Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Overtime for Casuals – Second Category of Awards (AM2017/51)

24 December 2019

4 YEARLY REVIEW OF MODERN AWARDS
OVERTIME FOR CASUALS – SECOND CATEGORY

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in relation to the following 'second category' of awards identified at paragraph [9] of the statement[1] issued by the Fair Work Commission (**Commission**) on 14 October 2019 (**Statement**):

   (a) *Black Coal Mining Industry Award 2010* (**Black Coal Award**);

   (b) *Contract Call Centres Award 2010* (**CCC Award**);

   (c) *Oil Refining and Manufacturing Award 2010* (**Oil Award**);

   (d) *Telecommunications Services Award 2010* (**Telecommunications Award**);

   (e) *Textile, Clothing, Footwear and Associated Industry Award 2010* (**TCF Award**);

   (f) *Transport (Cash in Transit) Award 2010* (**Cash in Transit Award**);

   (g) *Water Industry Award 2010* (**Water Award**); and

   (collectively, **Awards**)

[1] *4 yearly review of modern awards – Overtime for casuals* [2019] FWC 7087.

2. BLACK COAL AWARD

3. We here respond to the submission of APESMA dated 9 December 2019 and the CFMMEU – Mining and Energy Division dated 9 December 2019.

4. While Ai Group contends that the Black Coal Award does not require the payment of the loading during overtime or the calculation of overtime rates in a manner that compounds on the casual loading, both unions advance the contrary view. Perhaps more accurately, the unions contend that overtime penalty rates are calculated on a rate that includes the casual loading.

Response to APESMA

5. APESMA appear to set out various arguments as to why, as a matter of industrial merit as opposed to the proper interpretation of the Award, a casual employee should receive a casual loading during overtime; although they do not press for any change to the award in response to such arguments.

6. The union assert that it is well known in the black coal industry that casual employees are paid overtime and that the rate at which it is paid has never been disputed (to AMESMA's knowledge). They also observe that the Coal Mining Industry Employer Group (CMIEG) who represent a group of large mining industry employers (which Ai Group acknowledge sometimes get involved in award review proceedings) have not made a submission in the proceedings.

7. The submissions do not assist the Commission. It is not in dispute that casual employees receive overtime. The contentious issue is whether they receive the casual loading. APESMA's asserted awareness or understanding of the level of disputation over the issues is unsupported by evidence and, even if the assertion was accepted, does not rise so high as to establish what rate casuals are typically paid in the sector for overtime.

8. The absence of CMIEG's involvement cannot be viewed as suggesting that they are supportive or even ambivalent towards the matter. Their position on the matter is simply not known and it must be observed that the group does not get involved in all award review proceedings. Regardless, they do not constitute the

entirety of the industry and, in any event, the views of a discrete number of very large employers in a sector (who may well be subject to enterprise agreements) is not determinative of what the proper interpretation of the Black Coal Award is or even what is an appropriate and necessary approach to dealing with such matters in the context of the safety net of minimum terms and conditions.

9. APESMA argue that the casual loading is payable, in part, because casual employees do not get benefits such as personal/carer's and annual leave entitlements which are provided to full-time and part-time employees. If this is accurate (and we acknowledge that the assertion mirrors the wording of clause 10.4(b)) it is unclear why a casual loading should be payable during overtime as none of the aforementioned leave entitlements under the award (or NES) accrue by reference to overtime.

10. The union also asserts that it is wrong as a matter of principle or logic that casuals not receive the casual loading while working overtime. Without accepting such a submission, we observe that they do not contend that the loading is or should be payable on overtime. Instead they argue that it should be taken into account when calculating the penalty rates pursuant to the overtime provisions of the award. That is, they are not arguing that under the award a cumulative approach to the inclusion of the casual laoding in the calculation of overtime rates can or should be adopted. Instead they are arguing for a compounding approach. It is difficult to see why, as a matter of merit, a casual employee should receive a greater benefit for working overtime when compared to a permanent employee by virtue of the penalty compounding on the casual rate.

11. APESMA points to a recent decision of the Commission concerning the review of the *Social, Community, Home Care and Disability Services Industry Award 2010* in which the Full Bench decided that, as a matter of merit, employees should receive the casual loading during overtime. For context, we observe that that decision followed major proceedings involving detailed consideration of the circumstances of the industry. In contrast, the focus of these proceedings has been contestation over the proper interpretation of the current instruments. No evidence about the nature of the industry or its utilisation or payment of casuals

has been advanced and there has, put bluntly, been no robust merit case for altering the rate of casual employees working overtime advanced by the unions. Indeed, in these proceedings, no party has proposed a variation to the award seeking to require the payment of a casual loading during overtime.

12. Varying the rate at which a casual employee is paid during overtime would be a major change to the award. It is not something that could legitimately be entertained on the limited material before the Commission.

Construction of the Award

13. Ai Group's previous submissions have addressed the proper construction of the relevant award provisions and the historical context that we say supports our approach.

14. In reply, APESMA contend that casual employees are entitled to receive overtime rates and set out the circumstances in which employees are taken to be working overtime under the award. Without commenting on the accuracy of such submissions, we observe that they are not relevant to the issue of whether casual employees receive a casual loading during overtime hours under the award.

