



REPORT TO THE FULL BENCH

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – award stage

(AM2019/17)

Timber Industry Award 2010

(MA000071)

COMMISSIONER BISSETT

MELBOURNE, 5 JUNE 2020

4 yearly review of modern awards – Timber Industry Award – finalisation of outstanding issues – tranche 3

[1] On Monday 27 April 2020 the Full Bench issued a decision¹ (*April Decision*) with respect to the finalisation of exposure drafts for tranche 3 awards. Since that time a number of exposure drafts have been reissued in accordance with the decision with the revised Exposure Draft for the *Timber Industry Award 2010* published on 8 May 2020.

[2] In the *April Decision* the Full Bench indicated that a conference would be convened to discuss any outstanding issues arising from the revised Exposure Draft or the *April Decision*.

[3] A conference of the interested parties was convened on 4 June 2020.

[4] Prior to the conference the Construction, Forestry, Maritime, Mining and Energy Union– Manufacturing Division (CFMMEU) advised the Commission of two matters in relation to the Exposure Draft. At the conference the Australian Business Lawyers (ABL) and the Housing Industry Association (HIA) raised an issue arising from the *April Decision* that they suggested had not been resolved by the Full Bench.

Clause 16 – Classifications

[5] Clause 16 – Classifications in the Exposure Draft reads:

The definitions of the classification levels in clause 20—Minimum, are contained in Schedule A—Classification Definitions —General Timber Stream, Schedule B—Classification Definitions—Wood and Timber Furniture Stream and Schedule C—Classification Definitions —Pulp and Paper Stream.

[6] All parties agree that the word “Rates” should be inserted after the word “Minimum”.

Clause 20.4(a)(ii) – Adult apprentices

[7] In the *April Decision* the Full Bench said:

[469] Clause 20.4(a) (Adult apprentices in the Wood and Timber Furniture Stream) at 20.4(a)(ii) provides a table of applicable adult apprentices' rates of pay for employees who commenced on or after 1 January 2014. The second column of the table has a heading '*% of Level 5 adult ordinary hourly rate*'. [emphasis added by the CFMMEU]

[470] The equivalent provision in clause 17.6(a)(ii) of the Timber Award contains a heading titled '*% of level 5 minimum weekly wage*'.

[471] The CFMMEU submitted that it is not clear whether the change in terminology of the heading in the second column of clause 20.4(a)(ii) is intentional or an error.

[472] At [398] of the Tranche 3 BP we said:

'It appears that the change in terminology of the heading was made in error. It is our *provisional* view that the heading in the second column of clause 20.4(a)(ii) be amended to reflect that in the current modern award.'

[473] No party opposed our *provisional* view. We confirm our *provisional* view and will amend the heading in the second column of clause 20.4(a)(ii) to read '*% of Level 5 minimum weekly wage*'.

[8] The decision of the Full Bench was not reflected in the Exposure Draft with the Exposure Draft inserting the heading "*% of level 5 minimum weekly rate*" (underlining added)

[9] On consideration of the matter the parties agreed that the heading in the table should be as included in the Exposure Draft and not as expressed by the Full Bench at [473]. The use of the word "rate" instead of "wage" would be consistent with other tables in the Exposure Draft and the introductory paragraph to the table which states:

The minimum weekly rates of pay for adult apprentice who commenced on or after 1 January 2014 will be either the relevant percentage of the level 5 rate in the table below, the rate prescribed by clause 20.2 or 20.3 for the relevant year... (underlining added)

[10] The parties therefore are content for the wording in the Exposure Draft to remain.

[11] In the *April Decision* the Full Bench said:

[438] In clause D.3, parties were asked whether the public holiday penalty rate for casual workers should be limited to the General Timber Stream.

[439] ABI submitted that, based on the current wording of the Exposure Draft, casual employees are not entitled to public holiday loadings, unless they are in the General Timber Stream:

'78. This is because, clause 27.1(d) prescribes the public holiday penalty for casual employees. This clause is clearly limited to employees in the General Timber Stream.

