

Fair Work Commission  
Level 10, Terrace Tower, 80 William Street  
EAST SYDNEY NSW 2011  
Via email: [AMOD@fwc.gov.au](mailto:AMOD@fwc.gov.au)

8 June 2018

**Re: AM2014/247 Sugar Industry Award 2010**

## **BACKGROUND**

1. On 6 April 2018, Deputy President Asbury published Directions requiring parties to file written submissions regarding outstanding substantive issues regarding the *Sugar Industry Award 2010* ('**Award**').
2. These submissions of The Australian Workers' Union ('**AWU**') are in response to those Directions.

## **PIECEWORK AND CASUAL LOADINGS**

### **The Fair Work Ombudsman Query**

3. In correspondence dated 2 March 2015, the Fair Work Ombudsman ('**FWO**') requested clarification on if the casual loading is payable to a casual pieceworker in addition to the piecework loading, and if so, how the loadings interact.
4. This query was then noted in the Exposure Drafts for the Award. However, despite two points of view from interested parties being put forward briefly, until now there has been little discussion regarding this issue.
5. The query has two limbs. Firstly, if the casual loading is payable in addition to the piecework loading, and secondly, if both are payable, how the two loadings interact.

## **Casual Loading Payable**

6. The AWU confirms for the FWO that casual piecework employees are entitled to the casual loading in the Award.
7. The purpose of the casual loading and the reasons for which it is paid to casual employees is well settled. A Decision of the Australian Industrial Relations Commission of 29 December 2000<sup>1</sup> states this succinctly:

*“[160] As we have noted, all parties (and since at least 1937 all tribunals), accept that a primary component in the calculation of a casual rate loading is a value for the paid leave entitlements forgone where they are not incidents of that type of employment.”*

8. The Award itself makes a similar statement, albeit in simpler terms<sup>2</sup>:

*“...plus a casual loading of 25%. This loading is instead of entitlements to paid leave and other matters from which casuals are excluded by the terms of this award and the NES.”*

9. This casual loading is an entitlement to all casual employees and is therefore applicable to casual piecework employees.
10. The piecework loading is not paid to compensate a pieceworker for foregoing entitlements such as paid leave and therefore cannot replace the casual loading to which a casual pieceworker is entitled.
11. It is clear that a casual pieceworker is entitled to both the casual loading and the piecework loading in determining his or her piecework rate.

## **Interaction Between Casual and Piecework Loadings**

12. The AWU notes and accepts that the casual loading is not payable for all purposes in this Award, as this is stated explicitly<sup>3</sup>.

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<sup>1</sup> Australian Industrial Relations Commission, M1913 Dec 1572/00 S Print [T4991](#)

<sup>2</sup> *Sugar Industry Award 2010*, cl.11.3(a)

<sup>3</sup> *Ibid.*

13. However, the AWU submits that although this may be worthy of initial consideration in responding to the query from the FWO, whether or not the casual loading is all-purpose is not actually relevant in determining the interaction between the casual loading and the piecework loading.

### **Piecework – Loading and Rate**

14. The AWU notes that the piecework clause in the Award determines that the minimum piecework rate must be:

*“...equal to the payment for the actual hours worked based on both ordinary time and overtime as the case may be, in the relevant pay period plus a loading of 20%<sup>4</sup>.”*

15. The AWU notes that the piecework loading in the Award is not itself technically an amount that is calculated on a pieceworker’s hourly rate of pay for all hours worked, as this is not the basis of a piecework arrangement.

16. A pieceworker is paid an amount per unit of work completed, and therefore does not in reality receive a consistent hourly rate. Whilst it may provide a *general* idea of what a pieceworker may earn in a pay period, simply multiplying the relevant hourly rate by the casual loading and the piecework loading (whether compounding or cumulative) is not necessarily a true reflection of the piecework arrangement under this Award.

17. Paragraph 20.2(a) of the Award sets a minimum guarantee of earnings, with the 20% piecework loading an element of that safety net. This is a threshold or floor to be observed both when determining a pieceworker’s rate and also the pieceworker’s earnings for the relevant pay period. As a pieceworker is paid per unit of work completed, he or she may earn well in excess of this minimum guaranteed amount per pay period through the efficient performance of work, but cannot earn less.

### **Relevant Pay Period**

18. The AWU notes that the piecework clause in the Award determines that the minimum piecework rate must be (emphasis added by the AWU):

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<sup>4</sup> *Sugar Industry Award 2010*, cl.20.2(a)

**“...equal to the payment for the actual hours worked based on both ordinary time and overtime as the case may be, in the relevant pay period plus a loading of 20%<sup>5</sup>.”**