15. Turning more squarely to the contentious issue of the rate of remuneration payable to a casual employee, APESMA points to the words "rate of pay" in the heading in a table in clause 17.2(a). The union's argument appears to essentially be that, in the absence of a definition of the words "rate of pay", their natural and ordinary meaning is that this is the "ordinary rate of pay"; and that for a casual, "this rate of pay includes a 25% loading". They argue that there is no other ordinary rate of pay that applies to a casual employee.

16. A major difficulty with the union's interpretation is that it rests upon them reading into the words "rate of pay" a requirement that it is the employee's "ordinary" rate of pay. We take them to be suggesting that this either means the rate of pay that the employee 'ordinarily receives' or the rate of pay that the employee receives for their ordinary hours of work. Either way, there is no textual support for this.

17. Adopting the union's interpretation would also, if a consistent approach was to be adopted, arguably mean that the overtime rate had to be calculated on not just the minimum award rate plus the separately identifiable casual loading but also the various allowances that might be payable to a casual employee during ordinary hours. No party is pressing for this, and we do not suggest that is the correct approach, but we raise this anomalous outcome to highlight that there is no apparent reason for including what is in form a casual laoding in an employee's "rate of pay" for the purposes of clause 17.2(a) and not other amounts.

18. Clause 17.2(a) can and should instead be read as requiring that the overtime rates be applied uniformly to all employees by reference to the rates of pay referred to in clause 16 of the award, albeit that for a casual such rates would of course need to be calculated on an hourly basis. There is no difficulty with this second proposition as the same calculation is also required to calculate the hourly rates for permanent employees.

19. There is nothing in the text of clause 17.2(a) to suggest that a different approach to the calculation of overtime for different types of employees should be adopted.

20. A further difficulty with the union's proposal is that it is at odds with the clear requirement under clause 10.2(b) that the casual loading is paid to a casual employee "for working ordinary hours". There is simply nothing in the actual words of the award to suggest that the casual loading is payable during overtime or that it is relevant for the purposes of calculating the casual loading.

21. The union also seek to make something of the fact that the award contains a definition for the term "base rate of pay" and the fact that this term is not used in the context of the award's provisions dealing with calculation of overtime rates. The argument seems to be that because the term "base rate of pay" (which is defined as excluding amounts including separately identifiable loadings) has not be used in clause 17.2, the ordinary and natural meaning of the overtime provisions is that the overtime rate is to be calculated on an employee's ordinary rate of pay which could include a casual loading which would not be part of the base rate of pay.

22. The union's arguments regarding the words "base rate of pay" should be given no weight. They appear to seek to place far too much significance on the absence of these words in a clause that would not be expected to use such a phrase, given the nature of the provision.

23. The term "base rate of pay" is a defined term in the Act and one that has significance in the calculation of various NES entitlements. Relevantly, it captures certain over-award payments and is utilised in the NES's treatment of annual leave and personal/carer's leave. This is very likely why it has been used in award clauses dealing with the payment of annual leave and personal/carer's leave entitlements on termination of employment. It would not however be appropriate in the context of the safety net for overtime payments to be calculated by reference to the "base rate of pay" because this could include over-award payments. Accordingly, nothing can be made of the absence of the term in clause 17.2.

24. In support of their interpretation, the union also point to the Fair Work Ombudsman's (**FWO**) pay guide for the Black Coal Award. It is trite to observe that the FWO's guide is by no means authoritative as to the correct approach to the interpretation of the award. Without criticising the FWO, it must also be borne in mind that the organisation's interpretation of award clauses or even the legislation do at times change as a consequence of matters such as consultation with relevant industry participants or representatives. The Commission ought not place too much weight on this publication.

25. The union also points to the decision in *AMWU v Energy Australia Yallourn Pty Ltd*[2] (***Energy Australia***) in support of their position.

26. Without seeking to here cavil with the decision of the Full Bench in that matter, we observe that the decision related to the interpretation of a different industrial instrument and involved the interpretation of differently worded clauses. We address this decision further later in these submissions.

[2] [2017] FWCFB 381

27. We similarly submit that APESMA's reliance on *Australian Nursing and Midwifery Foundation v Domain Aged Care (Qld) Pty T/A Opal Aged Care*[3] (***Domain Aged Care)*** should not be regarded as persuasive in the consideration of the proper interpretation of the Black Coal Award. As the union acknowledges, the provisions the subject of examination in those proceedings (clauses in the *Nurses Award 2010* (**Nurses Award**)) were differently worded. Moreover, Ai Group respectfully contends that the Full Bench's interpretation of the terms of the Nurses Award was wrong, or at the very least that the terms of that award are ambiguous and is now seeking to address this through a separate application. We also address this decision further later in these submissions.

28. Finally, APESMA address the next steps that should be taken by the Commission in these proceedings.

29. APESMA argues that no further action is required by the Commission in respect of the construction or variation of overtime provisions for casual employees and that this four yearly review process is not the appropriate forum for consideration of the merits of whether or not the casual loading should be paid to casual employees on top of overtime rates.

30. Ai Group does not oppose this submission. The Award does not require that the casual loading is payable during overtime. Nor does it require that penalty rates be calculated by reference to the casual loading. This should not be altered in the current proceedings or through the exposure draft process more broadly.

Response to the CFMMEU

31. The CFMMEU indicate their support for the position advanced by APESMA. To the extent that the CFMMEU go on to raise similar arguments to those articulated by APESMA we simply rely our response as set out above.

32. There are however two additional arguments that justify a separate response.

[33] *Australian Nursing and Midwifery Foundation v Domain Aged Care (Qld) Pty T/A Opal Aged Care* [2019] FWCFB 1716.

