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IN THE FAIR WORK COMMISSION

Section 156 - 4 Yearly Review of Modern Awards

(AM2017/51)
OVERTIME FOR CASUALS
(Second Category of Awards)

SUBMISSION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION (MANUFACTURING DIVISION)

IN RESPONSE TO SUBMISSIONS OF THE ABI & NSWBC and AI GROUP

In relation to the Textile, Clothing, Footwear and Associated Industries Award 2010

(9 December 2019)

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INTRODUCTION

1. On 14 October 2019, Vice President Hatcher issued a Statement and Directions[1] ("*October 2019 Statement"*) in matter (AM2017/51) regarding the status of 3 categories of modern awards subject to the proceedings.

2. The Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ("CFMMEU – MD") has an interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 ("*TCF Award*") identified in category 2 of the *October 2019 Statement*.[2]

3. The CFMMEU – MD files these submissions in accordance with direction [3] of the Directions included in the *October 2019 Statement.* Specifically, they respond to the filed submissions of the ABI & NSWBC (12 November 2019)[3] and the AI Group (11 November 2019).[4]

4. In short summary, both ABI & NSWBC and the AI Group submit that under the *TCF Award*, the casual loading is payable on overtime, and is calculated on a cumulative basis.

5. The CFMMEU – MD agrees with the ABI & NSWBC and the AI Group that the *TCF Award* requires the payment of casual loading on overtime. However, with respect to the method of calculation, the CFMMEU – MD submits that the correct method of calculation of the entitlement is one based on a compounding method, rather than on a cumulative basis.

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[1] S.156 – 4 yearly review of modern awards; (AM2017/51) Overtime for Casuals, [2019] FWC 7087 (14 October 2019)
[2] [2019] FWC 7087 at paragraph [9]
[3] (AM2017/51) Submission of ABI & NSWBC (12 November 2019)
[4] (AM2017/51) Submission of the AI Group (11 November 2019)

6. As such, the area of contest between the CFMMEU – MD and the Employer parties would appear to be confined to the appropriate method of calculation (cumulative vs compounding) of a casual employee's entitlement to overtime under the *TCF Award*.

POSITION OF THE CFMMEU- MD

Source of a casual employee's entitlement to overtime

7. Clause 14 of the TCF Award expressly deals with the subject matter of casual employment. For clarity, clause 14 is reproduced in full (other than sub-clause 14.10 – Conversion of casuals).

> ***14. Casual Employment***
>
> *14.1 A casual employee is an employee who is engaged in relieving work or work of a casual, irregular or intermittent nature, but does not include an employee who could properly be classified as a full-time or part-time employee.*
>
> *14.2 A casual employee must be notified at their initial engagement of their employment category and when their employment status changes.*
>
> *14.3 A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.*
>
> *14.4 On each occasion a casual employee is required to work, they are entitled to a minimum payment for three hours' work.*
>
> *14.5 Casual employees are entitled to penalty payments for overtime, shiftwork and work on public holidays in accordance with the provisions of this award as they apply to permanent employees.*

14.6 Casual employees must be paid at the end of each day, but may agree to be paid weekly.

14.7 Casual employees are entitled to all provisions of this Award including overtime and superannuation and excluding annual leave, sick leave and public holidays.

14.8 An employer must not require a casual employee to attend for duty more than once on any day.

14.9 A casual employee will be engaged by the hour. Employment can be terminated by either the giving of one hour's notice by either party or the payment of forfeiture of one hour's wages.

8. Clause 39 of the *TCF Award* deals with the entitlement to overtime and is reproduced below (excluding sub-clause 39.5 – Time off instead of overtime).

39.1 *Overtime is all time worked by an employee in excess of an employee's ordinary hours of work or outside the span of hours prescribed.*

39.2 Requirement to work reasonable overtime

Subject to the NES, an employer may require an employee to work reasonable overtime at overtime rates.

39.3 Payment for working overtime

(a) An employer must pay an employee overtime at the rate of:

(i) 150% for the first three hours; and

(ii) 200% thereafter

(b) For the purpose of calculating overtime each day must stand alone.

