



BACKGROUND PAPER

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards—*Wool Storage, Sampling and Testing*

Award 2010

(AM2019/17)

MELBOURNE, 25 NOVEMBER 2019

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

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

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

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

AM2019/17—Final stage proceedings

[4] In *the October 2019 Decision*, the Full Bench considered whether the casual loading clause in the Wool Award required further consideration.

¹ [\[2019\]FWCFB 7173](#)

[5] Clause 11.3(a) reads as follows:

‘11.3 Casual loading

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

(i) the minimum hourly rate in clause 16.1; and

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

[6] In a submission dated 9 October 2019, the Australian Workers’ Union (AWU) submits the word ‘ordinary’ be removed from clause 11.3(a) of the Wool Award—Exposure Draft on the basis it departs from the current award and may constitute a significant substantive change.

[7] The AWU states the current award wording should prevail until the issue is resolved in AM2017/51—Overtime for casuals.²

[8] At the hearing on 11 October 2019, ABI and Ai Group opposed the AWU’s proposed amendment on the basis it pertains to the interpretation of whether a casual loading is payable on overtime.³

[9] The Full Bench deferred issuing a variation determination and listed this Conference for 2:30pm on Tuesday 26 November 2019 to discuss how to proceed.⁴

AM2017/51—Overtime for casuals

[10] A statement issued on 4 December 2017 identified the Wool Award as ambiguous in relation to whether overtime is payable to casuals, when overtime commences and at what rate overtime is payable.⁵

[11] In a submission dated 5 July 2019, ABI submit that 25% casual loading is not applied when calculating overtime for casual employees.⁶

[12] In a submission dated 11 July 2019, the AMWU submit that although the casual overtime rates payable pursuant to clauses 10.3(b) are not entirely clear it appears, on balance, that casual loading is paid on a cumulative basis when overtime is worked.⁷

[13] The Commission published an Issues Paper on 5 February 2019 which observed the following:

- clause 10.3(b) provides that casual employees are paid a casual loading of 25%;

² [AWU submission](#), 9 October 2019, at [41].

³ [Transcript](#), 11 October 2019, at PN292-PN299.

⁴ [\[2019\] FWCFB 7173](#) at [198].

⁵ [\[2017\] FWCFB 6417](#) at Attachment A.

⁶ [ABI and NSWBC submission](#), 5 July 2019, at 55.

⁷ [AMWU submission](#), 11 July 2019, at [78].

- clause 25.1 expresses overtime rates as additional payments of 50%, 100% and 150% of the ordinary hourly base rate of pay, and;
- clause 25.4 specifies that overtime rates are in substitution for any other loadings or penalty rates.⁸

[14] A statement issued on 14 October 2019, stated that parties have identified a disagreement about the meaning and effect of the casual overtime provisions in the Wool Award which will be the subject of a hearing before the Full Bench on 16 and 17 December 2019.⁹ In response to this statement, submissions were received from the following parties relating to the Wool Award:

Australian Industry Group

[15] Ai Group submit that the casual loading is not payable under this award.

[16] Ai Group refers to clause 10.3(b), which states:

‘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%.’

[17] Ai Group submit that clause 10.3(b) is drafted in similar terms to the Oil Award and states that the clause applies to every hour of work performed by a casual and therefore purports to apply to overtime.

[18] Ai Group submit that the clause does not mandate the payment of 1/38th of the weekly rate (**hourly rate**) and the casual loading for all hours worked. Ai Group state that rather a casual employee must be paid *no less than* the hourly rate plus the casual loading, for each hour worked.

[19] Ai Group refer to the overtime clauses of clause 25.1, 25.2, 25.3 and 25.4. Clause 25.4 which provides for the method of calculation:

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.

[20] Ai Group submit by virtue of clause 25.4(b), overtime rates payable under clause 25, are in substitution of any other loading prescribed by the award. Ai Group further state that the casual loading is payable under the award however it is not required where overtime rates apply.

[21] Ai Group submit that the employee is entitled to 150% or 200% of the hourly rate and in any case, clause 10.3(b) is satisfied as casuals are entitled to no less than 125% of the hourly rate.

⁸ [Issues paper](#), 5 February 2019 at 43.

⁹ [\[2019\] FWCFB 7087](#) at [10].

[22] Ai Group refer to the Full Bench decision [2015] FWCFB 7236¹⁰ and submit that this view is consistent and supported by the decision made by the Full Bench. Ai Group submit that the decision considered the issue of overtime calculations under the Wool Award that arose from the exposure draft.

[23] Ai Group refer to paragraphs [324] – [333] and particularly places emphasis on paragraph [333].

“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)

...

¹⁰ Paras [324] – [333].

[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.”

[24] Ai Group refer particularly to the above paragraphs of the Full Bench decision and submit that the Full Bench express the view that it seemed clear that the current award provides that overtime payments are paid in substitution for the casual loading and submits there is no reason to depart from this view.

ABI

[25] ABI refer to clause 10.3 of the Wool award and submit that the clause purports to apply the casual loading to all hours worked by the employee, which might feasibly include overtime. They submit that overtime however is not expressly referenced in this clause. They submit that this clause must be read in conjunction with the overtime provisions of the award at clause 25.

[26] ABI submit that the penalties are calculated on the ordinary hourly base rate of pay. They contend that clause 25.4 proceeds to confirm that the overtime penalties are to be substituted in lieu of all other penalties and loadings contained in the award. They submit that the “plain effect” of this clause is to render all loadings (including the casual loading) not payable when overtime is paid.

