



BACKGROUND PAPER

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Salt Industry Award 2010*

(AM2019/17)

MELBOURNE, 25 NOVEMBER 2019

Note: This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

1. Introduction

[1] The Fair Work Commission (Commission) has produced this background paper in order to facilitate discussions at the conference scheduled by providing background information about the summary of the contested casual overtime issue in the *Salt Industry Award 2010* (the Salt Award).

[2] In a decision issued on 24 October 2019¹ (*the October 2019 Decision*) the Salt Award was identified as an award where casual overtime rates are contested. The Full Bench decided to delay issuing a variation determination in respect of the award and a conference of interested parties is to take place at **11:30am on Tuesday 26 November 2019**, to discuss how to proceed.

[3] **Interested parties are asked to consider the material contained in this background paper and be prepared to advance a proposed resolution ready at the conference.**

[4] A comparison table of provisions relating to casual overtime rates in the Salt Award and the Salt Award—ED (the ED) has been provided at Attachment A to this background paper.

2. AM2019/17—Final stage proceedings

¹ [\[2019\]FWCFB 7173](#)

[5] In the *October 2019 Decision*, the Full Bench provided the following outline of a submission from the Australian Workers' Union (the AWU) to vary the casual loading clause in the ED:

“(iii) Clause 11.3(a)

[171] Clause 11.3(a) reads:

‘11.3 Casual loading

(a) For each ordinary hour worked, a casual employee must be paid:

(i) the ordinary hourly rate for their classification; and

(ii) a loading of 25% of the ordinary hourly rate.

(b) The loading constitutes part of the casual employee's rate of pay for all purposes.

(c) The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and the other conditions of full-time or part-time employment.’

[172] The AWU submits:

‘This should be amended to read: “For each ordinary hour worked, a casual employee must be paid...” The word “ordinary” does not appear in clause 10.3(b) of the current award. The casual loading is paid for all purposes so there should be no dispute about it being paid on overtime.’²

[6] At the hearing on 11 October 2019, Australian Industry Group (Ai Group) objected to the AWU's submission, submitting the Salt Award falls into the same category as the *Mining Industry Award 2010* (the Mining Award).³ Ai Group had previously argued that the Mining Award excludes casual loading from overtime payments despite casual loading being expressed as part of the all-purpose rate and that the Mining ED is an example of where ‘the rubber hits the road’ in relation to the issue of overtime for casuals.⁴

[7] In an earlier submission dated 20 September 2019, Ai Group submits the Salt Award excludes casual overtime payments in clause 23.3(b).⁵ Clause 23.3(b) of the Salt Award states the following:

“23.3. Method of calculation

² [2019] FWCFB 7173 at [173].

³ [Transcript](#), 11 October 2019, at PN262.

⁴ [Transcript](#), 11 October 2019, at PN202.

⁵ [Ai Group submission](#), 20 September 2019 at [98]-[100].

- (a) When computing overtime payments, each day or shift worked will stand alone.
- (b) Any overtime payments are in substitution of any other loadings or penalty rates.”

[8] As stated above, the Full Bench resolved to delay issuing a variation determination and listed the conference to discuss how to proceed.

3. AM2017/51—Overtime for casuals

[9] A statement issued on 4 December 2017 by the Full Bench constituted to deal with the issue of overtime for casuals (AM2017/51) identified the Salt Award as ambiguous in relation to whether overtime is payable to casuals, when overtime commences and at what rate overtime is payable.⁶

[10] A subsequent statement issued on 14 October 2019 identified the Salt Award as the subject of discussion between the parties. Parties were directed to continue discussions and report back to **VP Hatcher at 9:00am on 26 November 2019**.⁷

[11] The Full Bench expressed an expectation that, at the report back to VP Hatcher, parties would be in a position to identify either that there is an agreement as to the meaning and effect of the current casual overtime provisions or that there is a dispute about a specified issues. The Full Bench indicated that any disputed issue in an award will be added to the matters to be resolved at hearing before the Full Bench at 10:00am on 16 and 17 December 2019.⁸

[12] A number of submissions have been made on the Salt Award in the overtime for casuals matter. In a submission dated 11 July 2019, the AWU submits that, as clause 10.3(b) of the award states that casual loading forms part of the casual employee’s all-purpose rate, the loading is included in overtime calculations on a compounding basis.⁹ Clause 10.3(b) of the award provides the following:

- “(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 14— Minimum wages, plus a casual loading of 25%. The loading constitutes part of the casual employee’s all-purpose rate.”

