

IN THE FAIR WORK COMMISSION

Matter No: AM2017/51

Section 156 - Four Yearly Review of Modern Awards – Overtime for Casuals

SUBMISSION OF UNITED VOICE

1. On 4 December 2017, a Full Bench of the Fair Work Commission made a statement concerning over time and casual employment in relation to a number of modern awards ('the Statement').¹ This submission is responsive to the Statement's request for interested parties to provide a written response concerning the accuracy of the list of awards in Attachment A of the Statement.
2. United Voice has an interest in a number of the modern awards listed in Attachment A.
3. There are high levels of casualisation across many sectors in the Australian economy. Casual employees tend to earn less than permanent employees, and do not have access to the job security and leave entitlements that permanent employees rely upon. Casual employment is necessarily more precarious than permanent employment.
4. In some sectors, casual employees are heavily utilised and work long hours. Casual employees experience the same fatigue and disability that permanent employees do when working long hours. As such, there is no coherent reason to deny casual employees access to overtime which is intended to deal with disutility associated with the duration of the work.
5. United Voice made submissions regarding overtime for casuals in the proceedings AM2014/AM2014/196 & AM2014/197 – Casual employment and Part-time employment in relation to the *Hospitality Industry (General) Award 2010*, the *Registered and Licensed Clubs Award 2010* and the *Restaurant Industry Award 2010*.
6. Casual employees should be paid overtime rates for any hours worked in excess of a weekly maximum of 38 hours as this aligns with the ordinary hours of work for a full time employee. Fatigue and disability begin being evident after an individual's weekly hours of work approaches and exceeds 38 hours a week. Further, it is desirable that casual employment should broadly be cost equivalent with permanent employment so as to avoid providing an incentive for employers to over utilise casual employees.

¹ FWCFB 6417

7. The National Employment Standards ('NES') at section 62 of the *Fair Work Act 2009* ('the Act') provides that 38 hours is the maximum weekly hours. The section does not make any distinction between permanent and casual employment as it refers to '*an employee*'. Section 62 has a clear connection to overtime as hours worked in excess of maximum hours will ordinarily be considered overtime. Subsection 62(2) provides a right for employees to refuse additional work beyond 38 hours a week if working the additional hours is '*unreasonable*'. In determining whether additional hours are reasonable or unreasonable, the Act requires that a number of considerations are to be taken into account in subsection 62(3) of the Act. One consideration as to whether a direction to work additional hours is reasonable is:

(d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

8. Section 62 provides a clear basis to say that 38 hours is the appropriate number of intraweek hours beyond which overtime should be paid.
9. Further, section 147 of the Act states that:

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.
10. Section 147 provides a clear basis to say that casual employees should have ordinary hours of work stipulated by each modern award, where casual employment is permitted as a type of employment under the award.
11. In addition, casual employees should be paid overtime rates for any hours worked in excess of a maximum of 10 hours per day or shift, at the least. There is evidence that approaching and exceeding this duration is associated with fatigue and disability. Many modern awards stipulate that an employee can only work 8 or 10 maximum ordinary hours per day or shift.
12. Further, the casual loading should be disaggregated from overtime rates.
13. In the recent decision of 23 February 2017, *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 ('the Penalty Rates Decision'), the Commission made repeated reference to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading. At paragraph 333 of the Penalty Rates Decision, the Commission noted that the Productivity Commission in its Final Report observed:

In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent

employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.

14. The Productivity Commission described a ‘default approach’ where:

... the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.²

15. At paragraph 337 of the Penalty Rates Decision, the Commission indicated a preference for the default approach as:

... the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer’s leave, notice of termination and redundancy benefits.

16. While the Commission did not make any specific reference to consideration 134(1) (da) (i) which deals with the need to provide additional remuneration for employees working overtime, United Voice contends that the insertion of this consideration into the modern award objective in January 2013 provides support for the casual loading being an additional amount paid when any overtime rates apply to work in excess of ordinary hours. Subsuming the casual loading into overtime rates also means that a casual employee is not adequately compensated for disutility determined to apply for the hours worked.

17. On 5 July 2017, a Full Bench in *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541, observed in paragraph 549 that:

Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need not cause significant additional cost burdens for employers. That is relevant to the

² The Decision, paragraph [335].

consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.

