

Commission's decision and reasoning in that matter is therefore readily distinguishable and, in our submission, irrelevant to the Commission's consideration of the BE Award.

12. Furthermore, Ai Group is pursuing an application that seeks a variation to the Nurses Award in light of *Domain Aged Care* to clarify that the award does not operate in the manner held in that decision.[3] One of the grounds that we seek to rely upon in support of our application is that, with respect, the Full Bench erred in its construction of the Nurses Award. We intend to make detailed submissions in support of that contention. In that context, the Full Bench as presently constituted should not, in our submission, appropriate any weight or rely upon *Domain Aged Care* in these proceedings; even if it does not accept that the differences between the terms of the Nurses Award and the BE Award render *Domain Aged Care* irrelevant to the task before it.

13. *Third*, the ASU relies on *AMWU v Energy Australia Yallourn Pty Ltd*[4] (***Energy Australia***); a decision that concerns the proper interpretation of an enterprise agreement. The key paragraphs of the decision are as follows: (emphasis added)

> **[39]** Both parties accepted that the Commission should follow the approach set out in *Golden Cockerel* in regard to interpreting the Agreement and this was acknowledged by the Commissioner at first instance.
>
> **[40]** Paragraphs 4, 5 and 6 of Clause 5.3 provides as follows:
>
> > "A casual employee for working ordinary time shall be paid per hour one thirty-sixth of the weekly rate prescribed in this agreement for the classification of work performed plus a loading of 25% of that weekly rate. A casual employee is entitled to penalty rates applicable to rostered shifts work by the employee based on the ordinary rate of pay.
> >
> > The casual loading is in lieu of all paid leave, paid personal/carer's leave, compassionate leave, public holidays not worked, notice of termination and the other attributes of full-time and part-time employment. Nor a casual employee is entitled to parental leave except in circumstances provided by the FW Act.
> >
> > Casual employee shall be paid overtime for all hours worked in excess of ordinary hours on any day (i.e. eight hours/7 hours 12 minutes per day/ shift length). Except as provided by Clause 13 – Public Holidays of this agreement, all time worked which is in excess of ordinary daily as shall be paid at double time."

[3] AM2020/1 Application by the Australian Industry Group to vary the *Nurses Award 2010*.

[4] [2017] FWCFB 381

> **[41]** We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that [sic] double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments.[5]

14. Respectfully, *Energy Australia* should not be followed by this Full Bench.

15. Importantly, the proposition that the phrase "time and a half" or "double time" requires the calculation of the overtime rate by reference to "the amount paid for working ordinary time" is inconsistent with the Commission's decision earlier in this review that such terminology would be replaced in the new awards to instead require the payment of a rate that is expressed as a percentage of the minimum hourly rate (or 'ordinary hourly rate' where an award prescribes all purpose allowances).[6] The Full Bench did not determine that such provisions will instead require the calculation of the relevant rates by reference to the "amount paid for working ordinary time" in the new awards.

16. Further, the decision was made in the context of a dispute about a different instrument, a different *type* of instrument and about differently drafted provisions, based on the principles applying to the proper interpretation of enterprise agreements. This further undermines the weight that it can be given.

17. *Fourth*, the final paragraph of the ASU's submission is, respectfully, difficult to comprehend. The ASU appears to assert that casual employees have an "implied rate for casuals to be paid overtime based on their casual loadings". There is clearly no basis for this. Contrary to the ASU's submission, our position does not seek to "rely on some unfair and unwritten implied rule for casuals and another for permanent and part time staff". Our submissions are made having regard to the proper interpretation of the relevant provisions of the award.

[5] *AMWU V EnergyAustralia Yallourn* [2017] FWCFB 381 at [39] – [41].

[6] *4 yearly review of modern awards* [2015] FWCFB 4658 at [95] – [96].

18. *Finally*, Ai Group maintains that the casual loading is not payable during overtime. A finding to the contrary would amount to a significant substantive change to the entitlements of casual employees during overtime under the BE Award and impose a substantial additional employment cost on employers. In addition to the terms of the BE Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by s.138 of the Act.

4. PHARMACEUTICAL AWARD

19. The AWU's submissions do not raise any new matters that have not previously been addressed in our submissions of 18 January 2020 and 7 February 2020. We continue to rely on those submissions.

5. SALT AWARD

20. Having regard to the decision cited by the AWU in its submissions of 17 January 2020 regarding the *Mining Industry Award 2010*, Ai Group no longer opposes the AWU's position in respect of the Salt Award.

6. WOOL AWARD

21. The AWU's submissions are addressed in large part by previous submissions made by Ai Group on 18 January 2020 and 7 February 2020.

22. We make the following additional submissions in response to the AWU's submission of 7 February 2020.

23. *First,* paragraph 26 of the AWU's submission mischaracterises the relevant Full Bench decision. The Full Bench did *not* identify any ambiguity in respect of the calculation of overtime rates. The Full Bench's comments as to ambiguity concerned weekend penalty rates: (our emphasis in **bold**)

> **[332]** Whatever may be the correct interpretation of 'Any payments under this clause' it is clear that such payments are 'in substitution for' any 'other loadings or penalty rates', that is, they are substitution for the loadings and penalty rates provided elsewhere in the award. In this regard we note that clause 10.3(b) of the current award provides for 'casual loading of 25%'. It follows that if Ai Group's proposed amendment is adopted then casual employees working, say, on weekends, would be entitled to the payments for weekend work under clause 25.7 but not the 25% casual loading provided in clause 10.3(b).
>
> **[333]** The proposed amendment raises the general question of whether the casual loading is applied on top of other loadings or penalties. **It seems clear that the current award provides that overtime payments are paid in substitution for the casual loading. However, it is not clear whether weekend and other penalties are paid in substitution for the casual loading or whether the casual loading is applied to the weekend penalty rate. Given the ambiguity in the current award this is essentially a merit issue and we will refer it to the Casual and Part-time Employment Full Bench in AM2014/197.**[7]

24. *Second*, paragraphs 29 – 31 of the AWU's submissions disregard Ai Group's submissions of 7 February 2020 at paragraphs 28 – 30 and 39. We continue to rely on those submissions.

[7] *4 yearly review of modern awards* [2015] FWCFB 7236 at [332] – [333].