

IN THE FAIR WORK COMMISSION

Matter No:

AM2014/196 & AM2014/197
FOUR YEARLY REVIEW OF MODERN AWARDS
CASUAL EMPLOYMENT & PART-TIME EMPLOYMENT COMMON ISSUE

Parties:

AUSTRALIAN HOTELS ASSOCIATION
ACCOMMODATION ASSOCIATION OF AUSTRALIA
MOTOR INN AND MOTEL ACCOMMODATION ASSOCIATION

SUBMISSIONS IN REPLY TO DIRECTIONS OF THE FULL BENCH

1. We refer to the above matters and the decision of the Full Bench of the Fair Work Commission (**Commission**) handed down on 5 July 2017.¹
2. Chapter 13 of the Full Bench Decision invites interested parties to make written submissions in relation to various matters.
3. These submissions are made on behalf of the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn, Motel and Accommodation Association (**Associations**). These submissions address each of the following directions of the Commission:

¹ *Four yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 (**Full Bench Decision**).

- (i) Direction 2: Whether the notification requirement in any existing casual conversion clause should be modified²;
- (ii) Direction 4: In response to the submission of United Voice dated 21 July 2017 concerning a transitional arrangement for existing part-time employees³;
- (iii) Direction 5: Whether the part-time employment provisions of the *Restaurant Industry Award 2010 (Restaurant Award)* be varied consistent with the variations to the *Hospitality Industry (General) Award 2010 (Hospitality Award)* and *Registered and Licensed Clubs Award 2010 (Clubs Award)*⁴; and
- (iv) Direction 7: In response to the submission and draft determinations of United Voice dated 21 July 2017, filed in accordance with Direction 6.⁵

Direction 2

- 4. The Associations support the variation of the existing casual conversion clause in the Hospitality Award to incorporate the notification requirement in the proposed model clause.
- 5. The Associations submit that this can be achieved by inserting the following sub-clause into cl.13.4 of the Hospitality Award:

(n) An employer must provide a casual employee, whether a regular casual employee or not, with a copy of the provisions of this sub-clause:

² Ibid, 903.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

- (i) *If the employee was employed before 1 December 2017, by 1 December 2018; or*
- (ii) *If the employee was employed on or after 1 December 2017, within the first 12 months of the employee’s first engagement to perform work.*

Direction 4

6. The Associations refer to the submission of United Voice that a “*significant residual issue that has not been dealt with in the Decision is whether there should be any transitional arrangement for existing part-time employees...*”.⁶
7. The Associations submit that this submission is erroneous and should be rejected as the matter was comprehensively dealt with in the Full Bench Decision.⁷

Direction 5

8. The Associations support the variation of the Restaurant Award to incorporate a part-time employment provision which is consistent with the variations to the Hospitality Award and Clubs Award.

Direction 7

9. Pursuant to Direction 6 of the Full Bench Decision, United Voice were directed to file draft determinations for the variation of the relevant awards “*to give effect to*

⁶ United Voice, ‘Part time and casual employment common issue’, submission in *Four Yearly Review of Modern Awards Casual & Part-Time employment common issue*, AM2014/196 and AM2014/197, 21 July 2017, [1].

⁷ See proposed cl.12.11 in Fair Work Commission above n 1, [534].

*the **decision** regarding overtime penalty rates for casual employees ...*⁸
(emphasis added).

10. The “*decision*” referred to in Direction 6 was set out in the Full Bench Decision as follows:

*...we determine that overtime penalty rates should be payable to casual employees for all time worked in excess of 12 hours in a day or 38 hours per week. Where a casual employee works in accordance with a roster, the 38 hours may, for the purpose of overtime calculations, be averaged over the length of the roster cycle (which may not exceed 4 weeks). The rate of the overtime penalty will in the case of each award be the same as for full-time employees. It shall not however compound upon the casual loading.*⁹

11. The submission and draft determinations filed by United Voice go beyond the scope of the direction by introducing matters that were not agitated in the proceedings (and in any event do not form part of the decision). Additionally, in respect to the rate of the overtime penalty, United Voice’s submission and draft determinations do not, in our view, reflect the decision of the Commission.

Inclusion of casual employees on roster and minimum 4 hour engagements

12. United Voice submits that “[t]he only practical way to implement the Decision’s conclusion ... is to include casual employees within the roster clause ...”.¹⁰

⁸ Fair Work Commission, above n 1, [902].