33. *Firstly*, the union point to the need to calculate the overtime rates for junior employees by refence to the reduced hourly rates prescribed by the award lest they receive an unprecedented windfall. Ai Group agrees that the overtime rates should be applied to the reduced junior rates. Any other outcome would be ridiculous. Reading the award in a manner that avoids such an outcome does not however necessitate that the reference to rates of pay in clause 17.2 should be read as incorporating every other modified rate or loading provided for under the award.

34. If there is some deficiency in the drafting of the award that suggests that it could be read as requiring the payment of overtime rates calculated by reference to adult employee rates (not that we accept that is the case), this should potentially be rectified. This is not however a matter that must be dealt with in the current proceedings.

35. *Secondly*, the union takes issue with the prospect that a casual employee working overtime would receive less when working overtime on a weekend than if they worked ordinary hours. Ai Group does not accept that such an outcome is inappropriate. It is simply a product of the award's different treatment of overtime when compared to ordinary hours. Regardless, we note that the union merely point to this outcome as suggesting the approach to interpretation that should be adopted (rather than suggesting that as a matter of merit the outcome should be addressed – an issues that would be contested) and we ultimately contend that the wording of clause 17.2 and 10.2, combined with other contextual considerations (such as the history of the provisions[4]) does not permit the interpretation of the clause argued for by the union.

[4] See paragraphs 13 to 16 of Ai Group's 11 November 2019 submission

3. CCC AWARD

36. We here respond to the submission of the CPSU dated 6 December 2019.

37. The CPSU contends that the casual loading is payable during overtime, on a compounding basis, for the reasons that follow:

    (a) Neither clause 13 nor clause 22 of the CCC Award "expressly [exclude] a casual employee from receiving both their casual loading and overtime rates".

    (b) Ai Group's submissions "place too great an emphasis" on the reference to "ordinary time" in clause 13.1.

    (c) Clause 13.1 "establishes" the "ordinary rate of pay" for a casual employee, upon which overtime rates are to be calculated.

    (d) *Domain Aged Care* supports the proposition at paragraph (b) above.

    (e) *Energy Australia* also supports the CPSU's position.

38. The CPSU also submits that the exposure draft should be amended as proposed at paragraph [20] of its submission.

39. We deal with each of the CPSU's submissions below.

40. *First*, clause 13.1 of the CCC Award, which prescribes the casual loading, is clear. It states: (emphasis added)

> **13.1** A casual employee is an employee who is engaged on a casual basis. A casual employee <u>for working ordinary time</u> will be paid per hour 1/38th of the weekly wage prescribed by clause 18—Classifications and minimum wage rates for the work performed, plus 25%.

41. Ai Group's submission that the underlined words confine the entitlement to the casual loading to ordinary hours of work does not "place too great an emphasis" on the relevant part of the clause, as alleged by the CPSU. It is based only on the natural and ordinary meaning of the clause. The provision makes plain that it requires the payment of the casual loading only during ordinary hours of work.

42. Further, as we have previously submitted, no other provision of the CCC Award expressly extends the entitlement to the casual loading to overtime. This proposition appears to be uncontested by the CPSU.

43. *Second*, the argument that clause 13 and clause 26 do not *exclude* the casual loading from payment during overtime is a nonsense and should be disregarded by the Commission. The CPSU's submission suggests that where an award provides for an entitlement in certain circumstances or where certain conditions are met, but it does not expressly require that the entitlement does not arise in other circumstances or where the relevant conditions are not met, the award nevertheless requires that the entitlement be afforded to employees. This is a self-evidently absurd proposition. There is no basis for reading the award in the manner proposed by the CPSU. If it were accepted, it would result in a range of absurd outcomes.

44. *Third*, there is no basis for reading clause 13.1 as establishing an employee's "ordinary rate of pay" or for reading clause 26 as requiring the calculation of overtime rates on that "ordinary rate of pay". To accept the CPSU's submission, one must read various words into clause 13 and clause 26. There is no sound basis for doing so for the following reasons:

    (a) As is obvious, clause 13.1 does not term or denote the rate payable pursuant to it as the "ordinary rate of pay" or attribute any such other terminology to it.

    (b) Clause 13.1 prescribes the rate payable to a casual employee only during ordinary hours. Accordingly, even if it were to establish the "ordinary rate of pay", however defined or described, it expressly entitles an employee to that rate only during ordinary hours of work.

    (c) As is also clear, clause 26 does not require the calculation of overtime rates on the amount payable pursuant to clause 13.1. It does not mandate the calculation of the rates by reference to that clause, the "ordinary rate of pay" or any other such amount that is derived pursuant to clause 13.1. Rather, it

operates to the exclusion of clause 13.1; clause 13.1 applies to ordinary hours of work and clause 26.1 applies to overtime.

(d) An acceptance of the CPSU's submission would in fact result in the calculation of the overtime rates prescribed by clause 26 on a rate of 125% of 1/38th of the minimum weekly rate prescribed by the award. This is self-evidently absurd and, in any event, not the outcome sought by the CPSU.