(c) An employer must pay an employee who is paid under any system of payment by results for an overtime worked:

(i) for the first two hours, at the rate of 150% of the award rate for their skill level; and

(ii) for any subsequent hours, at the rate of 200% of the award rate for their skill level;

In addition to the payment by results earnings earned by the worker.

39.4 Weekend work

(a) All work on a Saturday will be paid at 150% of the employees' ordinary rate for the first three hours and 200% thereafter.

(b) All work on a Sunday will be paid 200% of the employees' ordinary rate.

(c) The ordinary hours of a night shift finishing on a Saturday morning will not be subject to overtime rates.

9. For completeness, specific overtime provisions (clause 37.2) also apply to seven-day continuous shift workers in the textile industry.

10. The CFMMEU – MD submits that the plain meaning of clause 14.2 of the *TCF Award*, is that a casual employee is entitled to be paid a wage rate comprising of the minimum hourly rate for the applicable classification, plus the 25% casual loading for <u>each hour</u> they work (the casual loaded hourly rate). Notably, clause 14.2 is not otherwise qualified and does not limit or exclude the casual loaded rate from applying on overtime.

11. Secondly, clause 14.5 expressly provides that casual employees are entitled to penalty payments for overtime. Clause 14.7 generally provides that casual employees are

entitled to all provisions of the award including overtime (excluding annual leave, sick leave and public holidays).

12. Thirdly, clause 39 applies by way of general application to all employees covered by the *TCF Award*. It has the effect that a casual employee has an entitlement to overtime payments for '*all time'* worked '*in excess of an employee's ordinary hours of work'* or '*outside the span of hours prescribed*.' Clause 39 does not prescribe the method of calculation of a casual employee's entitlement to overtime. In these circumstances, we submit that the correct form of calculation is the compounding method (i.e. the overtime penalty is applied to the casual loaded rate) rather than the cumulative method argued by the AI Group and ABI & NSWBC (i.e. where the casual loading is added after the application of the penalty to the ordinary hourly rate).

4 YEARLY AWARD REVIEW, AWARD STAGE (GROUP 1) DECISION

13. During the 4 yearly award review, a Full Bench issued a decision on 28 June 2018 with respect to the Award Stage (Group 1). The decision determined a range of outstanding technical and drafting issues for 25 awards in Group 1, including the *TCF Award*.[5]

14. The decision also considered a number of general issues affecting more than 1 award, including in relation to:
    - Additional week's leave for seven day shiftworkers – alleged NES inconsistencies;[6]
    - Overtime entitlements for casual employees;[7]
    - Casual conversion clause.[8]

[5] [2018] FWCFB 3802 at [401] – [422] for matters relating to the TCF Award
[6] [2018] FWCFB 3802 at [7] – [16]
[7] [2018] FWCFB 3802 at [17] – [18]
[8] [2018] FWCFB 3801 at [19]

15. At paragraphs [17] – [18] of the decision, the Full Bench stated: [emphasis added; citations not included]

> *[17] The issue of overtime for casuals has been identified as an outstanding issue in respect of a number of awards. The substantive matters of overtime entitlements for casuals in the Sporting Organisations Award 2010 and the Fitness Industry Award 2010 were referred to a separately constituted Full Bench for consideration (in AM2017/51). On 4 December 2017, the Full Bench constituted to deal with the Sporting Organisations Award 2010 and the Fitness Industry Award 2010 published a Statement identifying a number of other awards with similar issues.*
>
> *[18] The following Group 1 awards contain some ambiguity about whether overtime is payable to casual employees, when such overtime commences, or the rate at which overtime is payable (or some combination of the three). These awards have been referred to the Full Bench constituted to deal with AM2017/51:….*
>
> - *Textile, Clothing, Footwear and Associated Industries Award.*
>
> [other affected 24 modern awards not included]

16. The reference in paragraph [17] of the decision to the publication of a statement, refers to the Statement [2017] FWCFB 6417 (4 December 2017)[9] issued by the Full Bench in the current proceedings. Attachment A to the Statement contained a list of awards '*that may contain ambiguity about if, when and at what rate casuals may be entitled to overtime'.* The list in Attachment A included the *TCF Award*.

