

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

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

**18 January 2020**

**Ai**  
GROUP

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

### 1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in relation to the following awards identified at paragraphs [12] and [14](1) of the statement<sup>1</sup> issued by the Fair Work Commission (**Commission**) on 6 December 2019 (**Statement**):

- (a) *Aluminium Industry Award 2010* (**Aluminium Award**);
- (b) *Business Equipment Award 2010* (**BE Award**);
- (c) *Pharmaceutical Industry Award 2010* (**Pharmaceutical Award**);
- (d) *Salt Industry Award 2010* (**Salt Award**); and
- (e) *Wool Storage, Sampling and Testing Award 2010* (**Wool Award**).

(collectively, **Awards**)

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<sup>1</sup> 4 yearly review of modern awards – Overtime for casuals [2019] FWC 8318.

## 2. ALUMINIUM AWARD

3. Ai Group contends that under the Aluminium Award, a casual employee is not entitled to the casual loading during the performance of overtime. So much is clear from the terms of the award.
4. Clause 10.4(a) of the Aluminium Award expressly states that the casual loading is payable for “working ordinary time”: (emphasis added)
  - (a) A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38<sup>th</sup> of the minimum weekly wage prescribed in clause 13.4 for the work being performed plus a casual loading of 25%. ...
5. Clause 10.4(a) creates an entitlement to the casual loading but limits that entitlement to ordinary hours of work. By its express terms, it does not require the payment of the casual loading during overtime. Further, no other provision of the Aluminium Award has the effect of extending the entitlement to the casual loading to overtime.
6. In our submission, it is clear that the casual loading is not payable during overtime.

### 3. BE AWARD

7. Ai Group contends that under the BE Award, a casual employee is not entitled to the casual loading during the performance of overtime. So much is clear from the terms of the award.
8. Clause 13.2 of the BE Award states as follows: (emphasis added)

**13.2** A casual employee is one engaged and paid as such, and for working ordinary time will be paid, per hour, 1/38<sup>th</sup> of the weekly wage prescribed by this award for the work which the employee performs, plus 24%.
9. Clause 13.2 creates an entitlement to the casual loading but limits that entitlement to ordinary hours of work. By its express terms, it does not require the payment of the casual loading during overtime. Further, no other provision of the BE Award has the effect of extending the entitlement to the casual loading to overtime.
10. In our submission, it is clear that the casual loading is not payable during overtime.

#### 4. PHARMACEUTICAL AWARD

11. Ai Group contends that under the Pharmaceutical Award, a casual employee is not entitled to the casual loading during the performance of overtime. So much is clear from the terms of the award.
12. Clause 12.2 of the Pharmaceutical Award states as follows: (emphasis added)
  - 12.2 A casual employee is one engaged and paid as such. A casual employee for working ordinary time must be paid an hourly rate calculated on the basis of 1/38<sup>th</sup> of the minimum weekly wage prescribed in clause 15 – Classifications and adult minimum wages for the work being performed plus a casual loading of 25%.
13. Clause 12.2 creates an entitlement to the casual loading but limits that entitlement to ordinary hours of work. By its express terms, it does not require the payment of the casual loading during overtime. Further, no other provision of the Pharmaceutical Award has the effect of extending the entitlement to the casual loading to overtime.
14. In our submission, it is clear that the casual loading is not payable during overtime.

## 5. SALT AWARD

15. Ai Group contends that under the Salt Award, a casual employee is not entitled to the casual loading during the performance of overtime. So much is clear from the terms of the award.
16. Clause 10.3(b) of the Salt Award states as follows: (emphasis added)
  - (b) For each hour worked, a casual employee will be paid no less than 1/38<sup>th</sup> 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.
17. Clause 10.3(b) 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.
18. Clause 10.3(b) must be read in conjunction with the overtime provisions of the award. Relevantly, clause 25.3(b) expressly states that “any overtime payments are in substitution of any other loadings”.
19. By virtue of clause 25.3(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.
20. In our submission, it is clear that the casual loading is not payable during overtime.

## 6. WOOL AWARD

22. As outlined at paragraph [14](1) of the Commission's Statement, the issue of whether casual employees are entitled to the casual loading and if so, the basis upon which the relevant rates are to be calculated during the performance of ordinary hours on a weekend, ordinary hours on a public holiday and shiftwork has been referred to the Full Bench as presently constituted. This is in addition to the question of whether casual employees are entitled to the casual loading during overtime and if so, the basis on which overtime rates are to be calculated (**Overtime Issue**).
23. We addressed the Overtime Issue in our submissions of 11 November 2019. For convenience, those submissions are repeated below. We then deal with the remaining issues.
24. In summary, Ai Group contends that the casual loading is not payable under the Wool Award during overtime, ordinary hours on a weekend, ordinary hours on a public holiday or shiftwork.

### Overtime Issue

25. 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%.
26. 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.

27. 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.

28. 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.

29. 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>2</sup>

(our emphasis in paragraph [333])

30. The decision above concerned the application of clause 25.4(b) of the award where overtime rates, shift penalties and weekend penalties are payable. The Full Bench clearly expressed the view that it “seem[ed] clear that the current award provides that overtime payments are paid in substitution for the casual loading”.
31. There is no cogent reason for departing from the Full Bench’s consideration of the issue in these proceedings.

### **Weekends, Public Holidays and Shifts**

32. The extract of the decision above is also relevant to the issue of whether the casual loading is payable where an employee is entitled to the rates prescribed by clauses 25.6 (shiftwork), 25.7 (weekends) and 25.9 (public holiday).
33. The Full Bench accepted that the “loadings” referenced at clause 25.4(b) of the award includes the casual loading.<sup>3</sup> However, the Commission considered that it was ambiguous as to whether the “payments under this clause” include shift, weekend and public holiday rates.
34. Respectfully, Ai Group contends that the clause is not ambiguous.
35. Clause 25.4 is headed “method of calculation”. It appears in a clause that relates to “overtime and penalty rates”. Nothing in the terms of clause 25.4(b) limits its application to overtime payments only; nor does the context in which it appears.

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<sup>2</sup> 4 yearly review of modern awards [2015] FWCFB 7236 at [324] – [333].

<sup>3</sup> 4 yearly review of modern awards [2015] FWCFB 7236 at [332].

36. Similarly, there is in our respectful submission no basis for imputing the limitation found in clause 25.4(a) (that is, that it relates only to overtime) to the application clause 25.4(b).
37. We note that the terms of the Wool Award (including clause 25) appear to have been taken in large part from draft awards that were prepared and filed in the AIRC during the Part 10A Award Modernisation Process by the NUW and Agribusiness Employers' Federation.<sup>4</sup> Relevantly, clause 18.2(b) of the draft awards were in the same terms as clause 25.4(b) and clauses 18.5 – 18.8 prescribed shift, weekend and public holiday penalty rates. Clause 18.2(b) therefore purported to apply to clauses 18.5 – 18.8.
38. The drafting of clause 25.4(b) of the Award does not appear to be the product of sheer coincidence or inadvertence. Two draft instruments filed by two key organisations with an interest in the award during the Part 10A process both proposed provisions that had the effect of excluding the casual loading where shift, weekend and penalty rates are payable.
39. Any variation to the award requiring the payment of the casual loading on weekends, public holidays and during shifts would result in a substantive change to the extant entitlements, for which there is no 'merit' basis.

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<sup>4</sup> [Draft award](#) filed by Agribusiness Employers' Federation on 11 December 2008 and [draft award](#) filed by the NUW on 17 December 2008, making minor amendments to the former.