45. *Fourth*, the CPSU's reliance on *Domain Aged Care* is misplaced. That decision turned on the terms of the Nurses Award, which are materially different to the relevant provisions of the CCC Award. For instance, clause 10.4(b) of the Nurses Award, which prescribes the casual loading, does not confine the entitlement to the casual loading to ordinary hours of work. Further, the Full Bench's decision regarding the proper interpretation of the Nurses Award turned, in part, on other textual considerations such as clause 10.4(d) of the award; which do not arise in the context of the CCC Award. The Commission's decision and reasoning in that matter is therefore readily distinguishable and, in our submission, irrelevant to the Commission's consideration of the CCC Award.

46. Furthermore, Ai Group is pursuing an application that seeks a variation to the Nurses Award in light of *Domain Aged Care* to clarify that the award does not operate in the manner held in that decision. One of the grounds that we seek to rely upon in support of our application is that, with respect, the Full Bench erred in its construction of the Nurses Award. We intend to seek an opportunity in those proceedings to make detailed submissions in support of that contention. In that context, the Full Bench as presently constituted should not, in our submission, appropriate any weight or rely upon *Domain Aged Care* in these proceedings; even if it does not accept that the differences between the terms of the Nurses Award and the CCC Award render *Domain Aged Care* irrelevant to the task before it.

47. *Fifth*, the CPSU relies on *Energy Australia*; a decision that concerns the proper interpretation of an enterprise agreement. The key paragraphs of the decision are as follows: (emphasis added)

> **[39]** Both parties accepted that the Commission should follow the approach set out in *Golden Cockerel* in regard to interpreting the Agreement and this was acknowledged by the Commissioner at first instance.
>
> **[40]** Paragraphs 4, 5 and 6 of Clause 5.3 provides as follows:
>
> > "A casual employee for working ordinary time shall be paid per hour one thirty-sixth of the weekly rate prescribed in this agreement for the classification of work performed plus a loading of 25% of that weekly rate. A casual employee is entitled to penalty rates applicable to rostered shifts work by the employee based on the ordinary rate of pay.
> >
> > The casual loading is in lieu of all paid leave, paid personal/carer's leave, compassionate leave, public holidays not worked, notice of termination and the other attributes of full-time and part-time employment. Nor a casual employee is entitled to parental leave except in circumstances provided by the FW Act.
> >
> > Casual employee shall be paid overtime for all hours worked in excess of ordinary hours on any day (i.e. eight hours/7 hours 12 minutes per day/ shift length). Except as provided by Clause 13 – Public Holidays of this agreement, all time worked which is in excess of ordinary daily as shall be paid at double time."
>
> **[41]** We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. <u>We are satisfied that that [sic] double time means double the amount paid for working ordinary time.</u> We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments.[5]

48. Respectfully, *Energy Australia* should not be followed by this Full Bench.

49. Importantly, the proposition that the phrase "time and a half" or "double time" requires the calculation of the overtime rate by reference to "the amount paid for working ordinary time" is inconsistent with the Commission's decision earlier in this review that such terminology would be replaced in the new awards to instead require the payment of a rate that is expressed as a percentage of the minimum hourly rate (or 'ordinary hourly rate' where an award prescribes all purpose allowances).[6] The Full Bench did not determine that such provisions instead

[5] *AMWU V EnergyAustralia Yallourn* [2017] FWCFB 381 at [39] – [41].

[6] *4 yearly review of modern awards* [2015] FWCFB 4658.

require the calculation of the relevant rates by reference to the "amount paid for working ordinary time".

50. Further, the decision was made in the context of a dispute about a different instrument, a different *type* of instrument and about differently drafted provisions, based on the principles applying to the proper interpretation of enterprise agreements. This further undermines the weight that it can be given.

51. Ai Group maintains that the casual loading is not payable during overtime. A finding to the contrary would amount to a significant substantive change to the entitlements of casual employees during overtime under the CCC Award and impose a substantial additional employment cost on employers. In addition to the terms of the CCC Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by section 138 of the Act.

4. OIL AWARD

52. We here respond to the submissions of the AWU and the AMWU, both dated 9 December 2019. The unions argue that under the Oil Award, the casual loading is payable during overtime on a cumulative basis.

53. The AWU relies on the following contentions:

    (a) Clause 24.3(b) of the award is directly inconsistent with clause 10.3(b) and serves only to ensure that shift loadings, weekend penalty rates and public holiday penalty rates are not payable during overtime.

    (b) Clause 24.3(b), if read as contended by Ai Group, would result in absurd outcomes.

    (c) Its interpretation is consistent with the "principle of neutrality of treatment".

    (d) The FWO's guidance material includes overtime rates for casual employees covered by the Oil Award, which include the payment of the casual loading on a cumulative basis.

54. The AMWU relies on the following additional contentions:

    (a) Clause 24.3(b) applies only to other penalties and loadings prescribed by clause 24.

    (b) If it was intended that the casual loading is not payable during overtime, "it would have been far more logical for framers of the award" to include a clause that expressly says so.

    (c) Having regard to a general statement by the AIRC when the awards were made, the award should be construed as providing for the casual loading and overtime rates during overtime.

55. Ai Group responds to each of these submissions below.

56. *First*, we accept that clause 10.3(b) and clause 24.3(b) are arguably inconsistent to the extent that the former requires the payment of the casual loading for every hour of work whilst the latter has the effect of removing that entitlement.

