

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

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

**11 November 2019**

**Ai**  
GROUP

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

### 1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the following ‘second category’ of awards identified at paragraph [9] of the statement<sup>1</sup> 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
- (h) *Wool Storage, Sampling and Testing Award 2010* (**Wool Award**).

(collectively, **Awards**)

2. Consistent with the Statement and accompanying directions, these submissions address the meaning and effect of the relevant award provisions concerning the question of whether the casual loading prescribed by each Award is payable during overtime and if so, whether the overtime rates and casual rates cumulate or compound.

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<sup>1</sup> 4 yearly review of modern awards – Overtime for casuals [2019] FWC 7087.

3. We note that no party in these proceedings has to date proposed a variation to the Awards or the exposure drafts of the Awards in respect of the questions to which the Commission's aforementioned directions are directed. Rather, Australian Business Industrial and the New South Wales Business Chamber has previously expressed a view about the proper interpretation of the Awards and it appears that there is some contest as to the relevant entitlement under the Awards (although the basis for the relevant parties' position has not yet been fully articulated).
4. Accordingly, these submissions do not address any questions of merit, s.138 of the *Fair Work Act 2009* or the modern awards objective.
5. Finally, as the Commission is of course aware, it does not have jurisdiction to determine the existing legal rights of casual employees or obligations of employers under the Awards by ruling on the proper interpretation of the relevant Award provisions absent a broader consideration as to whether the Awards (or the exposure drafts) should be varied. Such a course of action would constitute the exercise of judicial power for which the Commission does not have jurisdiction.
6. Should the Commission form the view that the exposure drafts and, as a result, the awards, should potentially be varied in light of submissions advanced in these proceedings, it should afford parties an opportunity to be heard in relation to the merits of such a course of action before implementing such a view.

## 2. BLACK COAL AWARD

7. Ai Group submits that the Black Coal Award does not require the payment of the 25% casual loading during overtime.
8. Only 'Staff Employees' may be engaged on a casual basis under the Black Coal Award. The award does not permit the engagement of 'Production and Engineering Employees' on a casual basis.
9. Clause 10.4(b) of the award prescribes the casual loading in the following terms:  
(our emphasis)
  - (b) A casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus 25% instead of the leave entitlements under this award, with a minimum four hours payment on each engagement.
10. The clause requires the payment of a 25% casual loading "for working ordinary hours". The clause does not create an entitlement to the casual loading during overtime.
11. Clause 17 of the award prescribes the rates payable during overtime. The rates are expressed as "time and a half" and "double time". Clause 17 does not create an entitlement to the casual loading during overtime; nor does any other provision of the Award.
12. It is clear that the casual loading is not payable during overtime.
13. This is consistent with the position under the primary pre-modern award that applied to employees now classified as 'Staff Employees' under the Black Coal Award; that is, the *Coal Mining Industry (Staff) Award, 2004 (2004 Award)*<sup>2</sup>. Relevantly:

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<sup>2</sup> AP835164.

- (a) Clause 11.2.2 of the 2004 Award required the payment of the casual loading during ordinary hours only: (our emphasis)

**11.2.2** A casual employee, for working ordinary hours will be paid 1/35<sup>th</sup> (NSW and Tasmania) or 1/37.5<sup>th</sup> (Qld) of the appropriate weekly rate, plus 25 percent in lieu of the entitlements under Part 7 of this award (other than Long Service Leave for long term casuals), with a minimum of four hours payment on each engagement.

- (b) Neither clause 23 (dealing with overtime) nor any other provision of the 2004 Award extended the entitlement to the casual loading to overtime.

14. During the Part 10A Award Modernisation Process, the Coal Mining Industry Employer Group (**CMIEG**) filed a [draft award](#) on 31 July 2008, which contained the following clause:

**13.5 Casual employment**

**13.5.1** A casual employee is one engaged and paid as such.

**13.5.2** A casual employee, for working ordinary hours will be paid 1/35<sup>th</sup> of the appropriate weekly rate, plus 25 percent in lieu of the leave entitlements under this award, with a minimum of four hours payment on each engagement.

15. The Construction, Forestry, Mining and Energy Union (**CFMEU**) filed a [draft award](#) on 1 August 2008 that included casual employment provisions applying to 'Staff Employees' only. Schedule H of the draft award contained the following:

**1.1 Casual employment**

A casual employee is one engaged and paid as such.