79. Clause 27.1(c) also prescribes a public holiday penalty, but it expressly limited to weekly employees and so does not apply to casual employees, whether in the General Timber Stream or not.

80. Further to this, the Saturday and Sunday payments prescribed in clauses 27.1(a) and (b), are also expressly limited to weekly employees and do not apply to casual employees.

81. The Saturday and Sunday rates in the table at clause D.3.1 should be amended to reflect this.’

[440] At [370] of the Tranche 3 BP we invited interested parties to comment on the issue raised by ABI and the solution proposed.

[441] HIA agreed with ABI’s comments and submits that clause D.3.1 should be amended to provide public holiday rates only for casual employees in the General Timber Stream and remove the Saturday and Sunday rates currently specified.

[442] The CFMMEU – MD oppose ABI’s submission:

‘We note at the outset that there is no actual definition of ‘weekly employees’ in the Timber Award 2010. However, even on the assumption that the expression ‘weekly employees’ was intended to exclude casual employee, we submit that this does definitively determine the respective issues.

Clause 12.2 (Casual employment) of the Timber Award provides as follows:

12.2 Casual employment

A casual employee will be paid per hour 1/38th of the award ate applicable for the work performed plus a loading of 25% of the applicable rate of pay.

A casual employee who works in excess of the ordinary hours fixed for weekly employees on any day will be paid at the appropriate overtime rate provided in clause 30 – Overtime, Saturday, Sunday and public holiday payments-day work an shiftwork based on their ordinary rate of pay (including the loading provided for in clause 12.2(a). [added emphasis]

A casual employee engaged for any part of any day will be entitled to a minimum of fours hours’ pay per day whether the casual employee is required to work for four hours or not.

Clause 12.2 of the Timber Award is silent as to whether casual employees are (generally) excluded from an entitlement to penalty payments on public holidays and for work undertaken on Saturdays and Sunday.

It is the case that employees in the General Timber Stream expressly have an entitlement to public holiday penalty rates (see clause 30.7(b) of the Timber Award or clause 27.1(c) of the Exposure Draft). However, arguably, clause 30.7(b) is intended to carve out a different regime of penalty payments for casual employees in the General Timber Stream (reflecting the position in the pre-modern award) rather than operating to the effect that casual employees in the other two streams (i) Wood and Timber Stream; and (ii) Pulp and Paper Stream, have no entitlement to public holiday penalty rates.

Further, clause 12.2 of the Timber Award therefore expressly provides a casual employee an entitlement to overtime rates (as set out in clause 30) for all work

undertaken on any day in excess 'of the ordinary hours fixed for weekly employees'.

Clause 30.1 (Payment for working overtime) of the Timber Award provides a general entitlement for all employees (including casuals) working overtime in relation to ordinary hours, expressed as follows (in part):

30.1 Payment for working overtime

All time worked by employees outside of the spread of hours prescribed in clause 27 – Hours of work or in excess of the ordinary daily number of hours prescribed in clause 27, will be paid for at the rate of time and a half for first two hours and double time thereafter.

In computing overtime each day's work will stand alone.

For the purpose of this clause ordinary hours will mean the hours fixed in an establishment in accordance with 27 – Hours of Work.

Clause 27.2 makes provision for ordinary hours of all employees, by agreement, to be worked on any day of the week, including Saturday and Sunday inclusive. This applies to both day workers (27.2(b)) and shiftworkers (27.3(b)).

As such, if a casual employee's ordinary hours include hours on a Saturday or Sunday, and they work additional hours on that day, we submit, at a minimum, they would be entitled to overtime payments of time and half for the first two hours, and double time thereafter for such additional hours.'

[12] The parties have noted that, while the Full Bench identified the issues, it did not make a determination to resolve the disputed issue.

[13] The parties have proposed that they be given an opportunity to make further written submissions and that the Full Bench then determine the matter on the papers. The parties seek a week for the employer parties or those in support of the ABI and HIA view while the CFMMEU seeks a further week to reply.



COMMISSIONER

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Endnote:

¹ [2020] FWCFB 2124.