AM2014/94—Award stage proceedings

[27] In the overtime provisions of the Exposure Draft, clause 21.3(b) (previously clause 14.2) states:

‘21.3 Method of calculation

...

(b) Any payments under clause 21.1 are in substitution for any other loadings or penalty rates.’

[28] In a submission dated 24 October 2014, Ai Group submit that clause 21.3(b), which excludes “other loadings or penalty rates” from overtime payments should be extended to payments for shift work, weekend work and public holidays.¹¹

[29] The AWU, supported by the NUW,¹² opposed Ai Group’s proposal to extend the overtime method of calculation to shift work penalties, weekend work and public holidays and stated that the method of calculation of overtime in the current award is isolated to overtime.¹³ It submit that in the current award the provisions relating to shift work penalties, weekend work and public holidays are contained in a separate clause.

[30] In a decision issued on 23 October 2015 dealing with Ai Group’s submission, the Full Bench made the following observations about overtime payments and casual loading:

“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...”¹⁴

[31] The issue was subsequently referred to the Casual and Part Time Employment Full Bench. No interested party pursued the matter through these proceedings.

[32] In a recent submission dated 20 September 2019, Ai Group submit this related issue remains outstanding.¹⁵

¹¹ [Ai Group submission](#), at [229].

¹² [Transcript](#), 19 November 2019, at PN1679.

¹³ Australian Workers’ Union [submission](#), 12 November 2014, at [3]–[4].

¹⁴ [\[2015\] FWCFB 7236](#), at [333].

¹⁵ [Ai Group submission](#), 20 September 2019, at [117] – [120].

Attachment A – comparison table of the relevant provisions from the Wool Storage, Sampling and Testing Award 2010 and the Wool Storage, Sampling and Testing Award—Exposure Draft

Wool Storage, Sampling and Testing Award 2010—current award	Wool Storage, Sampling and Testing Award—Exposure Draft																
<p>10.3 Casual employment</p> <p>...</p> <p>(b) For each hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for their classification in clause 13—Classifications and minimum wage rates, plus a casual loading of 25%.</p>	<p>11.3 Casual loading</p> <p>(a) For each ordinary hour worked, a casual employee must be paid:</p> <p>(i) the minimum hourly rate in clause 16.1; and</p> <p>(ii) a loading of 25% of the minimum hourly rate, for the classification in which they are employed.</p>																
<p>25.1 Overtime payments—employees other than continuous shiftworkers</p> <p>Except where provided otherwise in this clause, an employee (other than a continuous shiftworker) will be paid the following additional payments for all work done in addition to their ordinary hours:</p> <p>(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;</p> <p>(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</p> <p>(c) 150% of the ordinary hourly base rate of pay for overtime worked on a public holiday.</p>	<p>21.1 Overtime rates</p> <p>An employee will be paid the following overtime rates for all work done in addition to their ordinary hours:</p> <table border="1" data-bbox="1234 887 2085 1394"> <thead> <tr> <th data-bbox="1234 887 1749 1018">For overtime worked on</th> <th data-bbox="1749 887 2085 1018">Overtime rate % of minimum hourly rate</th> </tr> </thead> <tbody> <tr> <td data-bbox="1234 1018 1749 1066">Monday to 12 noon Saturday—first 2 hours</td> <td data-bbox="1749 1018 2085 1066">150%</td> </tr> <tr> <td data-bbox="1234 1066 1749 1150">Monday to 12 noon Saturday—after 2 hours</td> <td data-bbox="1749 1066 2085 1150">200%</td> </tr> <tr> <td data-bbox="1234 1150 1749 1198">Saturday—after 12 noon</td> <td data-bbox="1749 1150 2085 1198">200%</td> </tr> <tr> <td data-bbox="1234 1198 1749 1246">Sunday all day</td> <td data-bbox="1749 1198 2085 1246">200%</td> </tr> <tr> <td data-bbox="1234 1246 1749 1294">Public holiday all day</td> <td data-bbox="1749 1246 2085 1294">250%</td> </tr> <tr> <td colspan="2" data-bbox="1234 1294 2085 1342">Continuous shiftworkers</td> </tr> <tr> <td data-bbox="1234 1342 1749 1394">All overtime hours</td> <td data-bbox="1749 1342 2085 1394">200%</td> </tr> </tbody> </table>	For overtime worked on	Overtime rate % of minimum hourly rate	Monday to 12 noon Saturday—first 2 hours	150%	Monday to 12 noon Saturday—after 2 hours	200%	Saturday—after 12 noon	200%	Sunday all day	200%	Public holiday all day	250%	Continuous shiftworkers		All overtime hours	200%
For overtime worked on	Overtime rate % of minimum hourly rate																
Monday to 12 noon Saturday—first 2 hours	150%																
Monday to 12 noon Saturday—after 2 hours	200%																
Saturday—after 12 noon	200%																
Sunday all day	200%																
Public holiday all day	250%																
Continuous shiftworkers																	
All overtime hours	200%																

<i>Wool Storage, Sampling and Testing Award 2010—current award</i>	<i>Wool Storage, Sampling and Testing Award—Exposure Draft</i>
<p>25.4 Method of calculation</p> <p>(d) When computing overtime payments, each day or shift worked will stand alone.</p> <p>(e) Any payments under this clause are in substitution for any other loadings or penalty rates.</p>	<p>21.3 Method of calculation</p> <p>(f) When computing overtime payments, each day or shift worked will stand alone.</p> <p>(g) Any payments under clause 21.1 are in substitution for any other loadings or penalty rates.</p>