**1.1.1** A casual employee, for working ordinary hours will be paid 1/35<sup>th</sup> (NSW and Tasmania) or 1/37.5<sup>th</sup> (Qld) of the appropriate weekly rate, plus 25 percent in lieu of the entitlements under Part 7 of this award (other than Long Service Leave for long term casuals), with a minimum of four hours payment on each engagement.

**1.1.2** A casual employee may be engaged to fill any vacancy created by a permanent employee being on leave of absence, or in the event of a short term requirement.

16. As can be seen, both the CMIEG and CFMEU draft awards required the payment of the casual loading only during ordinary hours.

### 3. CCC AWARD

17. Ai Group submits that the CCC Award does not require the payment of the 25% casual loading during overtime.

18. Clause 13.1 of the CCC Award prescribes the casual loading in the following terms: (our emphasis)

**13.1** A casual employee is an employee who is engaged on a casual basis. A casual employee for working ordinary time 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%.

19. Clause 13.1 requires the payment of the 25% casual loading only during ordinary of hours of work. The clause has no application to overtime. Its application is confined, expressly, to “ordinary time”.

20. Overtime rates are prescribed by clause 26.1:

#### **26.1 Payment for working overtime**

(a) Except as provided for in clause 12.5, for all work done in excess of the daily or weekly permissible number of ordinary hours an employee must be paid at the following rates:

(i) overtime on Monday to Saturday—time and a half for the first three hours and double time thereafter; and

(ii) overtime on Sunday—double time.

Where hours are averaged over a four week period the maximum number of ordinary hours before overtime rates apply is to be calculated on a four weekly rather than weekly basis.

(b) Provided that employees who are late starting or are absent for part of their ordinary hours on unpaid leave must complete their ordinary hours for that day prior to the entitlement to overtime.

21. Clause 26.1 does not require the payment of the 25% casual loading (or any other amount) in addition to the overtime rates it prescribes. Nor does any other provision of the CCC Award require the payment of the loading during overtime.

22. The Award clearly requires the payment of the casual loading only during ordinary hours.

23. This also reflects the position under the *Contract Call Centre Industry Award 2003*<sup>3</sup> (i.e. the pre-reform Federal award applying in the industry before the Part 10A Award Modernisation Process), as was intended by the AIRC when the award was made: (our emphasis)

**[162]** Parties to the existing *Contract Call Centre Industry Award 2003* (CCC Award 2003) supported the making of a separate award for contract call centres in preference to establishing call centre flexibilities within the Clerks Modern Award. In our view there should not be disparate safety net provisions for call centres. Flexibilities which reflect the needs of the industry while enhancing competitiveness and employment growth prospects should be generally available. We will make a CCC Modern Award based on the CCC Award 2003 – amended to reflect the Commission’s standard approach to certain modern award provisions. We will also make amendments to the Clerks Modern Award to reflect appropriate call centre flexibilities.<sup>4</sup>

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<sup>3</sup> AP827785.

<sup>4</sup> *Award Modernisation* [2009] AIRCFB 345 at [162].

## 4. OIL AWARD

24. Ai Group submits that the Oil Award does not mandate the payment of the 25% casual loading during overtime.
25. Clause 10.3(b) of the Oil Award prescribes the casual loading in the following terms: (our emphasis)
- (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%.
26. The clause is expressed to apply to every hour of work performed by a casual employee and thereby purports to apply to overtime. Importantly, the clause does not mandate the payment of 1/35<sup>th</sup> of the weekly rate (**Hourly Rate**) and the casual loading for all hours of work. Rather, it requires that a casual employee, for each hour of work, must be paid *no less than* the Hourly Rate plus the casual loading; or, put another way, a casual employee must be paid, for each hour of work, at least 125% of the Hourly Rate.
27. The overtime provisions of the award are in the following terms: (our emphasis)

### 24. Overtime and penalty rates

#### 24.1 Overtime payments—employees other than continuous shiftworkers

- (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 the employer requires them to perform in addition to their ordinary hours:
- (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 overtime worked at any time on a Sunday; and
  - (iii) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.
- (b) An employee recalled to work overtime after leaving the employer's premises (whether notified before or after leaving the premises) will be engaged to work for a minimum of four hours or will be paid for a minimum of four hours' work in circumstances where the employee is engaged for a lesser period.

