



Fair Work Commission
Section 156 - Fair Work Act 2009
4 Yearly Review of Modern Awards

(AM2017/51)
Overtime for Casuals

**Submission of the
Textile Clothing and Footwear Union of Australia**

(22 January 2018)

Submitted by:

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**2014 AWARD REVIEW
(AM2017/51)
OVERTIME FOR CASUALS**

**Submissions of the
Textile Clothing and Footwear Union of Australia**

1. BACKGROUND

1.1 On 4 December 2018, a separately Full Bench in (AM2017/51) issued a Statement¹ with respect to overtime for casuals with relevance to multiple modern awards.

1.2 Attachment A to the Statement contained a list of modern awards the Fair Work Commission (FWC) research area had identified in which ‘there is potential ambiguity as to when casual employees’ entitlements arise’.²

1.3 In the Statement, interested parties were invited to:

- Provide any written response concerning the accuracy of the list of awards in Attachment A by 4.00pm, Monday 11 December 2017;³ and
- For any interested party that seeks a variation to any of the modern awards listed in Attachment A in respect to overtime entitlements for casual employees to lodge a draft determination setting out variation sought by 4.00pm, Friday 18 December 2017.⁴

1.4 The Textile, Clothing and Footwear Union of Australia (TCFUA) filed brief correspondence with the FWC on 12 December 2017.⁵

1.5 On 14 December 2017, the FWC extended the time for parties to respond to both directions until 4.00pm, Friday 19 January 2018.⁶

1.6 The TCFUA files these submissions in response to the amended directions above. The TCFUA’s submissions supersede and replace in its entirety its earlier correspondence of 12 December 2017.

2. FWC STATEMENT (4 December 2017) – ATTACHMENT A

2.1 In these proceedings, the TCFUA has a primary interest in the:

- Textile, Clothing, Footwear and Associated Industries Award 2010 (‘TCF Award’)⁷; and
- Dry Cleaning and Laundry Industry Award 2010 (‘DC&LI Award’)⁸.

¹ [2017] FWCFB 5417 - 4 yearly review of modern awards, (AM2017/51) Overtime for Casuals (4 December 2017)

² Ibid; at [4]

³ Ibid; at [6]

⁴ Ibid; at [7]

⁵ (AM2017/51) TCFUA correspondence to FWC (12 December 2017)

⁶ (AM2017/51) Correspondence to Parties from Vice President Hatcher (14 December 2017)

⁷ Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017] - varied to 4 December 2017

⁸ Dry Cleaning and Laundry Industry Award 2010 [MA000096] – varied to 4 December 2017

2.2 Attachment A to the Statement lists both the TCF Award and the DC&LI Award. The TCFUA's comments with respect to the inclusion of these respective awards follow.

3. TEXTILE, CLOTHING, FOOTWEAR AND ASSOCIATED INDUSTRIES AWARD 2010

3.1 Attachment A includes information regarding the TCF Award as:

Award	Unclear whether overtime is payable to casuals	Unclear when overtime is payable	Unclear at what rate overtime is payable
Textile, Clothing, Footwear and Associated Industries Award 2010		√	√

Whether it is unclear whether overtime is payable to casual employees under the TCF Award

3.2 In respect to the first column, the TCFUA concurs with the position reflected in Attachment A to the Statement that it is not unclear whether overtime is payable under the TCF Award.

3.3 The TCF Award expressly provides that casual employees are entitled to overtime entitlements as evidenced by the terms of sub-clauses 14.5 and 14.7 (which relate to Casual employment), clause 30 (which relates to Ordinary working hours) and clause 39 (which relate to Overtime).

Whether it is unclear when overtime is payable under the TCF Award

3.4 In respect to the second column, the TCFUA does not agree that it is currently unclear when overtime is payable to casual employees under the TCF Award. In the TCFUA's earlier correspondence filed (12 December 2017) the TCFUA in error mistakenly concurred with the position on this issue contained in Attachment A to the Statement.

3.5 We submit that when viewed in combination, the current casual employment, hours of work and overtime provisions in the TCF Award do expressly determine *when* a casual employee's entitlement to overtime is triggered. The extracts of various clauses below seek to demonstrate this point. For context and completeness the full text of clause 14 (Casual employment) is reproduced, other than the casual Conversion clause (14.10).

3.6 Sub-clause 14.1 – 14.10 (Casual employment) of the TCF Award provides:

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 $\frac{1}{38}^{\text{th}}$ 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 the award as they apply to permanent employees.

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 per day.