[9] 4 yearly review of modern awards (AM2017/51) Overtime for casuals, Statement, [2017] FWCFB 6417 (4 December 2017)

17. The Statement sought written responses from interested parties regarding the accuracy of the list of awards in Attachment A. The former TCFUA subsequently filed a submission on 22 January 2018 setting out its position regarding the TCF Award.[10] The TCFUA continued to submit that the appropriate method of the calculation of casual rates of pay with respect to penalties (including overtime) was the compounding method. However, the TCFUA acknowledged that this interpretation of the relevant provisions of the *TCF Award* was contested by a number of employer parties with an interest in the award.

18. It is evident from above (the Statement in matter AM2017/51 and paragraphs [17] – [18] of the decision in matter AM2014/64 and Ors) that the Commission intended that a separate process (in the common issues proceedings, AM2017/51) would be used to consider the appropriate casual employee entitlements in the *TCF Award*.

19. Despite the separate process identified above, the Award Stage (Group 1) Full Bench (in the same decision) proceeded to determine the issue of the method of calculation of a casual employee's entitlement to overtime (and public holiday rates) in Schedule C of the *TCF Award*, Exposure Draft.

20. The Award Stage (Group 1) Full Bench held at paragraphs [417] – [419:

> *[417] The TCFUA submits that the overtime and public holiday rates for casual employees in Schedule C were calculated cumulatively and they in fact should be based on a compounding method. ABI and Ai Group oppose the TCFUA submission.*
>
> *[418] We do not agree with the submission of the TCFUA. The application of the casual loading in the Textile Award is specified in clause 14 of the current award.*
>
> > *'14.3 A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.'*

[10] 4 yearly review of modern awards (AM2017/51) Overtime for casuals, TCFUA submission (22 January 2018)

> *[419] This clause has been reproduced in the Exposure Draft in similar terms. Nowhere in the current award does it stipulate that the casual loading applies for all purposes. In such cases the loading should be applied using a cumulative method rather than compounding. The Exposure Draft applies such a method, consistent with the general rule. We see no reason to depart from this general approach in this instance.*

21. In the above circumstances, we submit that the process contemplated in the 4 yearly review for the determination of casual entitlements in the TCF Award was not followed and that it is now appropriate for the AM2017/51 Full Bench to re-consider the issue in context of the current proceedings.

DECISION – *ANMF v DOMAIN AGED CARE*

22. The CFMMEU – MD submits that it is appropriate for the AM2017/51 to consider the proper construction of the casual provisions in the *TCF Award*, in context of the Full Bench decision in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* issued on 17 April 2019 ("*ANMF v Domain*").[11]

23. In short summary, the *ANMF v Domain* decision concerned an enterprise agreement approval matter in which the ANMF appealed the approval by Commissioner McKinnon of the *Opal Aged Care (Qld) Enterprise Agreement 2017*. The ANMF opposed the approval of the enterprise agreement on a range of grounds, including the application of the BOOT, by reference to the *Nurses Award 2010* ("*Nurses Award*"), to the agreement.

24. The issue of relevance from the *ANMF v Domain* decision to the current proceedings, are the conclusions drawn by the Full Bench regarding the correct interpretation of

[11] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 (17 April 2019), Gostenicnik DP, Colman DP and McKenna, C.

the *Nurses Award* with respect to the calculation of casual rates of pay. In summary, a majority of the Full Bench found that the weekend penalty rates and the overtime rates in the *Nurses Award* are calculated using a compounding method, and not a cumulative method. [12]

25. This principle finding was premised variously on 'a plain reading of the clause' [13] 'the plain meaning of the instrument'[14] and that 'the relevant provisions are in our view clear'.[15]

26. In terms of the applicable method of calculation for casual employee wage rates under the *Nurses Award* the Full Bench held (citations excluded; emphasis added):