57. Any such perceived inconsistency should, in our submission, be resolved in accordance with the principle that the more specific provision is to override the general provision. This approach was adopted in a Full Bench decision concerning the proper interpretation of the *Aged Care Award 2010*: (our emphasis in **bold** text)

> **[18]** Insofar as there is an interpretational contest as to how clauses 10.3(c) and 22.6(c) interrelate with each other, we consider it appropriate to express our views on the subject. Our conclusion is that the effect of clause 10.3(c) is to require any changes to the agreement entered into before the commencement of employment pursuant to clause 10.3(b), including any changes to the number of hours worked each week, the days of the week the employee will work and the starting and finishing times each day, to be by further written agreement, and that clause 22.6(c) does not permit the employer to make unilateral changes in respect of any of these matters for part-time employees by use of its right to change the roster on the provision of the requisite notice. The reasons for our conclusion are as follows.
>
> **[19]** Clause 10.3 contains a scheme of provisions specific to the subject matter of part-time employment. **Applying the *generalia specialibus non derogant* principle of interpretation, the specific provisions of clause 10.3 should be read as prevailing over other more general provisions of the Award in the case of inconsistency unless the context dictates otherwise.** Clause 10.3(a), the commencing provision in the scheme, defines a part-time employee as one who is "engaged to work less than full-time hours of an average of 38 hours per week and has reasonably predictable hours of work" (underlining added). This requirement for reasonable predictability in hours of work stems, we consider, from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work. It follows that the other provisions of the Award applying to part-time employees must so far as the language permits be read as giving content to the definitional requirement of reasonable predictability in hours of work.[7]

58. As has been observed by the Commission[8] and the Federal Court[9], the aforementioned principle of interpretation is not a "technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage".

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[7] *Leading Age Services Australia NSW – ACT* [2014] FWCFB 129 at [18] – [19].

[8] *Ellen Brooks v Wambo Open Cut Pty Ltd* [2018] FWC 569 at [55].

[9] *Construction, Forestry, Mining and Energy Union v Hadgkiss* [2009] FCAFC 17 at [77].

59. In this instance, clause 10.3(b) of the Award requires the payment of the casual loading, generally, for each hour worked. This is to be read subject to clause 24.3(b), which deals more specifically with the method of calculation for the rates prescribed by clause 24. In particular, clause 24.3(b) states that the rates prescribed by clause 24 are to be paid in substitution for any other loading. It is clearly directed towards dealing with the interaction between amounts payable under clause 24 and other clauses of the award. Accordingly, it should be read as prevailing over clause 10.3(b).

60. *Second*, the unions point to the interaction between the shift penalties prescribed by clause 24 and the casual loading and allege that if Ai Group's interpretation of clause 24.3(b) were accepted, it would result in "absurd" outcomes.

61. It is not clear to us that the unions' understanding of the application of clause 24.3(b) and its interaction with clause 10.3(b) is correct. Clause 10.3(b) requires that for every hour worked, a casual employee must be paid at least 125% of 1/35th of the minimum weekly wage prescribed by the award: (emphasis added)

> **(b)** For each hour worked, a casual employee will be paid no less than 1/35th of the minimum weekly rate of pay for their classification in clause 14 – Minimum wages, plus a casual loading of 25%

62. Accordingly, although clauses 24.5(a) and (b) prescribe shift penalties of 15% and 20% respectively, and despite the operation of clause 24.3(b), a casual employee must be paid at least 125% of the minimum hourly rate prescribed by the award for all hours of work. Accordingly, the "absurd" outcomes alleged by the unions would not in fact arise.

63. *Third,* the "principle of neutrality" referenced by the AWU does not assist in determining the proper interpretation of the relevant provisions. Whilst the contention is one that is often advanced by unions in support of a variation to an award to require the payment of the casual loading during overtime and / or on weekends, in our submission, it is not a matter that can or should colour a determination as to the entitlement that arises under the terms of the award as presently drafted.

64. *Fourth*, the FWO's guidance material represents little more than the FWO's view about the proper interpretation of the award. The basis for it is not explained and it reflects only the opinion of one of many stakeholders. In the context of these proceedings, it should be given little weight.

65. *Fifth*, there is no basis for the submission that the reference to 'loadings' in clause 24.3(b) applies only to loadings prescribed by clause 24. We do not dispute that the intent of the clause is likely to have been to also deal with the interaction between the various amounts prescribed by clause 24, however the application of the clause is by no means limited to amounts prescribed by it. The clause expressly refers to "any other loadings", which clearly includes the casual loading prescribed by clause 10.2(b).

66. *Sixth*, little weight should be afforded to the proposition that the "framers of the award" would have sought to include a provision expressly excluding the entitlement to the casual loading during overtime if that was what was intended. The AMWU's submission in this regard entirely disregards the nature, size, scope and scale of the Part 10A Award Modernisation Process, which did not lend itself to adopting an approach to drafting modern awards in the manner suggested by the AMWU. In our submission, little if anything can be made of the absence of such a provision. It certainly cannot be inferred that in the absence of such a clause, the AIRC intended that casual employees receive the casual loading during overtime.

67. *Finally*, the AMWU relies on the following underlined general statement made by the AIRC during the Part 10A Award Modernisation process:

> **[50]** In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[10]

[10] *Award Modernisation* [2008] AIRCFB 1000 at [50].

68. The ‘general rule’ articulated by the AIRC concerns the rate upon which penalties and the casual loading are to be calculated under the modern awards; that being that in both cases, they are to be calculated on the ordinary time rate and they are not to compound on one another. The ‘general rule’ says nothing about whether there will be an entitlement to the casual loading during overtime.

