

IN THE FAIR WORK COMMISSION

Matter No: AM2014/196 and AM2014/197

Section 156 – 4 yearly review of modern awards – Casual employment and part-time employment – Rail Industry Award 2010

SUBMISSION BY THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION

1. The Australian Rail, Tram and Bus Industry Union ('**RTBU**') makes this submission pursuant to direction 20 made by the Full Bench in its decision of 5 July 2017 ([2017] FWCFB 3541) ('**Decision**') in relation to part-time and casual employment common issues in AM2014/196 and AM2014/197.
2. This is a submission in response to the Rail Employers' draft determination submitted 19 July 2017 ('**Determination**'). The Determination proposes amendments to the Rail Industry Award 2010 so as to give effect to paragraphs [891] to [892] of the Decision. It is the intention of the Rail Employers that the same amendments will be applied in the relevant sections of the Exposure Draft of the Rail Industry Award 2015 ('**Exposure Draft**'). This submission proceeds on that basis.
3. The RTBU proposes the following changes to the Determination:
 - a) The insertion of a new clause 23.1 that replicates clause 13.1 (titled 'Definitions') of the Exposure Draft, which seems to have been omitted by the Rail Employers, and the consequential renumbering of clause 23 of the Determination;
 - b) In the clauses currently numbered 23.2 - 23.4, the deletion of any reference to 'overtime' to remove overlap with the current clause 23.7. The latter clause adequately addresses overtime for permanent employees on its own;

- c) In the clause currently numbered 23.8, the replacement of all references to '24.4' with '23.8' or its equivalent number once the consequential numbering changes mentioned in point (3)(a) have been implemented.
4. Attached and marked **Annexure A** is a copy of a draft determination that reflects the changes stated in paragraph 3 of this submission and applies them to the Exposure Draft.



Imogen Szumer

National Industrial Officer

Australian Rail, Tram and Bus Industry Union

1 August 2017

ANNEXURE A

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FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 Yearly reviews of modern awards

4 yearly review of modern awards – Casual employment and Part-time employment (AM2014/196 and AM2014/197)

**VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL
COMMISSIONER ROE**

SYDNEY, XXXX 2017

Review of modern awards to be conducted.

Further to the Decision in [2017] FWCFB 3541, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the *Rail Industry Award 2010* be varied as follows:

[1] Delete Clause 6.4 of the **Exposure Draft** and insert the following new clause:

6.4 Casual employees

- (a) A casual employee is an employee who is engaged and paid as a casual employee.
- (b) A casual employee's ordinary hours of work are the lesser of 38 hours per week or the hours required to be worked by the employer.

(c) Casual loading

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

- (i) the ordinary hourly rate; and
- (ii) a loading of 25% of the ordinary hourly rate.

(d) **Casual penalty rates**

- (i) A casual employee will be paid **175%** of the ordinary hourly rate for the first three hours, and **225%** of the ordinary hourly rate thereafter, for any overtime hours on a Monday to Friday.
- (ii) A casual employee will be paid **175%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Saturday.
- (iii) A casual employee will be paid **225%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a Sunday.
- (e) A casual employee will be paid **275%** of the ordinary hourly rate for any hours, ordinary and overtime, worked on a public holiday prescribed in s.115 of the Fair Work Act.
- (f) The casual loading is paid instead of annual leave, paid personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment."

[2] Delete Clause 13 of the **Exposure Draft** and insert the following new clause:

13. Penalties

An employee will be paid the following penalty rates.

13.1 Definitions

- (a) **afternoon shift** means a shift that commences before 6.00 pm and concludes after 6.30 pm.
- (b) **early morning shift** means a shift that commences at or between 4.00 am and 5.30 am.
- (c) **night shift** means a shift that commences at or between 6.00 pm and 3.59 am.
- (d) **permanent night shift** means an employee who:
 - (i) during a period of engagement on shiftwork, works night shift only; or
 - (ii) remains on night shift for a longer period than four consecutive weeks; or
 - (iii) works on a night shift which does not rotate or alternate with another shift or with day work so as to give him or her at least 1/3rd of his or her working time off night shift in each shift cycle.

13.2 Shiftwork penalties

- (a) For each hour worked on **early morning shift** or **afternoon shift** an employee will be paid **\$2.73**.
- (b) For each hour worked on **night shift**, an employee will be paid **\$3.24**.
- (c) For each hour worked on **permanent night shift**, an employee will be paid **\$6.15**.

13.3 Sunday work

A full-time or part-time employee will be paid **200%** of the ordinary hourly rate for any ordinary hours worked on a Sunday.

13.4 Public holidays

A full-time or part-time employee will be paid **250%** of the ordinary hourly rate for any ordinary hours worked on a public holiday.

13.5 Saturday work

A full-time or part-time employee will be paid **150%** of the ordinary hourly rate for any ordinary hours worked on a Saturday.

[3] Delete Clause 14 of the **Exposure Draft** and insert the following new clause:

14. Overtime

14.1 Definition of overtime

- (a) For a full-time employee, overtime is any time worked in excess of the employee's ordinary hours (see clause 8.1).
- (b) For a part-time employee, hours worked in excess of the employee's ordinary hours (agreed in accordance with clause 6.3(c) and 6.3(d)) will be paid at the appropriate overtime rate.
- (c) For a casual employee, overtime is any time worked in excess of the employee's ordinary hours (see clause 6.4(b)).

14.2 Exclusions from overtime

- (a) An employee within the Clerical, Administrative and Professional classifications engaged on an annual salary equivalent that is at or above Level 7 will not be entitled to overtime.
- (b) An employee working overtime will not receive a shift penalty in accordance with clause 13.2.

14.3 Overtime rates

Where a full-time or part-time employee works overtime the employer must pay to the employee the overtime rates as follows:

For overtime worked on	% of ordinary hourly rate
Monday to Friday:	
• First 3 hours	150%
• After 3 hours	200%
Saturday – all hours	150%
Sunday – all hours	200%
Public holiday – all hours	250%

14.4 Time off instead of payment for overtime

- (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee.
- (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause 14.4.
- (c) An agreement must state each of the following:
 - (i) the number of overtime hours to which it applies and when those hours were worked;
 - (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime;
 - (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked;
 - (iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request.

Note: An example of the type of agreement required by this clause is set out at Schedule K. There is no requirement to use the form of agreement set out at Schedule K. An agreement under clause 14.4 can also be made by an exchange of emails between the employee and employer, or by other electronic means.

- (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked.

EXAMPLE: By making an agreement under clause 14.4 an employee who worked 2 overtime hours is entitled to 2 hours' time off.

- (e) Time off must be taken:
 - (i) within the period of 6 months after the overtime is worked; and
 - (ii) at a time or times within that period of 6 months agreed by the employee and employer.
- (f) If the employee requests at any time, to be paid for overtime covered by an agreement under clause 14.4 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.
- (g) If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.
- (h) The employer must keep a copy of any agreement under clause 14.4 as an employee record.
- (i) An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.
- (j) An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause 14.4 will apply, including the requirement for separate written agreements under paragraph (b) for overtime that has been worked.

Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act).

- (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause 14.4 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked.

Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading

representation about the workplace rights of another person under clause 14.4.

14.5 Call back

Where an employee is recalled to work overtime after leaving the employer's premises, the employee will be paid for a minimum of four hours.

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