> *[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1.*
>
> *[18] Furthermore, clause 10.4(d) makes very clear that casual employees are paid shift allowances on the ordinary rate of pay 'excluding the casual loading' with the casual loading then added to the penalty rate of pay. No such exclusion is made in respect of other penalties. Opal contended that it would be wrong to apply the maximum expression unius est exclusion alterius to this provision, and referred to the Full Bench decision in AMWU v Berri Pty Limited which warned against too ready an application of cannons of statutory interpretation to the task of construing an enterprise agreement. However, in our view, it is not so much a case of applying an interpretative presumption but of reading clause 10.4 in an ordinary and logical way. 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*

[12] [2019] FWCFB 1716 at [17] – [19]
[13] [2019] FWCFB 1716 at [17]
[14] [2019] FWCFB 1716 at [20]
[15] [2019] FWCFB 1716 at [21]

been subject to the general position that penalties are applied to the loaded casual rate, and this was not intended to be the case of shift allowances. It is also significant that clause 10.4(d) speaks of 'the ordinary rate of pay excluding the casual loading' which also reaffirms that in the context of this clause, for casual employees, the casual loading is part of the ordinary rate; otherwise it would not make sense to speak of 'excluding' the casual loading from it.

[19] The Commissioner's conclusion that overtime penalties are also paid on the loaded casual rates of pay is on our view also correct. Clause 28.1 simply speaks of 'time and a half for the first two hour and double time thereafter' for Monday to Saturday work, 'double time' for Sunday and 'double time and a half for public holidays.' The relevant 'time earnings' for a casual under clause 10.4 include the casual loading. Further, clause 28.1(c) provides that overtime rates are in substitution for and not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the exclusion of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading.[16]

27. The *ANMF v Domain* decision would appear to settle the correct approach to the interpretation of clauses 10.4, 26, 28.1 and 32.1 of the *Nurses Award* as they relate to the applicable wage rates for casual employees.

28. The provision in the *TCF Award* with respect to the payment of casual loading is relevantly identical to the equivalent clause in the *Nurses Award*:

TCF Award – clause 14.3
A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.

Nurses Award – clause 10.4(b)
A casual employee will be paid an hourly rate equal to 1/38th of the weekly rate appropriate to the employee's classification plus a casual loading of 25%.

[16] [2019] FWCFB 1716 at [17] – [19]

29. In both clause 14.3 of the *TCF Award* and clause 10.4(b) of the *Nurses Award*, the hourly rate of pay for a casual employee includes the casual loading of 25% i.e. the loaded casual rate and in context of *ANMF v Domain*, constitutes the 'ordinary rate of pay' for a casual employee.

30. The respective overtime provisions in the *TCF Award* and the *Nurses Award* differ in their wording, but use very similar terminology in describing the overtime rate to apply (see comparison below):

> ***TCF Award***
> ***clause 39.1***
> *Overtime is all time worked by an employee in excess if an employee's ordinary hours of work or outside the span of hours prescribed.*
>
> ***clause 39.3 (Payment for working overtime)*** [in part]
> *(a) An employer must pay an employee overtime at the rate of:*
> *(i) 150% for the first three hours; and*
> *(ii) 200% thereafter.*
>
> *(b) For the purposes of calculating overtime each day must stand alone.*
>
> ***Nurses Award***
> ***clause 28.1 (Overtime penalty rates)***
> *(a) Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21 – Ordinary hours of work, are to be paid as follows:*
> *(i) Monday to Saturday (inclusive) – time and a half for the first two hours and double time thereafter;*
> *(ii) Sunday – double time; and*
> *(iii) Public holidays – double time and a half.*
>
> *(b) Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.*
>
> *(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26 – Saturday and Sunday work and clause 29 – Shiftwork.*

31. Analogous to the conclusion drawn by the full bench in *AMNF v Domain*, we submit that clauses 39.1 and 39.3 of the *TCF Award* operate to require that the overtime penalties are paid on the loaded casual rate of pay (as provided under clause 14.3).

32. The CFMMEU – MD contends that the full bench decision of *ANMF v Domain* is relevant to the consideration by the full bench in the current proceedings (AM2017/51) regarding the operation of the casual overtime provisions in the TCF Award.