69. Ai Group maintains that the casual loading is payable during overtime on a cumulative basis under the Oil Award. A finding that overtime rates compound on the casual loading would amount to a significant substantive change to the entitlements of casual employees during overtime under the Oil Award and impose a substantial additional employment cost on employers. In addition to the terms of the Oil Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by section 138 of the Act.

5. TELECOMMUNICATIONS AWARD

70. We here respond to the submission of the CPSU dated 6 December 2019.

71. The submissions of the CPSU largely mirror those they have made in respect of the CCC Award. Further, the terms of the CCC Award and the Telecommunications Award are relevantly similar. Accordingly, we here rely on our submissions above in respect of the CCC Award.

6. TCF AWARD

72. We here respond to the submission of the CFMMEU – Manufacturing Division dated 9 December 2019.

73. The CFMMEU contends that the casual loading is payable during overtime and that overtime rates compound on the casual loading, on the basis that:

    (a) Clause 39 of the Award (which prescribes overtime rates) does not prescribe the method of calculation of a casual employee's entitlement to overtime rates and in those circumstances, the 'compounding' method is the correct method.

    (b) The "process contemplated in the 4 yearly review for the determination of casual entitlements in the TCF Award was not followed" and therefore "it is now appropriate [for the Full Bench as presently constituted] to re-consider the issue in the context of the current proceedings" and to depart from the decision made by another Full Bench in this review regarding the very same issue.

    (c) Clauses 14.3, 39.1 and 39.3 of the TCF Award are relevantly similar to the comparable terms of the Nurses Award and accordingly, *Domain Aged Care* should be followed.

    (d) Clause 14.5 does not have any bearing on the rate payable to casual employees for overtime.

74. We deal with each of the CFMMEU's submissions below.

75. *First*, there is simply no basis for finding that in the absence of clause 39 expressly requiring that overtime rates be calculated on the minimum hourly rate prescribed by the award, such rates are to be calculated on a rate that incorporates the casual loading. No foundation for such a reading of the provisions can be found in the relevant terms, other textual considerations or the historical context of those clauses.

76. Such an approach is also directly inconsistent with the Commission's decision earlier in this review that such terminology would be replaced in the new awards to instead require the payment of a rate that is expressed as a percentage of the minimum hourly rate (or 'ordinary hourly rate' where an award prescribes all purpose allowances).[11] The Full Bench did not determine that such provisions instead require the calculation of the relevant rates by reference to a loaded rate for casual employees.

77. *Second*, the fact that a Full Bench has been constituted to deal with the issue of overtime entitlements for casual employees is not of itself a cogent reason for departing from a recently issued decision of a Full Bench of the Commission regarding this very issue (**TCF Decision**).[12] Nor is the fact that the TCF Decision was issued notwithstanding the constitution of this Full Bench a cogent reason for departing from that decision.

78. The Commission's initiating statement[13] in respect of this matter including an analysis undertaken by the Commission's staff as to whether the relevant awards were clear as to casual employees' entitlements during overtime. The statement did not indicate that the analysis there set out reflected the views (or even the *provisional* views) of the Full Bench. Accordingly, in our respectful submission, the CFMMEU seeks to place a disproportionate amount of weight on the analysis set out in the aforementioned statement.

79. *Third*, the CFMMEU's reliance on *Domain Aged Care* is misplaced. That decision turned on the terms of the Nurses Award, which are materially different to the relevant provisions of the TCF Award. For instance, the Full Bench's decision regarding the proper interpretation of Nurses Award turned, in part, on textual considerations such as clause 10.4(d) of the award; which do not arise in the context of the TCF Award. The converse is also true. For instance, Ai Group argues that clause 14.5 of the TCF Award is a relevant textual consideration; a matter that did not arise in the context of the Nurses Award. The Commission's

[11] *4 yearly review of modern awards* [2015] FWCFB 4658.

[12] *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [417] – [419].

[13] *4 yearly review of modern awards* [2017] FWCFB 6417.

decision and reasoning in *Domain Aged Care* is therefore distinguishable and, in our submission, irrelevant to the Commission's consideration of the TCF Award.

80. Furthermore, as previously indicated, Ai Group is pursuing an application that seeks a variation to the Nurses Award in light of *Domain Aged Care* to expressly clarify that the award provisions relating to the payment of overtime do not operate in the manner held by the Full Bench. One of the grounds that we seek to rely upon in support of our application is that, with respect, the Full Bench erred in its construction of the Nurses Award. We intend to seek an opportunity in those proceedings to make detailed submissions in support of that contention. In that context, the Full Bench as presently constituted should not, in our submission, appropriate any weight or rely upon *Domain Aged Care* in these proceedings; even if it does not accept that the differences between the terms of the Nurses Award and the TCF Award render *Domain Aged Care* irrelevant to the task before it.

81. *Fourth*, the CFMMEU seeks to read words of limitation into clause 14.5 for which there is no proper foundation. Clause 14.5 provides that casual employees are entitled to penalty payments for overtime "in accordance with the provisions of this award as they apply to permanent employees". On its face, the provision concerns not only the circumstances in which the entitlement arises but also the manner in which it is derived. The CFMMEU argues that a narrower reading of the clause should be adopted by the Commission; however there is no justification for this.