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

3.7 Clauses 28, 29 and 30 of the TCF Award variously prescribe the ordinary hours of work (including spread of hours) and when overtime is triggered. These provisions apply by general application to all employees covered by the TCF Award, (including casual employees) other than those separately covered by the shiftwork provisions (see clauses 34, 35, 37 and 37) or outwork provisions (Schedule F).

3.8 Clauses 28, 29 and 30 are reproduced in full below.

Clause 28 (Hours of work)

Ordinary hours are provided for in Division 3 of the NES.

The average ordinary working hours will be fixed by agreement between the employer and the employees but will not exceed an average of 38 hours per week over a four week period.

Clause 29 (Spread of hours)

Ordinary hours may be worked between 7.00am and 7.00pm for up to eight hours per day Monday to Friday inclusive.

Clause 30 (Ordinary working hours)

30.1 An employee must notify an employer of the start and finishing times of work each day which are the ordinary working hours.

30.2 In the clothing industry, an employer must clearly display the ordinary working hours in an obvious place in each workforce.

30.3 An employer must pay an employee for time worked outside or in excess of ordinary working hours in accordance with clause 39 – Overtime rates.

3.9 Clause 39 (Overtime rates) expressly prescribes the circumstances in which overtime is payable including the various percentage overtime rates applicable. Clause 39 applies, by general application, to all employees, including casual employees.

3.10 Clause 39 is extracted, in part, below:

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 at overtime rates.

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 any 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 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 employee's ordinary rate for the first three hours and 200% thereafter.

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

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

3.11 With respect to casual employees who work less than full time hours (average of 38 hours per week), sub-clause 14.5 provides that an entitlement to penalty payments for overtime (and shiftwork and work on public holidays) is *'in accordance with the provisions of the award as they apply to permanent employees'*.

3.12 Clause 13 (part-time employment) provides an entitlement to overtime payment (as per clause 39) for a permanent, part-time employee for *'all time worked in excess of the hours mutually agreed'* (as per clause 13.2(b) and 13.3).

3.13 The provisions in the TCF Award together with the NES (Hours of Work) have the effect that casual employees have 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'*. This applies to casual employees who work full time hours (average of 38 hours per week) or less than full time hours for a particular shift or weekly engagement. Relevantly, as outlined previously, clause 30.1 requires that an employer *'must notify an employee of the start and finishing times of work each day which are the ordinary working hours'*. That is, a casual employee's daily ordinary hours are required to be explicitly determined and notified to employees, including casual employees.

3.14 Specifically, in respect to the TCF Award, it is submitted that casual employees are therefore entitled to overtime payments where they undertake work:

- outside the span of hours prescribed under the award; and/or
- in excess of 38 hours per week; and/or
- in excess of daily ordinary hours; or
- in excess of the number of hours fixed for their shift as provided in their engagement with their employer.

Whether it is unclear at what rate overtime is payable under the TCF Award

3.15 In relation to the TCF Award, the third column in Attachment A to the Statement is ticked as being *'unclear at what rate overtime is payable'*.

3.16 During the Exposure Draft process for the TCF Award, the TCFUA raised concerns as to the basis of the calculations used for casual wage rates contained in the new Pay Rates Tables (Schedule C – Summary Hourly Rates of Pay) in the various TCF Award Exposure Drafts.⁹ These concerns were outlined in the TCFUA's written submissions¹⁰ and in Conferences before the Commission held during 2014/2015.

3.17 In summary, the TCFUA submitted a part of the Exposure Draft process that the method of calculation for casual pay rates should be undertaken on the basis of a compounding method (i.e. where the particular penalty is applied to the casual loaded hourly rate), rather than a method of calculation commonly referred to as *'cumulative'* or *'in addition to'* (i.e. the casual loading is added after the application of the penalty to an ordinary hourly rate).

3.18 We continue to rely on those submissions.

3.19 The TCFUA's position in relation to the appropriate method of the calculation of casual employee's entitlement to overtime and other penalties under the TCF Award is opposed by a number of employer parties.

3.20 The TCFUA acknowledges that there is a contest between the TCFUA and various employer organisations with an interest in the TCF Award as to the appropriate method of calculation for casual employees with respect to overtime.