SUMMARY OF POSITION OF ABI & NSWBC

33. The ABI & NSWBC makes clear in its submission that it:
    - it is not pursuing any claims in relation to these awards;[17]
    - it is advancing its interpretations of the existing award provisions in order to assist the Commission in finalising the language of the Exposure drafts; [18]and
    - to ensure that the Award entitlements are clarified or may be more unambiguously expressed (where the existing drafting suffers from a level of ambiguity).[19]

34. As outlined in its submission, the specific contentions of the ABI & NSWBC with respect to the *TCF Award* are:
    - casual loading is payable on overtime; and
    - the casual loading is calculated on a cumulative method (rather than a compounding method). [20]

35. In support of its position, ABI & NSWBC submit that clause 14.3 of the *TCF Award* (which relates to the applicable rate of pay for casual employees) was considered by a separate Full Bench in the Group 1 Award Stage of the 4 Yearly Award Review[21] and

[17] (AM2017/51) Submission of ABI & NSWBC (12 November 2019) at paragraph 2.1 – in relation to 11 awards the subject of its submission
[18] (AM2017/51) Submission of ABI & NSWBC (12 November 2019) at paragraph 2.2
[19] (AM2017/51) Submission of ABI & NSWBC (12 November 2019) at paragraph 2.2
[20] (AM2017/51) Submission of ABI & NSWBC (12 November 2019) at paragraphs 2.3 – 2.4, 3.29 – 3.32
[21] 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 3802

found the casual loading operates on a cumulative basis together with the award overtime provisions. ABI & NSWBC contend that 'there does not appear to be any substantive basis articulated for the Commission to arrive at a different conclusion on the same Award interpretation matter within this 4 Yearly Review."[22]

RESPONSE TO ABI CONTENTIONS

36. The one specific contention raised by the ABI & NSWBC relating to the *TCF Award* is that the issue was determined by the full bench in the Award Stage (Group 1) decision.

37. In this regard, we rely on our submissions above at paragraphs 13 – 21.

SUMMARY OF POSITION OF THE AI GROUP

38. In summary, the AI Group submit

- The *TCF Award* requires the payment of casual loading during overtime on a cumulative basis;[23]
- Clause 14.5 of the *TCF Award* provides that a casual employee is entitled to overtime rates in accordance with the relevant provisions of the award as they apply to permanent employees and conclude that overtime rates are to be calculated for all employees without application on the casual loading;[24]
- Clause 39 of the *TCF Award* prescribes overtime rates payable under the *TCF Award* but does not deal expressly with the casual loading;
- The Part 10A Award Modernisation process dealt with the quantum of casual loading for modern awards and its interaction with penalty payments and made observations about a 'general rule' in this respect;[25]

[22] (AM2017/51) Submission of ABI & NSWBC (12 November 2019) at paragraphs 3.30 – 3.32
[23] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraph 37
[24] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraph 38 - 39
[25] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 41 - 42

- The issue of how overtime rates are to be calculated under the *TCF Award* was considered and determined by a Full Bench in the 4 yearly award review as part of the Award Stage process for the TCF Award Exposure Draft, finding that the cumulative method applied rather than a compounding one;[26] and
- There is no basis for departing from the above decision in the four yearly review of modern awards.[27]

RESPONSE TO AIG CONTENTIONS

Clause 14.5 of the TCF Award

39. The AI Group contend that on the basis of clause 14.5 of the *TCF Award*, 'overtime rates for casual employees are to be calculated on the same basis as they are for permanent employees i.e. the overtime rates in the *TCF Award* are to be calculated for all employees without application on the casual loading.'[28]

40. We submit that the AI Group's contention as to the meaning of clause 14.5 of the TCF Award is incorrect. Clause 14.5 provides:

> *14.5 Casual employees are entitled to penalty payments for overtime, shiftwork and work on public holidays in accordance with the provisions of this award as they apply to permanent employees.*

41. In our view, clause 14.5 makes clear that casual employees are entitled to penalty payments for overtime, shiftwork and public holidays on the basis of the same formula as they apply to permanent employees. That is, the penalties (as expressed in percentages) and the circumstances in which the penalty provisions are triggered, apply equally to casual employees as well as permanent employees.