82. Ai Group maintains that the casual loading is payable during overtime on a cumulative basis under the TCF Award. A finding that overtime rates compound on the casual loading would amount to a significant substantive change to the entitlements of casual employees during overtime under the TCF Award and impose a substantial additional employment cost on employers. In addition to the terms of the TCF Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by section 138 of the Act

7. CASH IN TRANSIT AWARD

84. We here respond to the submission of the TWU dated 5 December 2019.

85. The TWU now belatedly contends that the CIT Award requires that a casual employee who performs overtime work must be paid both the overtime rates payable under the award and the casual loading prescribed by clause 11.5. As acknowledged by the union, the TWU had previously advised the Commission that it was not pressing for the casual loading to be paid in addition the appropriate overtime rates.

86. The TWU's position rests upon two arguments. The first is that the wording of the exposure draft, and in particular, the words "for each hour worked" in clause 11.4, is consistent with their interpretation. The second argument appears to be that the wording of the exposure draft is sufficiently similar to that of the Nurses Award so as to warrant the same approach.

87. The most obvious and fundamental reason for rejecting the TWU's contentions is that their submissions fail to grapple with the current terms of the award in any meaningful way or arguably even at all. Given that the task before the Commission is to grapple with the proper interpretation of the current award provisions so as to facilitate their translation into the exposure draft, or potentially to resolve any ambiguity or uncertainty, the union's submissions are largely (if not entirely) irrelevant.

88. The TWU submit that, "the current clauses clearly express that for each hour worked a casual employee will be paid the appropriate rate and rates payable **AND** the casual loading of 25%".[14] Whilst we assume that the reference to the "current clause" is intended to be reference to the exposure draft clause, this is not completely clear. In reply we accordingly reiterate our contention that the current clause 11.5(c) of the award does not require that the casual loading be paid during overtime.

[14] At paragraph 6

89. The text of clause 11.5(c) suggests that it is payable in relation to ordinary hours of work. The rate or rates that it is said the loading is payable "in addition to" are rates that may be payable for ordinary hours of work. Further, the loading is payable by reference to the ordinary hourly rate for the classification under which an employee is employed. This in no way requires or even suggests that the casual loading is payable in addition to rates payable for overtime or in relation to overtime worked.

90. While at paragraph 7 of their submission the TWU place significant importance on the work of the words "for each hour worked" in the exposure draft as clarifying that the casual loading is payable for every hour that is worked, it is telling that such words are missing from the current award. There is nothing in the current award to suggest that the casual loading is payable for "for each hour worked".

91. For completeness, we observe that the text of clause 28.1 of the current award, which deals with payment for overtime, does not refer to the payment of a casual loading so as to make in payable in circumstances where it is not payable under clause 11.5(c). It merely prescribes that work outside ordinary hours will be paid at "time and half" or "double time". This is similar to the wording of other provisions dealing with penalty rates and, when read consistently with the approach adopted in such other provisions, should be interpreted as applying to the minimum rates prescribed by the award absent the inclusion of any other loadings or allowances that may be payable under the award by reference to such hours of work.

92. Put simply, we say that it is clause 11.5(c) that makes the casual loading payable in addition to the other rates referred to in that provision and the absence of a reference to overtime means that the loading is not payable during overtime.

93. If our contentions regarding clause 281 and 11.5(c) are wrong, it would raise the spectre of anomalous outcomes whereby the overtime rates would compound on the casual loading, while no other penalty rate would be calculated in such a manner. Such an interpretation should not lightly be accepted. We do not need to take this further as no party is contending that the penalty rates prescribed by clause 28 are calculated on a rate that include a casual loading.

94. In relation to the appeal to the logic of *Domain Aged Care* we reiterate that Ai Group respectfully contends that the Full Bench in that decision erred in its interpretation of the relevant provisions of the Nurses Award. Nonetheless, the union's reliance on the decision is entirely misplaced for the following three reasons.

95. *Firstly*, the terms of the Nurses Award dealing with when a casual loading is payable are markedly different to those of the CIT Award.

96. *Secondly*, the controversy in *Domain Aged Care* was over the manner in which the overtime rates interacted with the casual loading. It was not over whether the casual loading was payable during overtime.

97. *Thirdly*, *Domain Aged Care* provided that the overtime rates in the Nurses Award compounded on the casual loading. Why this approach could be said to be in any way analogous to that which should be taken in the current context is baffling given the TWU does not press for an equivalent interpretation in the CIT Award. It is entirely unclear why the union contend that the decision assists them.

98. In short, the reasoning in *Domain Aged Care* simply does not assist the union. Their attempt to press for an interpretation of the CIT Award which is squarely incompatible with the current text of the instrument by reference to the decision ought to be rejected.

99. Ai Group maintains its view that the casual loading is not payable during overtime, as articulated in our 11 November 2019 submission. A finding that overtime rates are payable during overtime would amount to a significant substantive change and impose a substantial additional employment cost on employers. In addition to the terms of the CIT Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by section 138 of the Act

8. WATER AWARD

100. We here respond to the submission of the AWU dated 9 December 2019 and the AMWU dated 9 December 2019.

101. The unions variously submit that:

(a) If Ai Group's interpretation were adopted, the reference to overtime in clause 10.5(c) would be superfluous.

(b) Clause 10.5(c) serves only to make clear that overtime rates are not calculated on an hourly rate that incorporates the casual loading.

(c) The interpretation advanced by the AWU is consistent with the "principle of neutrality of treatment".

(d) The FWO's guidance material includes overtime rates for casual employees covered by the Water Award, which include the payment of the casual loading on a cumulative basis.

(e) A consideration of certain pre-modern awards supports the unions' position.