19. Based on the ordinary meaning of the words above, it is clear that the intention of this clause is to set a minimum level of guaranteed earnings *per pay period* for pieceworkers.
20. Unlike a casual loading, which – except in very limited circumstances<sup>6</sup> – is payable to a casual employee for all hours worked, the 20% piecework loading is merely an element of a calculation that is made to ensure a pieceworker has been paid at least the minimum amount prescribed by the Award for piecework that has been completed in the relevant pay period.
21. The inclusion of a 20% loading in the piecework clause is to assist the employer and employee to arrive at a piecework rate that will ensure the pieceworker is paid his or her minimum entitlement as a pieceworker – which is essentially what an employee would have been paid if paid hourly for the work performed plus an additional 20% loading.
22. In order to guarantee that the piecework rate is set at an amount that will ensure the employee is paid at or above his or her minimum entitlements under the Award, the payment that employee receives for the piecework performed will need to at least equal the amount the employee would have received if he or she was paid hourly, plus a 20% loading.
23. In the Award, a casual employee receives a 25% loading on all ordinary time hours. The AWU notes that it is not at all controversial to state that the casual loading of 25% forms part of the *payment* for actual hours worked by a casual employee.
24. Paragraph 20.2(a) of the Award prescribes that the piecework loading of 20% is to be calculated on the *payment*, and not on the minimum rate of pay for a full-time employee in the relevant classification. It is clear that the use of the word ‘payment’ is meant to reflect the actual amount that would have been received

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<sup>5</sup> *Sugar Industry Award 2010*, cl.20.2(a)

<sup>6</sup> Such as when an award specifically excludes the casual loading from overtime rates

by a non-pieceworker for actual hours worked, and not merely on the base rate of pay without relevant loadings.

25. As the piecework loading is to be calculated on the entire amount of the payment, this necessarily results in the casual loading and piecework loading being calculated in a *compounding* manner in determining the piecework rate for a casual pieceworker.

### **Ordinary Time and Overtime**

26. The AWU notes that the piecework clause in the Award determines that the minimum piecework rate must be (emphasis added by the AWU):

*“...equal to the payment for the actual hours worked **based on both ordinary time and overtime as the case may be**, in the relevant pay period plus a loading of 20%<sup>7</sup>.”*

27. The AWU submits that the purpose of adding the words emphasised above is to ensure that a pieceworker is not disadvantaged in his or her employment in comparison to a worker paid hourly, and is paid consistently at least 20% above what an employee paid by the hour would have been paid. These words ensure that any time worked by a pieceworker that would be considered overtime if the pieceworker was paid an hourly rate are taken into consideration when the piecework rate is calculated.
28. The AWU submits that the inclusion of these words, in addition to the other words discussed above – specifically ‘relevant pay period’ – evinces a clear intention that the pieceworker loading is not intended to be calculated in the same manner as other loadings in the Award, and is therefore not constrained by the consideration of whether or not any loading is ‘all-purpose’ or not.

### **Piecework Agreement Review**

29. Paragraph 20.2(b) of the Award requires each piecework agreement to be reviewed at particular times during the crushing season. This is for the purpose of ensuring that the pieceworker has received his or her entitlements as prescribed by paragraph 20.2(a).

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<sup>7</sup> *Sugar Industry Award 2010*, cl.20.2(a)

30. The AWU notes that if it was indeed the case that the interaction between the casual loading and the piecework loading was cumulative and not compounding in nature, the retrospective review required by paragraph 20.2(b) would be considerably more burdensome for the employer, as the simple process of multiplying hours worked by loadings payable plus 20% of the total amount that paragraph 20.2(a) mandates would require additional steps in separating the applicable loadings.

### **Casual and Piecework Loadings Compounding**

31. The AWU submits that it is clear in the language of the relevant clauses in the Award that the piecework loading of 20% is calculated on what a pieceworker *would have been paid* if he or she was paid by the hour over the course of the relevant pay period, including all relevant loadings.

32. As a casual employee paid by the hour would be paid the casual loading for every hour worked, the casual loading forms part of the *payment* for a casual pieceworker that the 20% loading is calculated on to ensure that the piecework rate is appropriate, and is therefore compounded on the piecework loading.

33. The AWU accepts that there are general principles regarding how loadings interact. However, the piecework loading is not entirely similar to other loadings such as overtime. The piecework loading is an element of a calculation that is in place to ensure that a pieceworker's rate enables the pieceworker to meet the minimum income requirements in the Award per pay period whilst working under the arrangement.

34. The piecework loading is an element of a calculation that sets a minimum guaranteed income per pay period for a pieceworker, and is not calculated by the hour but on the payment a pieceworker would have received if the pieceworker was paid an hourly rate for the time he or she performed work under his or her piecework agreement.

35. The AWU submits that a casual pieceworker is clearly entitled to both the casual loading and the piecework loading in the Award in determining his or her piecework rate.

36. Clause 20.2 of the Award sets a minimum income guarantee for pieceworkers, and a process to ensure that this minimum guarantee is met, including periodic reviews of payments received by the pieceworker under the piecework agreement.
37. The AWU submits that a pieceworker covered by the Award is entitled to a piecework rate that ensures the employee earns at least equal to the following per pay period:
- 37.1. The hourly rate the pieceworker would have received for time worked; plus
  - 37.2. Any time-based loadings such as overtime if applicable; plus
  - 37.3. Any casual loading if applicable; plus
  - 37.4. A 20% loading on the total of 37.1, 37.2, and 37.3.
38. The AWU believes that amendments to the Award may be required to increase clarity around this issue. The AWU is willing to provide proposed amendments to the Fair Work Commission as necessary.

Yours faithfully,



Zachary Duncalfe  
**NATIONAL LEGAL OFFICER**  
**The Australian Workers' Union**