18. In Attachment A to the Statement, the Commission rated modern awards in respect of three categories:
 - *‘Unclear whether overtime is payable to casuals’;*
 - *‘Unclear when overtime commences’;* and
 - *‘Unclear at what rate overtime is payable.’*
19. United Voice has made comments on the above categories in Attachment 1 to this submission in respect of the modern awards we have a significant interest in.
20. In all the modern awards of interest to United Voice in Attachment 1, casual employees do have an entitlement to overtime. We do not agree with the categorisation that in any of the modern awards in Attachment 1, that it is *‘unclear whether overtime is payable to casuals.’*
21. We do acknowledge that in several modern awards, the entitlement is read by reference to a number of clauses including clauses dealing with types of employment, ordinary hours of work and overtime. There is likely utility in having clear provisions concerning when overtime is paid to casual employees. A clear provision that work in excess of 38 hours a week by a casual employee is paid at overtime would be useful in a number of the modern awards in Attachment 1.
22. Similarly, with respect to the categories *‘Unclear when overtime commences’* and *‘Unclear at what rate overtime is payable’*, we disagree that the matters are *‘unclear’* in regards to the majority of the modern awards in our Attachment 1.
23. In the vast majority of the modern awards in our Attachment 1, both matters can be read from the text of the modern award by reading the types of employment, ordinary hours of work and overtime clauses together.
24. Again, we acknowledge that for the purpose of simplicity, there may be utility in clarifying the entitlement within certain modern awards.
25. United Voice intends to submit draft determinations in respect of awards in which the casual overtime provisions could be clarified in accordance with the timetable proposed in the Statement.

UNITED VOICE
11 December 2017

Attachment 1

Award	Comments	Should the Award be retained or removed from the FWC's list?
Aboriginal Community Controlled Health Services Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 20.2, Clause 24). • Overtime is paid for work over 10 hours per day (Clause 20.2). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4(b)). • We note that there is a claim in the award stage review of this modern award to clarify the disaggregation of the casual loading from any overtime penalty payable. 	Retained
Aged Care Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 10.4(a), Clause 25.1(b)). • Overtime is paid for work in excess of 10 hours per day or 38 hours per week (Clause 25.1(b)). • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4(b)). 	Removed
Airport Employees Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 27, Clause 30). • Overtime is paid for work in excess of 10 hours per day or an average of 38 hours per week (Clause 27, Clause 30) • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 12.4(b)). 	Removed
Ambulance and Patient Transport Industry Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 24). • The commencement of overtime for casuals requires clarification. There is no clear provision concerning when overtime commences. Clause 24.1(a) notes overtime is payable <i>'for any work exceeding the number of hours fixed as a day's, week's, or fortnight's work'</i>. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(d)). 	Retained
Amusement, Events and Recreation Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 10.4(c), Clause 23). • Overtime is paid for work in excess of 10 hours per day or 38 hours per week (Clause 10.4(c)). 	Removed

	<ul style="list-style-type: none"> Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4(d)). 	
Animal Care and Veterinary Services Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 22, Clause 24). Overtime is paid for work in excess of 10 ordinary hours per day or 38 hours per week (Clause 22, Clause 24). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(b)). 	Removed
Car Parking Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 21, Clause 23). Overtime is paid for work in excess of 7.6 (or 10, by agreement) ordinary hours per day or 38 hours per week (Clause 21, Clause 23). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(d)). 	Removed
Cemetery Industry Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 21, Clause 23). Overtime is paid for work in excess of an average of 38 hours per week or outside the ordinary hours per day (Clause 21, Clause 23). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.3(b)). 	Removed
Children's Services Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 10.5(e)). Overtime is paid for work in excess of 8 hours per day or shift or 38 hours per week (Clause 10.5(e)). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(a)). 	Removed
Cleaning Services Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 12.5(a)). Overtime is paid for work in excess of 7.6 hours per day, 5 days a week for a casual employee as this provision notes that these are the ordinary hours of casual and part time employees (Clause 24.2). The payment of overtime for hours exceeding 38 hours per week requires clarification. There is no clear provision that entitles casual employees to overtime after 38 hours work within a week. Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 12.5(a)). 	Retained