⁹ (AM2014/91) Textile, Clothing, Footwear and Associated Industries Award. Exposure Drafts dated 30 October 2015; 4 November 2015; 13 June 2017

¹⁰ (AM2014/91) TCFUA Submission (14 November 2014) at paragraphs 118 - 121; (AM2014/91) TCFUA Submission (24 November 2015) at pp 8 -14 of Table attached to submission; (AM2014/91) TCFUA Submission (7 July 2017) at paragraphs 65 – 96

4. DRY CLEANING & LAUNDRY INDUSTRY AWARD 2010

4.1 Attachment A to the Statement includes information regarding the DC&LI Award as follows:

Award	Unclear whether overtime is payable to casuals	Unclear when overtime is payable	Unclear at what rate overtime is payable
Dry Cleaning and Laundry Industry Award 2010			√

Whether it is unclear whether overtime is payable to casual employees under the DC&LI Award

- 4.2 In respect to the first column, the TCFUA concurs with the position reflected in Attachment A to the Statement that it is not unclear whether overtime is payable under the DC&LI Award.
- 4.3 The DC&LI Award expressly provides in sub-clause 10.5(a) that casual employees are entitled to overtime (where they work in excess of 38 ordinary hours per week) and by way of general application of sub-clause 22.1 (Overtime).

Whether it is unclear when overtime is payable under the DC&LI Award.

- 4.4 We submit that when viewed in combination, the casual employment, hours of work and overtime provisions of the DC&LI Award do determine when a casual employee is entitled to overtime payments. The overtime rates applicable under the DC&LI Award and the casual loading of 25% are both payable as the casual loading must be paid for all hours worked (sub-clause 10.5(c)) and the casual loading is not paid in lieu of an entitlement to overtime (sub-clause 10.5(d)).
- 4.5 A casual employee is expressly entitled to overtime when they work in excess of 38 ordinary hours per week (subclause 10.5(a)) and by way of general application, when they perform work outside of/ and/or in excess of their ordinary hours (subclause 22.1). This would include on a daily basis. The applicable overtime rate is time and half for the first three hours and double time thereafter. In computing overtime, each day's work will stand alone (subclause 22.1). However, specific penalty rates apply to *all work* undertaken by an employee on a Sunday – rate of double time (subclause 22.5(b)) and on a public holiday – rate of double time and a half (subclause 22.5(c)).
- 4.6 Ordinary hours for all employees (for dry cleaning and laundry workplaces) are prescribed in clause 21. The TCFUA notes the issue raised by United Voice in these proceedings, in its submission (11 December 2017) that *'The payment of overtime for a daily maximum in dry cleaning workplaces requires clarification.'*¹¹

5. ***Whether it is unclear at what rate overtime is payable***

- 5.1 In relation to the DC&LI Award, the third column in Attachment A to the Statement is ticked as being 'unclear at what rate overtime is payable'.

¹¹ (AM2017/51) United Voice Submission (11 December 2017)

- 5.2 During the Exposure Draft process for the DC&LI Award in 2016/2017, the TCFUA raised concerns as to the basis of the calculations used for the casual wage rates contained in the new Pay Rates Table (Schedule C – Summary Hourly Rates of Pay) in the various DC&LI Award Exposure Drafts.¹² These concerns were outlined in the TCFUA’s written submissions¹³ and in Conferences held before the Commission in 2017.
- 5.3 In summary, the TCFUA submitted a part of the Exposure Draft process that the method of calculation for casual pay rates should be undertaken on the basis of a compounding method (i.e. where the particular penalty is applied to the casual loaded hourly rate), rather than a method of calculation commonly referred to as ‘cumulative’ or ‘in addition to’ (i.e. the casual loading is added after the application of the penalty to an ordinary hourly rate).
- 5.4 We continue to rely on those submissions.
- 5.5 The TCFUA’s position in relation to the appropriate method of the calculation of casual employee’s entitlement to overtime and other penalties under the TCF Award is opposed by a number of employer parties.
- 5.6 The TCFUA acknowledges that there is a contest between the TCFUA and various employer organisations as to the appropriate method of calculation for casual employees with respect to overtime. The Revised Summary of Submissions – Technical and Drafting published on 20 November 2017 reflects this.¹⁴

Filed on behalf of:

Textile Clothing and Footwear Union of Australia
(National Office)

(22 January 2018)

¹² (AM2014/264) Dry Cleaning and Laundry Industry Award 2010. Exposure Drafts dated 3 November 2016, 15 May 2017 and 20 July 2017.

¹³ (AM2014/264) TCFUA Submission (18 January 2017) at pages 10 – 14
(AM2014/264) TCFUA Submission in Reply (23 February 2017)

¹⁴ (AM2014/264) Dry Cleaning and Laundry Industry Award 2010. Revised Summary of Submissions – Technical and Drafting (republished 20 November 2017) at page 14