

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

AM2017/51 – Overtime for casuals

**AWU REPLY SUBMISSIONS - CASUAL OVERTIME ENTITLEMENTS –
ALUMINIUM INDUSTRY AWARD AND OTHERS**

BACKGROUND

1. On 6 December 2019, the 4-yearly award review Full Bench constituted to resolve disputes about casual overtime conditions in a range of modern awards issued a Statement and Directions containing procedural directions.¹
2. The Statement and Directions identifies a group of awards in paragraphs [12], [13] and [14] which are the subject of common filing directions.
3. In relation to this group of awards, The Australian Workers' Union (“**AWU**”) has previously filed submissions on 17 January 2020 and then reply submissions on 7 February 2020 regarding the current casual overtime conditions in the following awards:
 - (i) *Aluminium Industry Award 2010* (“**Aluminium Award**”);
 - (ii) *Amusement, Events and Recreation Award 2010* (“**Amusement Award**”);
 - (iii) *Pharmaceutical Industry Award 2010* (“**Pharmaceutical Award**”);
 - (iv) *Salt Industry Award 2010* (“**Salt Award**”); and
 - (v) *Wool Storage, Sampling and Testing Award 2010* (“**Wool Award**”).

The AWU’s submissions and reply submissions also dealt with casual shift work, weekend work and public holiday penalty rate calculations under the Salt Award and the Wool Award.

¹ [2019] FWC 8318.

4. Reply submissions from the following employer groups were also filed on 7 February 2020:
 - (i) Australian Industry Group (“**AIG**”);
 - (ii) Australian Business Industrial and the NSW Business Chamber (“**ABI**”); and
 - (iii) Australian Federation of Employers and Industries (“**AFEI**”).
5. The AWU’s response to the reply submissions filed by AIG, ABI and AFEI appears below.

ALUMINIUM AWARD

6. ABI, and to a lesser extent AIG, have mischaracterised the AWU’s submissions concerning the Fair Work Ombudsman’s pay guides.
7. ABI and AIG submit it is currently clear that the 25% casual loading is not paid when overtime is worked under the Aluminium Award.
8. However, the Fair Work Ombudsman has published pay guides that include the casual loading on a cumulative basis when overtime is worked. The fact that an independent statutory agency has interpreted the Aluminium Award in a different manner to ABI and AIG suggests the current provisions are ambiguous.
9. As per its previous submissions, the AWU submits the ambiguity should be resolved by varying the Aluminium Award to reflect the established industrial principle of neutrality of treatment.
10. Clarifying the operation of the award to reflect an established industrial principle is consistent with the modern awards objective and particularly s 134(1)(g) of the *Fair Work Act 2009* (“**FW Act**”).

AMUSEMENT AWARD

11. ABI and AFEI submit it is currently clear that the 25% casual loading is not paid when overtime is worked under the Amusement Award.
12. However, the Fair Work Ombudsman has published pay guides that include the casual loading on a cumulative basis when overtime is worked. The fact that an independent statutory agency has interpreted the Amusement Award in a different manner to ABI and AIG suggests the current provisions are ambiguous.

13. As per its previous submissions, the AWU submits the ambiguity should be resolved by varying the Amusement Award to reflect the established industrial principle of neutrality of treatment.
14. Clarifying the operation of the award to reflect an established industrial principle is consistent with the modern awards objective and particularly s 134(1)(g) of the *Fair Work Act 2009* (“**FW Act**”).

PHARMACEUTICAL AWARD

15. AIG and ABI submit it is currently clear that the 25% casual loading is not paid when overtime is worked under the Pharmaceutical Award.
16. The AWU relies on its previous submissions to the effect that the current provisions are ambiguous and the ambiguity should be resolved by varying the Amusement Award to reflect the established industrial principle of neutrality of treatment.
17. Clarifying the operation of the award to reflect an established industrial principle is consistent with the modern awards objective and particularly s 134(1)(g) of the *Fair Work Act 2009* (“**FW Act**”).

SALT AWARD

18. ABI’s submission that the casual loading is not paid when overtime is worked under the Salt Award is completely at odds with clause 10.3(b) which states the casual loading “constitutes part of the casual employee’s all purpose rate”.
19. It is well understood that the term “all purpose” is used in awards when it is intended for the relevant entitlement, in this case the casual loading, to be included in other rate calculations on a compounding basis. It is inconceivable that these words would have been included in clause 10.3(b) of the Salt Award if the intent was for the casual loading to be excluded entirely from some rate calculations.

WOOL AWARD

20. AIG has submitted a casual employee does not receive their 25% casual loading if they are being paid overtime, shift work, weekend or public holiday rates under the Wool Award. ABI has adopted the same position in relation to overtime rates.
21. The AWU disagrees with AIG’s submissions concerning the application of the principle that a specific provision will override a general provision in relation to the Wool Award.

22. The specific provision directed at prescribing when then casual loading is paid appears in clause 10.3(b) of the Wool Award – that provision states it is paid for “each hour worked”.

23. In any event, as per the AWU’s previous submissions, clause 25.4(b) is only directed at the payments prescribed in clause 25 – that is made clear by the inclusion of the words “under this clause”.

24. Further, AIG appears to accept at paragraph [33] of their reply submissions that the intent of clause 25.4(b) is to deal with the interaction between the various payments prescribed in clause 25. That is significant because it is well established that the purpose of an award provision is relevant to its interpretation.²

25. At paragraph [29] of its reply submissions, AIG suggests the Wool Award operates in the following manner:

- (i) clause 10.3(b) prescribes a minimum payment to casual employees of 1/38th of the minimum weekly rate plus a casual loading of 25% which applies for each hour worked;
- (ii) clause 25.4(b) prescribes that the payments under clause 25 are in substitution for any other loadings or penalty rates and this includes the 25% casual loading in clause 10.3(b); and
- (iii) however, the 15% shift loadings are not in substitution for the 25% casual loading because the 25% casual loading prevails as a minimum standard. Therefore, the 25% casual loading is actually in substitution for the 15% shift loadings.

26. AIG’s interpretation is strained, contrived and incorrect. The Wool Award operates in the following logical and simple manner:

- a casual employee receives their 25% casual loading for every hour they work including overtime; and
- an employee only receives one of the additional payments in clause 25 at any one time – e.g. they do not receive shift penalties in addition to overtime rates or weekend penalty rates.

² *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [53].



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