[26] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 43 - 45
[27] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 46
[28] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraph 39

42. Clause 14.5 does not say anything regarding the applicable *rate of pay* of casual employees to apply in relation to the respective penalty provisions. In our submission, clause 14.5 is not qualified in the way contended by the AI Group.

Clause 39 of the TCF Award

43. The AI Group, in its submission states 'For completeness, we note that clause 39 of the TCF Award prescribes overtime rates payable under the award' and 'does not expressly deal with the casual loading.'[29]

44. This is correct. Clause 39 makes no distinction at all between the entitlements of permanent and casual employees as regards the operation of the overtime provisions. As such, clause 39 applies to casual employees by way of general application. This is the plain and ordinary meaning of clause 39.

45. In this context, the overtime provisions operate to provide the relevant entitlement to casual employees based on the casual loaded rate per hour (provided under clause 14.2).

Part 10A Award Modernisation Process

46. The AI Group seek to rely on the decision of the Part 10 Award Modernisation Full Bench which dealt with the 25% casual loading and its interaction with penalty payments, including 'as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[30]

[29] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraph 40
[30] Award Modernisation [2008] AIRCFB 1000'at [50]

47. The AI Group contend that the 'general rule' stated by the Full Bench in the Award Modernisation decision 'is reflected in the vast majority of modern awards, including the *TCF Award*.'[31] We disagree with AI Group's conclusion.

48. In *ANMF v Domain*, the employer sought to rely on the Award Modernisation decision and its statement regarding the 'general rule' regarding the application of the casual loading with respect to penalty provisions. The Full Bench rejected these submissions:

> *[21] Opal also relied on the Award Modernisation Decision (AM2008/1-2) in which the Full Bench said that 'as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.' A general statement such as this might be of some assistance in cases of ambiguity, but that is not the case in the present matter. The relevant provisions are in our view clear.*[32]

49. As submitted above, the relevant casual and overtime provisions in the *TCF Award* are sufficiently similar to the equivalent provisions in the *Nurses Award*, subject of the decision in *ANMF v Domain*. In this context, we submit that the provisions in the *TCF Award* are not ambiguous and the relevant provisions are clear in their meaning as contended by the CFMMEU – MD. We therefore reject the AI Groups'contention that the so called 'general rule' applies.

50. Since the commencement of the 4 yearly review of in 2014, the former TCFUA (prior to its amalgamation with the CFMMEU) and the CFMMEU – Manufacturing Division (post amalgamation) has taken a consistent position in relation to the *TCF Award*. That is, the plain meaning of the relevant casual and overtime provisions in the TCF Award provide

[31] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 41 - 42
[32] '[2019] FWCFB 1716 at [21] (citations excluded)

a casual employee an entitlement to penalty provisions calculated on a compounding basis (the penalty is applied to the casual loaded rate).

51. Whilst the CFMMEU – MD acknowledges that the method of calculation in the *TCF Award* (cumulative vs compounding) has been in contest between the TCFUA/CFMMEU – MD and the AI Group and the ABI & NSWBC, this alone is not evidence of an ambiguity in the award.

Decision – Award Stage (Group 1) [33]

52. The AI Group in its submissions refer to the full bench decision in the Award Stage (Group 1) and its findings in relation to the *TCF Award*.[34] It contends that 'there is no basis for departing from the very recent decision made by the Commission in this regard.'[35]

53. The CFMMEU – MD submits that there are cogent reasons as to why this Full Bench should consider departing from the findings made in the Award Stage (Group 1) decision. As outlined above, these include (i) the process identified by the Commission in the establishment of a separate full bench (AM2017/51) to deal with overtime for casuals issues in modern awards, and (ii) the findings in *AMNF v Domain*, by way of application to the *TCF Award*.

Filed on behalf of:

Construction Forestry Maritime Mining and Energy Union
(Manufacturing Division)

Vivienne Wiles
Senior National Industrial Officer and Co-ordinator
(9 December 2019)

[33] [2018] FWCFB 3802 (28 June 2018)
[34] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 43 - 46
[35] (AM2017/51) Submission of the AI Group (11 November 2019) at paragraphs 46