(f) A consideration of the Part 10A Award Modernisation process supports the unions' position.

(g) Having regard to a general statement by the AIRC when the awards were made, the award should be construed as providing for the casual loading and overtime rates during overtime, on a cumulative basis.

102. We deal with each of the unions' submissions in turn.

103. *First*, clauses 10.4(b) and (c) are in the following terms: (emphasis added)

> **(b) Casual loading**
>
> Casual employees will be paid, in addition to the ordinary hourly rate and rates payable for shift and weekend work on the same basis as a full-time employee, an additional loading of 25% of the ordinary hourly rate for the classification in which they are employed as compensation instead of paid leave under this award and the NES.
>
> **(c) Penalties and overtime**
>
> Penalties (including public holiday penalties) and overtime for casual employees will be calculated on the ordinary hourly rate for the classification in which they are employed exclusive of the casual loading.

104. Neither provision requires the payment of the 25% casual loading during overtime (and nor does any other provision of the award).

105. Clause 10.4(b) requires that the casual loading be paid only in addition to the 'ordinary hourly rate' (that is, the hourly rate payable for ordinary hours of work), rates payable for shifts and rates payable for weekend work. It does not require that the 25% loading be paid for all hours of work or, more specifically, during overtime.

106. Clause 10.4(c) similarly does not require the payment of the 25% casual loading during overtime. Rather, it appears to seek to clarify that overtime rates are payable to the exclusion of the casual loading; that is, that the casual loading is not payable during overtime.

107. The Commission should not accept that the reference to overtime in clause 10.4(c) is superfluous or that clause 10.4(c) deals only with the hourly rate upon which overtime rates are to be calculated. Rather, the reference to overtime in clause 10.4(c) reinforces the operation of clause 10.4(b).

108. *Second,* the "principle of neutrality" referenced by the AWU does not assist in determining the proper interpretation of the relevant provisions. Whilst the contention is one that is often advanced by unions in support of a variation to an award to require the payment of the casual loading during overtime and / or on weekends, in our submission, it is not a matter that can or should colour a

determination as to the entitlement that arises under the terms of the award as presently drafted.

109. *Third*, the FWO's guidance material represents little more than the FWO's view about the proper interpretation of the award. The basis for it is not explained and it reflects only the opinion of one of many stakeholders. In the context of these proceedings, it should be given little weight.

110. *Fourth*, a consideration of the pre-reform awards is of limited assistance in this matter.

111. Even if they provided for an entitlement to the casual loading during overtime, it is well-accepted that the Part 10A Award Modernisation process did in many circumstances result in a change to minimum entitlements (as a result of which transitional arrangements were implemented for several years after the award commenced operation) and a 'swings and roundabouts' approach was adopted by the AIRC in this regard.

112. It is apparent from a brief review of the pre-modern awards referenced by the AMWU[15] that casual employment and overtime entitlements are both treated substantively differently in the modern award when compared to those awards. For instance:

    (a) Casual employment in the *Regional Water Authorities Award 1999* was confined to employees employed "for the purpose of meeting particular and short term needs".[16] By contrast, the Water Award defines a casual employee as any employee who is engaged and paid as such.[17]

[15] The *Rural Water Industry Award 2001* and the *Regional Water Authorities Award 1999*.

[16] Clause 9.4.1.

[17] Clause 10.5(a).

(b) The *Rural Water Industry Award 2001* requires that overtime rates would not be calculated on a rate not exceeding "the Band C3 rate".[18] The *Regional Water Authorities Award 1999* also imposed a cap on the maximum hourly rate upon which overtime rates were to be calculated.[19]

113. In this context, little if any weight can be placed on the entitlement of casual employees under the relevant pre-modern awards for the purposes of interpreting the current award provisions.

114. *Fifth*, the AMWU argues that the form of words ultimately adopted by the AIRC when the award was made, and the difference between those words and the draft award submitted by the Local Government Association "suggests" that the AIRC "turned its mind to the issue directly, and considered that casuals should not be excluded from receiving the casual loading when working overtime".

115. The AIRC did not make any express determination concerning the issue of whether casual employees are entitled to the casual loading during overtime. The AMWU instead attempts to draw an inference from the drafting adopted by the Commission which, in our submission, is not open to be drawn. It could equally be said that AIRC determined that a clause that expressly states that the casual loading is not payable during overtime was not necessary because clauses 10.4(b) and (c) already have the effect.

116. *Finally*, the AMWU relies on the following underlined general statement made by the AIRC during the Part 10A Award Modernisation process:

> **[50]** In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[20]

[18] Clause 10.4.6.

[19] Clause 18.2.2(a).

[20] *Award Modernisation* [2008] AIRCFB 1000 at [50].

117. The ‘general rule’ articulated by the AIRC concerns the rate upon which penalties and the casual loading are to be calculated under the modern awards; that being that in both cases, they are to be calculated on the ordinary time rate and they are not to compound on one another. The ‘general rule’ says nothing about whether there will be an entitlement to the casual loading during overtime.

118. Ai Group maintains that the casual loading is not payable during overtime under the Water Award. A finding to the contrary would amount to a significant substantive change to the entitlements of casual employees during overtime under the Water Award and impose a substantial additional employment cost on employers. In addition to the terms of the Water Award not giving rise to any basis for interpreting the award in this way, there is no basis for concluding that such a change is necessary in the sense contemplated by section 138 of the Act.