

From: Yolla Abousleiman <yolla@etuaustralia.org.au>
Sent: Tuesday, 13 October 2020 3:47 PM
To: AMOD <AMOD@fwc.gov.au>; Chambers - Hatcher VP <Chambers.Hatcher.VP@fwc.gov.au>
Cc: David Mier <david@etuaustralia.org.au>
Subject: AM2017/51 - Overtime for casuals - draft determinations
Importance: High

Dear AMOD Team and Associate to Hatcher VP,

I refer to the above matter and my email correspondence of 7 October 2020.

In absence of receiving a response from the FWC, the CEPU seeks to file the attached submissions in reply with respect to the Electrical Electronic and Communications Contracting Award 2010.

Kind Regards,
Ms. Yolla Abousleiman
National Junior Industrial Officer
Mobile: 0448 222 715



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From: Yolla Abousleiman
Sent: Wednesday, 7 October 2020 3:34 PM
To: Chambers - Hatcher VP <Chambers.Hatcher.VP@fwc.gov.au>
Subject: AM2017/51 - Overtime for casuals - draft determinations
Importance: High

Dear Associate,

RE: AM2017/51 - Overtime for casuals – draft determinations
Electrical Electronic and Communications Contracting Award 2010.

I refer to the above matter and the submissions filed by the following employer groups with respect to the Electrical Electronic and Communications Contracting Award 2010.

1. National Electrical and Communications Association on 7 September 2020;
2. Master Electricians Australia On 8 September 2020; and
3. Australian Industry Group on 2 October 2020.

The CEPU has concerns with issues raised by the parties and kindly requests the opportunity to provide brief submissions in reply.

Kind Regards,
Ms. Yolla Abousleiman
National Junior Industrial Officer
Mobile: 0448 222 715



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IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2017/51 – OVERTIME FOR CASUALS

Submissions by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia

1. On 18 August 2020 the Full Bench of the Fair Work Commission ('**Commission**') issued a Decision with respect to overtime for casuals in a number of Modern Awards ('**the Decision**').¹ In its Decision the Full Bench provided interested parties with the opportunity to make submissions in response to the draft determinations issued on 18 August 2020.²
2. On 4 September 2020, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ('**CEPU**') filed a submission in support of the Commission's provisional view to insert the draft determinations in to the following Awards:
 - a. Electrical Power Industry Award 2020 (**Electrical Power Award**);³ and
 - b. Electrical, Electronic and Communications Contracting Award 2010 (**Electrical Contracting Award**).⁴
3. The following parties filed submissions opposing the Commission's provisional view to insert the draft determinations into the Electrical Contracting Award:
 - a. National Electrical and Communications Association ('**NECA**'), dated 6 October 2020;⁵
 - b. Master Electricians Australia ('**MEA**'), dated 8 October 2020;⁶ and
 - c. Australian Industry Group ('**AIG**'), dated 2 October 2020.⁷

*(collectively, '**Employer Groups**')*

¹ [\[2020\] FWCFB 4350.](#)

² [Schedule of draft determinations](#)

³ [MA000088 – Draft Determination - Electrical Power Industry Award 2020](#)

⁴ [MA000025- Draft Determination - Electrical, Electronic and Communications Contracting Award 2010](#)

⁵ [NECA submissions of 6 October 2020](#)

⁶ [MEA submission of 8 October 2020](#)

⁷ [AIG Submissions of 2 October 2020](#)

4. This submission is made by the CEPU in response to the issues raised by the above forementioned Employer Groups with respect to the Electrical Contracting Award.
5. The CEPU repeats and replies on its submissions of 13 December 2017, 4 September 2020 and the submissions herein.

EMPLOYER GROUPS PROPOSITION AND PRIMARY ISSUES RAISED

6. The Employer Groups all oppose the adoption of the Commissions view that the ‘compounding method’ should be adopted when calculating overtime rates. The Employer Groups suggest that the ‘cumulative method’ is the more appropriate method to be adopted for the following reasons:
 - a. that the pre-reform instruments word the calculation for overtime with casuals as an “addition” or “plus” not compounding on the hourly rate⁸ and use the words “casual loading should be used for all purposes of the Award”;⁹
 - b. the Fair Work Ombudsman (‘FWO’) calculation tool utilises the cumulative method when calculating overtime for casuals;¹⁰ and
 - c. casual loading was used to compensate for various entitlements and attributes of full-time employment.¹¹

We will seek to address each of above forementioned reasons in turn.

a) PRE-REFORM INSTRUMENTS

7. We note, that annexed to MEA’s submissions is a table of all the pre-reform instruments designed to illustrate that all but one of the Awards (Electrical Contracting Industry (SA) Award) use the words “in addition” or “plus” for the calculation of overtime and the loading is not compounding on the hourly rate.
8. The CEPU submits that a reading such as that posed by MEA of the pre-reform instruments is misconstrued for the following reasons:
 - a. All the casual employment clauses in the pre-reform instruments state that all hours of work performed by a casual are made up of the ordinary hourly rate and the respective casual percentage loading. It should be noted that at no point do any of the pre-form instruments specify that the hourly rate of pay and the loading

⁸ [MEA submission of 8 October 2020](#) at 7.

⁹ [NECA submissions of 6 October 2020](#) at 33 to 37.

¹⁰ [MEA submission of 8 October 2020](#) at 5 and 6, [NECA submissions of 6 October 2020](#) at 9, [AIG Submissions of 2 October 2020](#) at 69.