⁹ Fair Work Commission, above n 1, [550].

¹⁰ United Voice, above n 6, [22].

13. This submission underpins United Voice's further submission that a casual employee be entitled to a minimum engagement, or payment, of 4 hours on rostered days off.¹¹

14. Any variation to the rostering clause or introduction of 4 hour minimum engagements for casual employees for *call-ins* or rostered days off should be rejected for the following five reasons:

- (i) First, in pursuit of their claim that casual employees be entitled to overtime rates for work performed in excess of particular daily or weekly thresholds, United Voice maintained the position that casual employees will remain outside the roster provisions¹², except for a submission in relation to breaks between shifts as part of the final written submissions.¹³
- (ii) Second, the issue of casual employees not being included on rosters was traversed in proceedings before the Commission on 27 October 2016 and, even at that late stage, United Voice did not submit that casual employees be covered by the rostering provision.¹⁴
- (iii) Third, United Voice expressly submitted throughout the proceedings that cl.33.3 (a) (iii) of the Hospitality Award, which provides a minimum of four hour payment on rostered days for full-time and part-time employees "*will have no application to casual employees*".¹⁵ In

¹¹ Ibid 23.

¹² United Voice, 'Part time and casual employment common issues', submission in *Four Yearly Review of Modern Awards Casual & Part-Time employment common issue*, AM2014/196 and AM2014/197, 29 February 2016, [7], [8], [9]; 19 September 2016, [38].

¹³ Ibid 19 September 2016.

¹⁴ Transcript of proceedings, *Four yearly review of modern awards – Casual employment and Part-time employment* (Fair Work Commission AM2014/196 and AM2014/197, VP Hatcher, SDP Hamberger, DP Bull, DP Kovacic, C Roe, 27 October 2016) PN299-PN303.

¹⁵ United Voice, above n 11, [8].

addition, the Full Bench Decision rejected claims by the Australian Council of Trade Unions and United Voice to increase minimum engagements for casual employees.¹⁶

To the extent that the claim for a minimum engagement or payment of 4 hours for *call-ins* or rostered days off for casual employees is a different claim compared to the claims for increases to the general daily minimum engagement threshold, it is a claim of potential major significance and has been proposed after the handing down of the Full Bench Decision.¹⁷

- (iv) Fourth, the extent of the Full Bench Decision was that an overtime penalty rate would apply to casual employees for work performed in excess daily and weekly or roster cycle thresholds. The roster cycle threshold is only available *if* the casual employee works in accordance with a roster. There is nothing in the Full Bench Decision that warrants variation to the rostering and/or minimum engagement provisions for *call-ins* or rostered days off.
- (v) Fifth, the Full Bench Decision is a decision made under Part 2-3 of the *Fair Work Act 2009* (Cth) (**FW Act**). While s.603 of the FW Act provides the Commission with discretion to vary or revoke decisions, decisions made under Part 2-3 are excluded.

¹⁶ Fair Work Commission, above n 1, [407], [552].

¹⁷ Ibid 552.

The rate of the overtime penalty

15. In the Full Bench Decision, the Commission determined that the overtime penalty for casual employees is to be *“the same as for full-time employees. It shall not however compound upon the casual loading”*.¹⁸
16. In arriving at this determination, the Commission found that the disabilities associated with working long hours in a day or throughout a week *“are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so.”*¹⁹
17. Furthermore, the Commission found, in respect to overtime penalty rates for casual employees covered by the Hospitality Award, that *“[t]he position here appears to be the same as that discussed by the Full Bench in relation to the SCHCDSI Award²⁰ in Australian Municipal, Administrative, Clerical and Services Union”*(emphasis in original).²¹
18. In *Australian Municipal, Administrative, Clerical and Services Union*²², a Full Bench of the Commission considered whether or not *the overtime penalty rate should be paid in addition to or in substitution for the casual loading*²³ and determined that the overtime penalty rate would operate in substitution for the casual loading, noting that *“[t]he question of whether there is a proper basis for the payment of the casual loading in addition to overtime penalty rates was not argued at the level of general principle in this case”*.²⁴

¹⁸ Ibid 550.

¹⁹ Ibid 548.

²⁰ *Social, Community, Home Care and Disability Services Industry Award 2010*.

