

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission Horticulture Award 2010**

AM2014/196 & AM2014/197  
Casual Employment &  
Part-Time Employment

**16 August 2017**

**Ai**  
GROUP

# 4 YEARLY REVIEW OF MODERN AWARDS

## AM2014/196 & AM2014/197

### CASUAL AND PART-TIME EMPLOYMENT

#### 1. INTRODUCTION

1. This submission is made in respect of the matters dealt with in sections 7.1 to 7.6 of the Commission's decision of 5 July 2017 ([2017] FWCFB 3541) in the *4 Yearly Review of Modern Awards – Casual Employment and Part-time Employment Case (Decision)*.
2. Sections 7.1 to 7.6 of the Decision deal with the claim of the Australian Workers Union (**AWU**) for casuals under the *Horticulture Award 2010 (Horticulture Award)* to receive overtime payments.
3. The Full Bench decided (at paragraph [748] of the Decision) that:
  - ) The Horticulture Award does not properly describe the ordinary hours of employment for casual employees and therefore does not comply with s.147 of the *Fair Work Act 2009 (FW Act)* (paragraph [748] of the Decision);
  - ) The Horticulture Award will be varied to prescribe overtime penalty rates for casual employees.
4. The Full Bench invited submissions on the following matters:
  - ) Whether the ordinary daily hours of casual employees should be limited to the period 6.00am to 6.00pm, with any work performed outside of those hours paid at overtime rates (paragraph [752] of the Decision).

- ) The period over which the 38 weekly hours of casual employees can be averaged (paragraph [753] of the Decision).
- ) What overtime penalty rates should apply (paragraph [753] of the Decision).

5. These matters are addressed below.

## **2. THE NATURE OF THE HORTICULTURE INDUSTRY**

6. In its Decision, the Full Bench made the following findings (at paragraph [749]) about the nature of the horticulture industry:

- (1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.
- (2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.
- (3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.
- (4) The most likely response of horticultural employers to the imposition of any onerous overtime penalty rate requirement will be to try to avoid its incidence. Most would try to achieve this by reducing the working hours of their casuals to a level which did not attract any overtime payments, and employ more casuals to cover the hours. However this could be counter-productive because it was likely that the lower incomes per worker this would produce would reduce the supply of persons willing to work casually in the industry. The alternatives mentioned were to move to less labour intensive crops or reduce output.

### 3. THE AWARD VARIATIONS PROPOSED BY Ai GROUP TO IMPLEMENT THE DECISION

7. The variations to the Horticulture Award proposed by Ai Group to implement the Commission's Decision are:

) Insert a new subclause 22.3 as follows:

**22.3(a)** The ordinary hours of work for a casual employee will:

- (i) not exceed 988 hours over a 26 week period;
- (ii) be worked between Monday and Sunday; and
- (iii) not exceed 12 hours on any day.

**(b)** All time worked in excess of the ordinary hours will be deemed overtime."

) Insert a new subclause 24.3 as follows:

#### **24.3 Payment for overtime – casual employees**

The rate of pay for overtime for a casual employee will be 150%. This rate includes the 25% casual loading.

8. The reasons why the above provisions are appropriate are detailed in the following sections.

### 4. THE DAILY SPREAD OF HOURS FOR CASUAL EMPLOYEES

9. With regard to the daily spread of hours for casual workers, in its Decision the Full Bench said:

[752] In respect of daily hours of work, we consider that the ordinary hours of casual employees should be no more than 12 hours per day, and that overtime penalty rates should be payable for work performed in excess of 12 hours. A 12 hour day is consistent with the facilitative maximum daily hours permitted for full-time employees under clause 22.1(c), and we think is reasonable having regards to the physical demands of harvesting work and the work requirements of employers. There is an

additional question as to whether the ordinary daily hours of casual employees should be limited to the period of 6.00 am to 6.00 pm, as it is for full-time and part-time employees under clause 22.1(b), with any work performed outside these hours to be paid at overtime rates. We are not satisfied that the evidence or submissions have properly assisted us in respect of this issue. We will invite further submissions about this from interested parties.

10. A daily spread of hours of 6.00am to 6.00pm for casuals would cause major operational problems for employers in the Horticulture Industry and would substantially disadvantage employees.
11. It is essential that businesses be permitted to engage casual workers to work early in the morning and at night when the temperature is cooler, without the payment of any penalties. Many casual employees prefer to work at these times to avoid working during the hottest times of the day.
12. It is also essential that businesses be permitted to roster different groups of employees at different times in each 24 hour period, without the payment of penalties.
13. In its Decision, the Full Bench made the finding (at paragraph [746]) that:  
*“Certainly the evidence clearly demonstrates that employers covered by the Horticulture Award do not, as a matter of fact, pay overtime penalty rates to casual employees.”*
14. Further, the Full Bench made the finding (at paragraph [749]) that:
  - (1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.
15. Given that businesses throughout the Horticulture Industry are not currently paying overtime penalties to casuals, the imposition of overtime penalties will undoubtedly impose substantial cost increases. If businesses are not permitted to roster different groups of employees at different times during each 24 hour period without the payment of penalties, the cost increases will be even greater. Such cost increases would have adverse employment effects and would impact upon business viability.