## 24.2 Overtime—continuous shiftworkers

A continuous shiftworker will be paid an additional payment for all work the employer requires them to perform in addition to ordinary hours of 100% of the ordinary hourly base rate of pay.

## 24.3 Method of calculation

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

28. By virtue of clause 24.3(b), overtime rates payable under clause 24 are in substitution of *any* other loading prescribed by the award. The casual loading is, self-evidently, a loading payable under the award and therefore, it is not required to be paid where overtime rates are payable. Accordingly, during overtime, an employee is entitled to 150% of the Hourly Rate or 200% of the Hourly Rate, as applicable. In either case, clause 10.3(b) is also satisfied, because the casual employee is entitled to no less than 125% of the Hourly Rate.

29. We also note that the decision<sup>5</sup> later cited in this submission concerning the Wool Award and, more specifically, a provision contained therein that is in relevantly similar terms to clause 24.3(b) of the Oil Award, is also here relevant.

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<sup>5</sup> 4 yearly review of modern awards [2015] FWCFB 7236 at [324] – [333].

## 5. TELECOMMUNICATIONS AWARD

30. Ai Group submits that the Telecommunications Award does not require the payment of the 25% casual loading during overtime.
31. Clause 11.3(b) of the Telecommunications Award prescribes the casual loading in the following terms: (our emphasis)
- (b)** A casual employee is one engaged and paid as such, and for working ordinary time will be paid per hour 1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 25%.
32. Clause 11.3(b) requires the payment of the 25% casual loading only during ordinary of hours of work. The clause has no application to overtime. Its application is confined, expressly, to “ordinary time”.
33. Overtime rates are prescribed by clause 21.1:

### 21.1 Overtime rates

- (a)** Except as provided for in clause 11.2(b), for all work done in excess of ordinary hours an employee will be paid at the rate of time and a half for the first three hours and double time thereafter.
- (b)** In computing overtime, each day’s work will stand alone.
- (c)** Employees who are late starting or are absent for part of their ordinary hours on unpaid leave will complete their ordinary hours for that day prior to the entitlement to overtime.
34. Clause 21.1 does not require the payment of the 25% casual loading (or any other amount) in addition to the overtime rates it prescribes. Nor does any other provision of the Telecommunications Award require the payment of the loading during overtime.
35. The Award clearly requires the payment of the casual loading only during ordinary hours.
36. This also reflects the position under the *Telecommunications Services Industry Award 2002*<sup>6</sup>, upon which the Telecommunications Award is primarily based.

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<sup>6</sup> AP819699.

## 6. TCF AWARD

37. Ai Group submits that the TCF Award requires the payment of the casual loading during overtime on a cumulative basis.
38. Clause 14 of the TCF Award relates to casual employees. The following subclauses are relevant: (our emphasis)

### 14. Casual employment

...

- 14.3** A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.

...

- 14.5** Casual employees are entitled to penalty payments for overtime, shiftwork and work on public holidays in accordance with the provisions of this award as they apply to permanent employees.

39. Importantly, clause 14.5 of the award makes clear that a casual employee is entitled to overtime rates in accordance with the relevant provisions of the award, as they apply to permanent employees. Accordingly, in our submission, overtime rates for casual employees are to be calculated on the same basis as they are for permanent employees; that is, the overtime rates are to be calculated for all employees without application on the casual loading.
40. For completeness, we note that clause 39 of the TCF Award prescribes overtime rates payable under the award. It does not deal expressly with the casual loading.
41. During the Part 10A Award Modernisation Process, the AIRC dealt with the quantum of the casual loading to be prescribed by modern awards and its interaction with penalty payments as follows:

**[47]** In our statement of 12 September 2008 we indicated that we intended to adopt a standard loading of 25 per cent for casual employees. ...

...

**[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.<sup>7</sup>

42. The “general rule” described in the passage above is reflected in the vast majority of modern awards, including the TCF Award, save for a small number that expressly require the calculation of overtime and penalty rates on an hourly rate that includes the casual loading.
43. The issue of how overtime rates are to be calculated under the TCF Award was expressly considered by a five-Member Full Bench (Ross J, Hatcher VP, Hamberger SDP, Bull DP and Bissett C) earlier in the current 4 yearly review of modern awards, in the context of proceedings concerning the exposure draft of the TCF Award. The Textile, Clothing and Footwear Union of Australia (**TCFUA**) sought to argue that the casual loading and overtime rates compound, whilst Ai Group maintained that they are to be calculated on a cumulative basis.
44. The Full Bench determined as follows: (our emphasis)

**[417]** The TCFUA submits that the overtime and public holiday rates for casual employees in Schedule C were calculated cumulatively and they in fact should be based on a compounding method. ABI and Ai Group opposed the TCFUA submission.