²¹ Fair Work Commission, above n 1, [548].

²² *Australian Municipal, Administrative, Clerical and Services Union v Jobs Australia & Aged and Community Services Association of NSW and ACT Incorporated and Others* [2014] FWCFB 379.

²³ Ibid 42.

²⁴ Ibid 42, 43, 44.

19. At all times during the proceedings before the Commission, United Voice pursued an overtime penalty rate for casual employees that was *cost neutral, not cumulative on the casual loading, and exclusive of the casual loading*.²⁵

20. This position was confirmed by United Voice in proceedings before the Commission in the following exchange with His Honour, Deputy President Bull²⁶:

DEPUTY PRESIDENT BULL: Mr Bull, before you sit down, your claim is overtime in lieu of the casual loading for all those awards?

*MR BULL: That's correct. So it's not cumulative, so it goes up to time and a half and double time and so forth.*²⁷

(Emphasis added)

21. The position that was advanced by United Voice throughout the proceedings is consistent with a number of other modern awards which contain overtime penalty rates for casual employees.²⁸

22. In circumstances where no alternative rate calculation was proposed by United Voice, and where the Commission has determined the overtime penalty will be

²⁵ United Voice, above n 11, 29 February 2016 [2], [3]; 19 September 2016 [35], [36]; United Voice 'Amended Draft Determination' submission in *Four yearly review of modern awards – Casual employment and Part-time employment*, AM2014/197, 4 March 2017.

²⁶ Transcript of proceedings, *Four yearly review of modern awards – Casual employment and Part-time employment* (Fair Work Commission AM2014/196 and AM2014/197, VP Hatcher, SDP Hamberger, DP Bull, DP Kovacic, C Roe, 16 August 2016).

²⁷ Ibid PN1229- 1230.

²⁸ *Amusement Events and Recreation Award 2010; Clerks- Private Sector Award 2010; Live Performance Award 2010; Marine Tourism and Charter Vessels Award 2010; Sporting Organisations Award 2010; Travelling Shows Award 2010.*

the same as for full-time employees, the Associations submit the correct approach to overtime penalty rates for casual employees will be:

- (i) Monday to Friday: 150% of the employee's ordinary hourly rate for the first two hours; 200% thereafter.
- (ii) Between midnight Friday and midnight Sunday: 200% of the employee's ordinary hourly rate.

23. To avoid doubt, we have illustrated the casual loadings and penalty rates, relative to ordinary hourly rate (i.e. the minimum hourly wage rate in cl.20 of the Hospitality Award), in the following table:

Day/Category	Loading/Penalty
Casual Employee Monday to Friday	125%
Casual Employee Saturday	150%
Casual Employee Sunday	175%
Casual Employee Public Holiday	275%
Casual Employee Overtime (M-F hours 1-2)	150%
Casual Employee Overtime (any other time)	200%

Draft Determination

24. The Associations hereby attach a draft determination for the Hospitality Award reflecting the above submissions.

For the Australian Hotels Association, the Accommodation Association of Australia and the Motor Inn and Motels Accommodation Association

2 August 2017

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

Four yearly review of modern awards – Part-Time & Casual Employment (AM2014/196 & AM2014/197)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2010 [MA000009]

A. It is ordered that the *Hospitality Industry (General) Award 2010* be varied as follows:

1. By deleting clause 13 in its entirety and inserting the following:

13. Casual Employment

13.1 A casual employee is an employee engaged as such and must be paid a casual loading of 25% as provided for in this award. The casual loading is paid as compensation for annual leave, personal/carer's leave, notice of termination, redundancy benefits and the other entitlements of full-time or part-time employment.

13.2 A casual employee may be engaged to work:

(a) for a maximum of 12 hours per day or within a shift or

(b) for a maximum of 38 hours per week, or where the casual employee works in accordance with a roster, an average of 38 hours per week over the roster cycle (which may not exceed 4 weeks).

13.3 On each occasion a casual employee is required to attend work they are entitled to a minimum payment for two hours' work.

13.4 All time worked in excess of the hours prescribed in clause 13.2 will be overtime and paid for at the rates prescribed in clause 33—Overtime.

13.5 A casual employee must be paid at the termination of each engagement, but may agree to be paid weekly or fortnightly.