16. It is not unusual for awards to recognise the necessity for workers to work ordinary hours early in the morning and at night without the payment of penalties. For example, the *Fast Food Industry Award 2010* allows ordinary hours to be worked between 6.00am and 10.00pm without penalty payments provided that an individual employee does not exceed the specified daily maximum number of hours.
17. Given the unique nature of the Horticulture Industry and the substantial disruption and increased costs that the imposition of overtime penalties for casuals will cause for businesses, it is appropriate that the Horticulture Award not specify a daily spread of hours within which casuals must work their ordinary hours. The requirement that no more than 12 ordinary hours can be worked by a casual on any day provides a great deal of protection to employees.

## 5. THE PERIOD OVER WHICH ORDINARY HOURS CAN BE AVERAGED

18. With regard to the period over which ordinary hours can be averaged, in its Decision the Full Bench said: (emphasis added)

[753] In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. There remains 2 critical issues to be resolved: first, over what period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time.

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[755] We consider that a better solution to the difficulty would be to allow an averaging period of sufficient length to allow long hours of work to be performed in short periods of time without attracting overtime penalty rates. We are provisionally minded to allow weekly hours to be averaged over a period of 8 weeks, so that overtime penalty rates would only be payable if the employee worked in excess of 304 hours over an 8 week period. However because this was, again, an issue not extensively explored in the evidence and submissions, we will allow interested parties an opportunity to make further submissions about this (and, if necessary, to adduce further evidence) before we make a final decision. We will also direct the parties to confer in order to endeavour to reach an agreed outcome. A member of the Commission will be made available to assist if interested parties request this to occur.”

19. In its Decision, the Full Bench made the findings (at paragraph [749]) that:
- (2) Casual employees are used extensively to perform seasonal harvesting functions. These functions require extensive hours of work to be performed in relatively short periods of time. Weather events may mean that harvesting time which is lost on particular days must be made up in subsequent days, regardless of which day of the week it is.
  - (3) Casual employees who perform seasonal harvesting work are commonly on work or holiday visas. Their preference is (within reason) to work as many hours, and earn as much income, as they can within a short space of time and then move on.
20. The Commission has correctly recognised the needs of both businesses and casual workers in the Horticulture Industry for the ordinary hours of work to be averaged over a period of time before overtime penalties become payable. The Commission has expressed the provisional view that an 8 week averaging period may be appropriate. We submit that this period is too short given the unique nature of the Horticulture Industry and the diversity of crops that are grown in the industry. We propose a six month averaging period (i.e. overtime penalties would only be payable if an employee works more than 988 hours over a 26 week period).
21. The requirement that no more than 12 ordinary hours can be worked by a casual on any day provides a great deal of protection to employees from any adverse consequences associated with the proposed 26 week averaging period. For example, if an employee worked 14 hours in a day but had not worked 988 hours over a 26 week period, the employee would be entitled to two hours of overtime.
22. If the Commission does not accept Ai Group's primary position that a 26 week averaging period is appropriate, as a secondary position we propose that the averaging period should be 13 weeks with a facilitative provision included to allow an individual employee to reach agreement with the employer on the extension of the averaging period by a further 13 weeks to a maximum of 26 weeks.

23. Facilitative provisions which enable the period over which hours can be averaged to be extended are not uncommon in awards. For example, under the *Manufacturing and Associated Industries and Occupations Award 2010*, facilitative provisions enable employers and employees to agree to extend the period of time over which hours can be averaged, up to a period of 12 months (clauses 36.3(c) and 36.4(b)).

## 6. THE OVERTIME PENALTY RATE

24. With regard to the overtime penalty rate that should be payable to casual employees, in its Decision the Full Bench said: (emphasis added)

[753] In respect of weekly ordinary hours, the position should remain that the hours for casuals are the lesser of an average of 38 hours per week or the hours required to be worked by the employer. There remains 2 critical issues to be resolved: first, over what period may the 38 weekly hours of casual employees be averaged and, second, should overtime penalty rates be payable for work in excess of those hours? We consider that those issues should be resolved in a way in which overtime penalty rates do not become payable in respect of seasonal casual employees who are required, and want to, work large amounts of hours in a short period of time.

25. In its Decision, the Full Bench made the finding (at paragraph [746]) that: *“Certainly the evidence clearly demonstrates that employers covered by the Horticulture Award do not, as a matter of fact, pay overtime penalty rates to casual employees.”*

26. Further, the Full Bench made the finding (at paragraph [749]) that:

- (1) Horticultural businesses tend to be price takers for their product, meaning that they have little or no capacity to pass on any increase of significance in their labour costs. Therefore any award variation which significantly increases labour costs would adversely affect profit margins and potentially affect business viability, which ultimately might have adverse employment effects.

27. Given that businesses throughout the Horticulture Industry are not currently paying overtime penalties to casuals, the imposition of overtime penalties will undoubtedly impose substantial cost increases. Therefore, the overtime penalty rate to be imposed must not be excessive. An excessive overtime penalty rate would have adverse employment effects and would impact upon business viability.



28. In all the circumstances, an overtime penalty rate of 150 per cent is appropriate. This proposed penalty rate includes the casual loading.
29. The proposed penalty rate would result in casual employees receiving a very substantial increase in entitlements. Any higher penalty rate is not warranted and would not be in the interests of businesses or their casual employees.

## **7. DISCUSSIONS WITH THE AWU**

30. As directed by the Commission (at paragraph [755] of the Decision), Ai Group has had discussions with the AWU in an endeavour to reach agreement on these matters. Proposed award variations were also forwarded to the Union.
31. To date, the discussions have not led to agreement being reached.