**[418]** We do not agree with the submission of the TCFUA. The application of the casual loading in the Textile Award is specified in clause 14 of the current award.

**‘14.3** A casual employee will be paid per hour 1/38th of the weekly award wage prescribed for the relevant classification plus a loading of 25%.’

**[419]** This clause has been reproduced in the Exposure draft in similar terms. Nowhere in the current award does it stipulate that the casual loading applies for all purposes. In such cases the loading should be applied using a cumulative method rather than compounding. The Exposure Draft applies such a method, consistent with the general rule. We see no reason to depart from this general approach in this instance.<sup>8</sup>

45. As we understand it, the ‘general rule’ referenced by the Full Bench is that which was articulated by the AIRC during the Part 10A Award Modernisation Process, as extracted above.

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<sup>7</sup> *Award Modernisation* [2008] AIRCFB 1000 at [47] – [50].

<sup>8</sup> *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802 at [417] – [419].

46. There is no basis for departing from the very recent decision made by the Commission in this regard.

## 7. CASH IN TRANSIT AWARD

48. It is Ai Group's submission that the casual loading is not payable during overtime under the Cash in Transit Award.
49. Clause 11.5(c) of the award requires the payment of the casual loading: (our emphasis)
- (c) 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 weekly employee, an additional loading of 25% of the ordinary hourly rate for the classification under which they are employed.
50. By virtue of clause 11.5(c), casual employees are entitled to the casual loading only in addition to the ordinary hourly rate and where rates for shift and weekend work are payable.
51. The clause does not expressly require the payment of the casual loading during overtime; and nor does any other provision of the award.

## 8. WATER AWARD

52. Ai Group contends that the casual loading is not payable during overtime under the Water Award.

53. Clause 10.5 of the award is in the following terms: (our emphasis)

### 10.5 Casual employees

(a) A casual employee is an employee who is engaged and paid as such but will not include a part-time or full-time employee.

#### (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.

(d) A casual employee must be engaged and paid for at least 2 consecutive hours of work on each occasion they are required to attend work.

54. Clause 10.5 does not expressly require the payment of the casual loading in addition to overtime rates.

55. Clause 10.5(b) of the Water Award requires the payment of the casual loading in addition to the ordinary hourly rate, rates payable for shift work and rates payable for weekend work.

56. Clause 10.5(c) of the Water Award deals with the application of penalty rates and overtime rates for casual employees. Relevantly, it states that overtime for casual employees will be calculated on the ordinary hourly rate, exclusive of the casual loading.

57. In our submission, the casual loading is not payable during overtime.

## 9. WOOL AWARD

58. Ai Group submits that the casual loading is not payable under the Wool Award during overtime.
59. Clause 10.3(b) of the award prescribes the casual loading: (emphasis added)
- (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 13—Classifications and minimum wage rates, plus a casual loading of 25%.
60. Clause 10.3(b) is drafted in terms that are relevantly similar to the Oil Award. The clause is expressed to apply to every hour of work performed by a casual employee and thereby purports to apply to overtime. Importantly, however, the clause does not mandate the payment of 1/38<sup>th</sup> of the weekly rate (**Hourly Rate**) *and* the casual loading for all hours of work. Rather, it requires that a casual employee, for each hour of work, must be paid *no less than* the Hourly Rate plus the casual loading; or, put another way, a casual employee must be paid, for each hour of work, at least 125% of the Hourly Rate.
61. The relevant overtime clauses are in the following terms: (our emphasis)

### 25.1 Overtime payments—employees other than continuous shiftworkers

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:

(a) 50% of the ordinary hourly base rate of pay for the first two hours and 100% of the ordinary hourly base rate of pay thereafter, for overtime worked from Monday to 12.00 pm Saturday;

(b) 100% of the ordinary hourly base rate of pay for overtime worked after 12.00 pm on a Saturday and at any time on a Sunday; and

(c) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.