13.6 Conversion to full-time or part-time employment

- (a)** *This clause only applies to a regular casual employee.*
- (b)** *A regular casual employee means a casual employee who is employed by an employer on a regular and systematic basis for several periods of employment or on a regular and systematic basis for an ongoing period of employment during a period of at least 12 months.*
- (c)** *A regular casual employee who has been engaged by a particular employer for at least 12 months may elect (subject to the provisions of this clause) to have their contract of employment converted to full-time or part-time employment.*
- (d)** *An employee who has worked at the rate of an average of 38 or more hours a week in the period of 12 months casual employment may elect to have their employment converted to full-time employment.*
- (e)** *An employee who has worked at the rate of an average of less than 38 hours a week in the period of 12 months casual employment may elect to have their employment converted to part-time employment.*
- (f)** *Where a casual employee seeks to convert to full-time or part-time employment, the employer may consent to or refuse the election, but only on reasonable grounds. In considering a request, the employer may have regard to any of the following factors:*
- *the size and needs of the workplace or enterprise;*
 - *the nature of the work the employee has been doing;*
 - *the qualifications, skills, and training of the employee;*
 - *the trading patterns of the workplace or enterprise (including cyclical and seasonal trading demand factors);*
 - *the employee's personal circumstances, including any family responsibilities; and*
 - *any other relevant matter.*
- (g)** *Where it is agreed that a casual employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and agree upon:*

- *the form of employment to which the employee will convert—that is, full-time or part-time employment; and*
- *if it is agreed that the employee will become a part-time employee, the matters referred to in clause 12—Part-time employment.*

(h) *The date from which the conversion will take effect is the commencement of the next pay cycle following such agreement being reached unless otherwise agreed.*

(i) *Once a casual employee has converted to full-time or part-time employment, the employee may only revert to casual employment with the written agreement of the employer.*

(j) *An employee must not be engaged and/or re-engaged (which includes a refusal to re-engage) to avoid any obligation under this award.*

(k) *Nothing in this clause obliges a casual employee to convert to full-time or part-time employment, nor permits an employer to require a casual employee to so convert.*

(l) *Nothing in this clause requires the employer to convert the employment of a regular casual employee to full-time or part-time employment if the employee has not worked for 12 months or more in a particular establishment or in a particular classification stream.*

(m) *Nothing in this clause requires an employer to increase the hours of a regular casual employee seeking conversion to full-time or part-time employment.*

(n) *An employer must provide a casual employee, whether a regular casual employer or not, with a copy of the provisions of this sub-clause:*

(i) *If the employee was employed before 1 December 2017, by 1 December 2018; or*

(ii) *If the employee was employed on or after 1 December 2017, within the first 12 months of the employee’s first engagement to perform work.*

2. By deleting the words “*other than a casual employee*” in clause 33.1(a).

3. By deleting the words “*in the circumstances specified in clause 12.7*” in clause 33.2(b) and adding the words “*for all work*”.

4. By adding the following sub-clauses in 33.2(b):
- (i) in excess of 38 ordinary hours per week or, where the employer operates a roster, an average of 38 hours per week over the roster cycle; and/or*
 - (ii) in excess of the conditions set out in clause 29.2; and/or*
 - (iii) in excess of the employee's rostered hours*
5. By adding the following sub-clause 33.2(c):
- (c) A casual employee is paid at overtime rates in the circumstances specified in clause 13.4.*
6. By deleting sub-clause 33.3(a)(i) and (ii) in their entirety and inserting the following:
- (i) Monday to Friday: 150% of their ordinary hourly rate for the first two hours of overtime; and 200% of their ordinary hourly for the rest of the overtime.*
 - (ii) Between midnight Friday and midnight Sunday: 200% of their ordinary hourly rate.*
7. By deleting sub-clause 33.3(a)(iii) in its entirety.
8. By deleting sub-clause 33.3.(b) in its entirety and inserting the following:
- (b) Full-time and part-time employees – rostered day off**
 - (i) For overtime worked on a rostered day off, a full-time or part-time employee must be paid 200% of their ordinary hourly rate for at least four hours even if they work for less than four hours.*
 - (ii) The four hour minimum payment does not apply to work which is part of the normal roster which began the day before the rostered day off; or when overtime worked is continuous from the previous day's duty.*

B. This determination comes into operation on the first full pay period on or after 1 September 2017.

BY THE COMMISSION