¹¹ [AIG Submissions of 2 October 2020](#) at 71, [NECA submissions of 6 October 2020](#) at 5.

are to be paid for only “ordinary hours worked”. Rather when describing when the hourly rate of pay and the loading should be paid, they all use the following terms:

- i. “for the work he/ she performs;”¹²
 - ii. “the all-purpose weekly rate prescribed by clause 5.4.1 for the classification in which the employee ordinarily employed;”¹³
 - iii. “for the work he performs;” and¹⁴
 - iv. “employed for the work performed.”¹⁵
9. Further, it should be noted that the South Australian and the NSW pre-reform Awards clearly identify that the casual hourly rate is made of the ordinary hourly rate of pay and the percentage loading which is to be paid for “all purposes of the award”.

Electrical, Electronic and Communications Contracting Industry (State) Award (NSW)

8.2.3 Casual Employment Additional Rate - A casual employee shall be paid 12 per centum of the weekly rate prescribed by clause 3.4, Wages Rates (except for 3.4.1.3 of the said Clause) in addition to the weekly wage rate prescribed by this award for the work which he/she performs. The casual employment additional rate shall be paid for all purposes of the award.

Electrical Contracting Industry (SA) Award:

4.2.2 A casual employee is one engaged as such. A casual employee shall be paid per hour one thirty-eighth of the weekly rate prescribed by Clauses 5.2, 5.3.1, 5.3.2, 5.3.3 and 5.3.4 of this award for the work he/she performs, plus 20 per cent. Such total rate shall form the ordinary rate for all purposes of the award.

¹² Electrical, Electronic and Communications Contracting Industry (State) Award (NSW), cl.8.2.3; Electrical Contracting Industry (SA) Award, cl. 4.2.2

¹³ Electrical Contracting Industry Award State (QLD), cl. 4.2

¹⁴ Electrical, Engineering and Contracting Industries Award (Northern Territory) Award 2002, cl. 10.2

¹⁵ National Electrical, Electronic and Communications Contracting Industry Award, cl. 11.3.1

10. Similarly, the current wording of Electrical Contracting Award contemplates that the ‘casual hourly rate of pay’ is made up of the ordinary hourly rate of pay and 25% loading which is to be paid for “each hour worked”.

For each hour worked, a casual employee will be paid no less than 1/38th of the all-purpose weekly wage rate of pay for their classification in clause 16—Classifications and minimum wages, plus a casual loading of 25%.

11. The CEPU submits that the phrase “for each hour worked” captures overtime. This phrase does not discriminate between ordinary hours and overtime. If the intention of the casual loading was to apply only on ordinary hours, then the pre-reform awards and the current Electrical Contracting Award would explicitly state so.
12. Further on the plain and ordinary meaning, the CEPU submits that when reading the casual clause as a whole, the phrases “for each hour worked” inevitably captures or provides the same effect as the use of the terms “all purposes of the award” as stated in the SA and NSW pre-reform Awards.

b) FWO

13. The Employer Groups rely of the calculations and advice provided by the FWO to substantiate their position that overtime for casuals is calculated cumulatively.¹⁶
14. The CEPU seeks to remind the Employer Groups that the FWO is a statutory body created under the FW Act¹⁷ and its primary functions are amongst other things is to:
 - a. promote and monitor compliance;
 - b. provide education and assistance; and
 - c. undertake enforcement activities (i.e investigations and issuing compliance notices).
15. Unlike the FWC, a tribunal with vested power to make binding decisions and directions, it is not bound to or guided by the advice of the FWO, which serves only as a regulator with no authoritative power.
16. Therefore, the FWO pay advices, calculator and the method upon which it utilises to calculate casual overtime do no more than act as a guide to various stakeholders in the

¹⁶ [MEA submission of 8 October 2020](#) at 5 and 6, [NECA submissions of 6 October 2020](#) at 9, [AIG Submissions of 2 October 2020](#) at 69.

¹⁷ FW Act, Part 5-2

workplace relations realm and should not be relied upon as authority or a concrete means to adopt the cumulative approach.

c) CASUAL LOADING USED TO COMPENSATE FOR VARIOUS ENTITLEMENTS

17. Both NECA and AIG's submissions stress that the casual loading is to be treated as a separate and distinct amount from a causal's ordinary rate of pay on the basis that the loading is paid instead of annual leave, paid personal/carers leave, notice of termination, redundancy benefits and other attributes of full time / part time employment and therefore the loading should not be applied when calculating overtime.¹⁸
18. The CEPU submits that these submissions should be rejected for the following reasons as outline in the case of *AMWU v Energy Australia Yallourn Pty Ltd*:¹⁹
 - a. the mere fact that full-time /part-time employees do not accrue leave on overtime is not material;
 - b. that clause 10.3(c) of the Electrical Contracting Award, operates to do no more than describe the historical basis of the inclusion of the casual loading;
 - c. had it been the intention when drafting the Electrical Contracting Award to exclude casual loading when calculating overtime, it would have included a provision similar to that in the *Electrical Power Industry Award 2010* which expressly provides that the casual loading is not included when calculating overtime and penalty rates.
19. Further upon NECA's analysis of the Full Benches Decision on applying the *Yallourn* approach, it states that unlike the Electrical Contracting Award, the Nurses Award 2010 does not say that a casual employee will be paid a casual loading "for all hours worked".²⁰
20. The distinction posed by NECA does not assist with their submissions; rather that the use of the words "for all hours worked" in the Electrical Contracting Award provides further clarity that a causal should be paid the ordinary rate of pay and the loading for all hours worked. "All hours worked" clearly capitulates both ordinary hours and overtime hours.

CEPU

13 October 2020

¹⁸ [NECA submissions of 6 October 2020](#) at 25, [AIG Submissions of 2 October 2020](#) at 71 and 72.

¹⁹ [2017] FWCFB 381, at [42].

²⁰ [NECA submissions of 6 October 2020](#) at 18.