[13] In a submission dated 5 July 2019, Australian Business Industrial and NSW Business Chamber (ABI) made a preliminary comment that casual loading is “all-purpose method” and noted there may be historic industry considerations behind the drafting They otherwise reserved their position.¹⁰

⁶ [2017] FWCFB 6417 at Attachment A.

⁷ [2019] FWCFB 7087 at [11] and [Notice of Listing – 26 November 2019 – further amended](#), 21 November 2019.

⁸ [2019] FWCFB 7087 at [12].

⁹ [AWU submission](#), 11 July 2019, at [65]-[66].

¹⁰ [ABI and NSWBC submission](#), 5 July 2019, at Overtime for Casuals Summary Table at 63.

[14] An Issues Paper published by the Commission on 5 February 2019 made the following observations:

- clause 10.3(b) provides that casual employees are paid a casual loading of 25%;
- this loading constitutes part of the casual employee’s all-purpose rate; and
- clause 20.3 express overtime rates as 50% and 100% of the ordinary hourly base rate of pay.¹¹

4. AM2014/88 – Award Stage Proceedings—Salt Industry Award 2010

[15] During the award stage proceedings, ABI and NSWBC made a submission that the word ‘loadings’ in clause 14.4(b) of the ED (now clause 21.4) should not be deleted as casuals are not entitled to casual loading on overtime under this award.¹² Clause 21.4(b) of the ED and the equivalent award clause 23.3(b) have been reproduced in the comparison table of relevant provisions at Attachment A.

[16] The issue was subsequently referred to the Full Bench in AM2017/51.¹³

¹¹ [Issues paper](#), 5 February 2019 at 35.

¹² [ABI submission](#), 7 July 2017, at [31].

¹³ [\[2018\] FWCFB 3802](#) at [18].

Attachment A—Comparison Table

<i>Salt Industry Award 2010 – current award</i>	<i>Salt Industry Award—Exposure Draft</i>
<p>10.3. Casual employment</p> <p>...</p> <p>(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 14—Minimum wages, plus a casual loading of 25%. The loading constitutes part of the casual employee’s all-purpose rate</p>	<p>11.3. Casual Loading</p> <p>(a) For each ordinary hour worked, a casual employee must be paid:</p> <ul style="list-style-type: none"> (i) the ordinary hourly rate for their classification; and (ii) a loading of 25% of the ordinary hourly rate. <p>(b) The loading constitutes part of the casual employee’s rate of pay for all purposes.</p>
<p>23.1. Overtime payments—employees other than continuous shiftworkers</p> <p>(a) Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work done in addition to their ordinary hours:</p> <ul style="list-style-type: none"> (i) 50% of the ordinary hourly base rate of pay for the first two hours and 100% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until Saturday; (ii) 100% of the ordinary hourly base rate of pay for any overtime worked on a Sunday; and (iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday. 	<p>21.2. Overtime payments—employees other than continuous shiftworkers</p> <p>(a) Except where provided otherwise in clause 21.2, an employee (other than a continuous shiftworker) will be paid the following rates for all work done in addition to their ordinary hours:</p> <ul style="list-style-type: none"> (i) 150% of the ordinary hourly rate for the first 2 hours and 200% of ordinary hourly base rate of pay thereafter, for overtime worked from Monday until Saturday; (ii) 200% of the ordinary hourly rate for any overtime worked on a Sunday; and (iii) 250% of the ordinary hourly rate for overtime worked on a public holiday.

<i>Salt Industry Award 2010 – current award</i>	<i>Salt Industry Award—Exposure Draft</i>
<p>23.3. Method of calculation</p> <p>(a) When computing overtime payments, each day or shift worked will stand alone.</p> <p>(b) Any overtime payments are in substitution of any other loadings or penalty rates.</p>	<p>21.4. Method of calculation</p> <p>(a) When computing overtime payments, each day or shift worked will stand alone.</p> <p>(b) Any overtime payments are in substitution of any other loadings or penalty rates</p>
<p>3. Definitions and interpretation</p> <p>base rate of pay has the meaning in the NES</p>	<p>2. Definitions</p> <p>base rate of pay has the meaning in the NES</p> <p>casual ordinary hourly rate means the hourly rate for a casual employee for the employee’s classification specified in clause 16—Minimum rates, inclusive of the industry allowance and casual loading</p> <p>ordinary hourly rate means the hourly rate for the employee’s classification specified in clause 16—Minimum rates, inclusive of the industry allowance</p>