25.2 An employee recalled to work overtime after leaving the employer's premises (whether notified before or after leaving the premises) will be engaged to work for a minimum of four hours or will be paid for a minimum of four hours work in circumstances where the employee is engaged for a lesser period.

### 25.3 Overtime—continuous shiftworkers

A continuous shiftworker will be paid an additional payment for all work done in addition to ordinary hours of 100% of the ordinary hourly base rate of pay.

#### 25.4 Method of calculation

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

62. By virtue of clause 25.4(b), overtime rates payable under clause 25 are in substitution of *any* other loading prescribed by the award. The casual loading is, self-evidently, a loading payable under the award and therefore, it is not required to be paid where overtime rates are payable. Accordingly, during overtime, an employee is entitled to 150% or 200% of the Hourly Rate, as applicable. In either case, clause 10.3(b) is also satisfied, because the casual employee is entitled to no less than 125% of the Hourly Rate.

63. This view is supported by a decision of a Full Bench of the Commission (Ross J, Hatcher VP, Hamberger SDP, Bull DP and Bissett C), in which it considered the issue of overtime calculations under the Wool Award in the context of a decision that dealt with a range of issues arising from the exposure draft of this award:

##### *Overtime method of calculation*

[324] Clause 14 of the Exposure Draft deals with overtime. Clause 14.2 deals with the overtime rates applicable at various times. Clause 14.4 deals with the method of calculating overtime, it states:

(a) When computing overtime payments, each day or shift worked will stand alone.

(b) Any payments under clause 14.2 are in substitution for any other loadings or penalty rates (emphasis added)

[325] Ai Group submits that the reference to 'any payments under clause 14.2' should be replaced with 'any payments under clause 13 or clause 14.2'. Clause 13 deals with penalty rates for shiftwork, weekend work and for ordinary hours worked on a public holiday.

[326] The AWU opposes Ai Group proposal. Both parties rely on the terms of the current modern award in support of their respective positions. Clause 25 of the current modern award provides as follows:

...

[327] Ai Group relies on clause 25.4(b) of the current award and contends that clause 14.4(b) of the Exposure Draft only applies to overtime rates in clause 14 and that consistent with clause 25.4(b) of the current award should make it clear that the

shiftwork, weekend work and public holiday penalties in clause 13 are in substitution for any other loadings or penalty rates.

**[328]** The AWU submits clause 25.4(b) in the current award only follows the provision on overtime and does not extend to shiftwork penalties, weekend work and public holidays, which come after clause 25.4(b).

**[329]** The resolution of this issue depends on the proper construction of clause 25.4(b) of the current award, which says:

'Any payments under this clause are in substitution for any other loadings or penalty rates' (emphasis added)

...

**[332]** Whatever may be the correct interpretation of 'Any payments under this clause' it is clear that such payments are 'in substitution for' any 'other loadings or penalty rates', that is, they are substitution for the loadings and penalty rates provided elsewhere in the award. In this regard we note that clause 10.3(b) of the current award provides for 'casual loading of 25%'. It follows that if Ai Group's proposed amendment is adopted then casual employees working, say, on weekends, would be entitled to the payments for weekend work under clause 25.7 but not the 25% casual loading provided in clause 10.3(b).

**[333]** The proposed amendment raises the general question of whether the casual loading is applied on top of other loadings or penalties. It seems clear that the current award provides that overtime payments are paid in substitution for the casual loading. However, it is not clear whether weekend and other penalties are paid in substitution for the casual loading or whether the casual loading is applied to the weekend penalty rate. Given the ambiguity in the current award this is essentially a merit issue and we will refer it to the Casual and Part-time Employment Full Bench in AM2014/197.<sup>9</sup>

(our emphasis in paragraph [333])

64. The decision above concerned the application of clause 25.4(b) of the award where overtime rates, shift penalties and weekend penalties are payable. Whilst the Full Bench referred consideration of the operation of clause with respect to shift and weekend penalties to another Full Bench (which, to our knowledge, did not ultimately consider the issue), it expressed the view that it "seem[ed] clear that the current award provides that overtime payments are paid in substitution for the casual loading".
65. There is no cogent reason for departing from the Full Bench's consideration of the issue in these proceedings.

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<sup>9</sup> 4 yearly review of modern awards [2015] FWCFB 7236 at [324] – [333].