<p>Corrections and Detention (Private Sector) Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 10.5, Clause 20). • Overtime is paid for work in excess of 10 hours (12 hours for shift workers) (Clause 20). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime and there is clarification regarding the calculation of penalties and overtime for casual employees in that it is calculated on the ordinary rate (Clause 10.5). 	<p>Retained</p>
<p>Dry Cleaning and Laundry Industry Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 10.5). • Overtime is paid for work in excess of 38 hours per week or in excess of the daily maximum hours (Clause 10.5(a), Clause 21). The payment of overtime for a daily maximum in dry cleaning workplaces requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(d)). 	<p>Retained</p>
<p>Educational Services (Schools) General Staff Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 22, Clause 27). • Overtime is paid for work in excess of the ordinary hours of work (Clause 22, Clause 27). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(b)). 	<p>Retained</p>
<p>Educational Services (Teachers) Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Schedule B.1) • In Long Day Care Centres, overtime is paid for work in excess of 8 hours per day (Clause B.1.3). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as casual rates are not paid instead of overtime (Clause 14.5). 	<p>Retained</p>
<p>Food, Beverage and Tobacco Manufacturing Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 30, Clause 33). • Overtime is paid in excess of an average of 38 hours per week or outside the ordinary works or work (Clause 30.2). • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 13.1). 	<p>Removed</p>
<p>Funeral Industry Award 2010</p>	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 21, Clause 24). • Overtime is paid for work in excess of 10 ordinary hours per day or an average of 38 hours per week 	<p>Removed</p>

	<p>(Clause 21, Clause 24).</p> <ul style="list-style-type: none"> • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(b)). 	
Health Professionals and Support Services Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 10.4, Clause 23.2 and Clause 28). • Overtime is paid for work in excess of 10 ordinary hours per day or an average of 38 hours per week (Clause 10.4(a), Clause 23.2, Clause 28). • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4(b)). 	Removed
Hospitality Industry (General) Award 2010	Subject to AM2014/196 & AM2014/197 – Casual employment and Part-time employment	
Manufacturing and Associated Industries and Occupations Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 36, Clause 40). • Overtime is paid for work in excess of an average of 38 hours per week or beyond the ordinary hours or work (Clause 36, Clause 40). • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 14.1). 	Removed
Miscellaneous Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 20.2, Clause 22.3). • Overtime is paid for work in excess of 10 hours per day or shift (Clause 20.2). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4). 	Retained
Nurses Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 21.2). • Overtime is paid for work in excess of 10 ordinary hours per day or shift (Clause 21.2). The payment of overtime for hours exceeding 38 hours per week requires clarification. • Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.4(b)). 	Retained
Racing Clubs Events Award 2010	<ul style="list-style-type: none"> • The award does contain an entitlement to overtime for casual employees (Clause 26, Clause 29). • Overtime is paid for work in excess of 8 ordinary hours per day or 38 hours per week (Clause 26, 	Removed

	<p>Clause 29).</p> <ul style="list-style-type: none"> Both the casual loading and overtime rates should be paid as the casual loading and casual rates are not paid instead of overtime (Clause 13.2, Clause 14.9). 	
Registered and Licensed Clubs Award 2010	Subject to AM2014/196 & AM2014/197 – Casual employment and Part-time employment	
Restaurant Industry Award 2010	Subject to AM2014/196 & AM2014/197 – Casual employment and Part-time employment	
Security Services Industry Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 21, Clause 23). Overtime is paid in excess of an average of 38 hours per week and 10 hours per day (Clause 21, Clause 23). Ordinary hours can be averaged over an 8 week cycle. This is a lengthy period of time, and can result in employee’s experiencing unreasonable delay in the payment of overtime. There should be clarification as to whether the casual loading is disaggregated from overtime (Clause 10.5(b)). 	Retained
State Government Agencies Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 21, Clause 23). Overtime is paid for work in excess of ordinary hours or 38 hours per week (Clause 21, Clause 23). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(a)). 	Removed
Supported Employment Services Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 20, Clause 21). Overtime is paid in excess of an average of 38 hours per week and 8 hours per day (Clause 20, Clause 21). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5(b)). 	Removed
Water Industry Award 2010	<ul style="list-style-type: none"> The award does contain an entitlement to overtime for casual employees (Clause 10.5, Clause 25, and Clause 26). Overtime is paid in excess of an average of 38 hours per week and 10 hours per day (Clause 25, Clause 26). Both the casual loading and overtime rates should be paid as the casual loading is not paid instead of overtime (Clause 10.5). 	Removed

Wine Industry Award 2010	<ul style="list-style-type: none">• The award does contain an entitlement to overtime for casual employees (Clause 13).• Overtime is paid in excess of an average of 38 hours per week and 10 hours per day (Clause 28, Clause 30).• The payment of casual loading is not instead of overtime on Sundays and public holidays (Clause 13.4(b)).	Removed
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