**Fair Work Act 2009**

**s.156 - 4 yearly review of modern awards**

**4 yearly review of modern awards**

**AM2014/265**

# Exposure Draft – Electrical, Electronic and Communications Contracting Award 2016 – Drafting and Technical Issues

**Submissions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)**

1 The CEPU notes that the proceedings in AM2014/196 Part-time employment provisions and AM2014/197 casual employment provisions may affect the provisions in the Electrical, Electronic and Communications Contracting Award 2016.

2 The Parties are asked about Clause 10.5— Part-time employment—public holidays and cl 13.5(b). "Clause 13.15(b) appears to apply to shiftworkers on other than continuous work only. Is the clause reference in 10.5(b) correct? Should it instead refer to clause 13.15 and 19.4(b)?" For convenience the clauses are extracted below:

> **10.5 Part-time employment—public holidays**
> (a) Where the normal hours of a part-time employee fall on a public holiday and work is not performed by the employee, such employee will not lose pay for the day.
> (b) Where the employee works on the holiday, such employee must be paid in accordance with clause 13.15(b)(ii).

3 The CEPU notes that the reference to clause 13.5(b) in cl 10.5(b) is curious, the CEPU supports the suggested alternative references to cl 13.5 as a whole and 19.4(b).

> **11.4** The provisions of clause 19—Overtime and clause 13.13 apply to casual employees.

4 "Parties are asked to clarify whether clause 11.4 correctly refers to clause 13.13. For example, is the provision intended to provide that shift provisions apply to casual workers, or is it to specify what overtime provisions apply to casual workers, which may include the overtime provisions for shiftworkers (which are actually in provision 13.16)?"

5 The CEPU is of the view that clause 11.4 should actually refer to the whole of clause 13—Hours of Work. It is possible for a casual under this award to work the cycles in the award, including those involving rostered days off and shiftwork and their concomitant provisions.

> **12.10** Subject to clause 12.15 the period of apprenticeship will be four years. The period may be varied with approval of the apprenticeship authority provided that any credits granted will be counted as part of the apprenticeship for the purpose of wage progression under clause 16.2.

6 "Parties are asked to confirm whether the reference to clause 16.2 in clause 12.10 should instead be to clause 16.4—Apprentice minimum wages."

7 The reference to clause 16.2 in cl 12.10 does appear to be an error; clause 16.2 applies to employees other than apprentices, whereas 16.4 applies exclusively to apprentices.

> **13.6 Late comers**
> **(a)** An employer may select and utilise for time-keeping purposes, any fractional or decimal proportion of an hour (not exceeding quarter of an hour), and may apply such proportion in the calculation of the working time of employees who, without reasonable cause which is promptly communicated to the employer, report for duty after their appointed starting times or cease duty before their appointed finishing times.
>
> **(b)** An employer who adopts a proportion for the purpose of clause 13.6(a) may apply the same proportion for the calculation of overtime.

8 "Could clause 13.6 be clearer as to how it works in practice? If this provision means an employee can be paid for working less time than actually worked, is this inconsistent with s.326 of the Act?"

9 Before considering the question posed it may be useful to extract the appropriate text from the Fair Work Act 2009 (FW Act), the Fair Work Regulations 2009 (the Regulations) and the Fair Work Bill Explanatory Memorandum (the EM).

10 The relevant part of s 326 of the FW Act reads:

> **326 Certain terms have no effect**
>
> *Unreasonable payments and deductions for benefit of employer*
>
> (1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
>
> (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
>
> (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;
>
> if either of the following apply:
>
> (c) the deduction or payment is:
>
> (i) directly or indirectly for the benefit of the employer, or a party related to the employer; and
>
> (ii) unreasonable in the circumstances;

(d) if the employee is under 18—the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

(2) The regulations may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable.

11 The text from the Explanatory Memorandum in respect of this provision states:

**Clause 326 – Certain terms have no effect**
1297. Subclause 326(1) provides that a term of a modern award, enterprise agreement or contract of employment is of no effect to the extent that the term:

permits, or has the effect of permitting, an employer to deduct an amount from an amount payable to an employee for the performance of work; or

requires, or has the effect of requiring, an employee to make a payment to an employer (e.g., by imposing a fine on the employee for lateness) or another person (e.g., requiring the employee to lease premises from a person who is related to the employer), if the deduction or payment directly or indirectly benefits the employer and is unreasonable in the circumstances.

12 The text from the Regulations:

2.12 Certain terms have no effect — reasonable deductions
(1) For subsection 326 (2) of the Act, a circumstance in which a deduction mentioned in subsection 326 (1) of the Act is reasonable is that:
(a) the deduction is made in respect of the provision of goods or services:
(i) by an employer, or a party related to the employer;
and
(ii) to an employee; and
(b) the goods or services are provided in the ordinary course of the business of the employer or related party; and
(c) the goods or services are provided to members of the general public on:
(i) the same terms and conditions as those on which the goods or services were provided to the employee; or
(ii) on terms and conditions that are not more favourable to the members of the general public.
Examples
1 A deduction of health insurance fees made by an employer that is a health fund.
2 A deduction for a loan repayment made by an employer that is a financial institution.

(2) For subsection 326 (2) of the Act, a circumstance in which a deduction mentioned in subsection 326 (1) of the Act is reasonable is that the deduction is for the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by an employee (whether authorised or not).

13 The CEPU submits that the text and the intent of clause 13.6 in the Award is quite apparent-it essentially allows an employer to withhold payment from an employee who starts work late and has not performed work at the time they were due to commence.

14 However, it would appear, and this is what the question posed is really directed to, to permit an employer to withhold payment for the period of non-work in blocks or chunks of time (any fractional or decimal proportion of an hour (not exceeding quarter of an hour)), which could potentially also result in non-payment for time that was actually worked if that fractional or decimal proportion of time was sufficiently large or long enough. A simple example would be where an employee commences work five minutes after their start time, but is deducted a full 15 minutes thereby not receiving payment for 10 minutes they have actually worked.

15 Although s 326 of the FW Act is cast more widely than the situation in which cl 13.6 is confined, the withholding of payment for the 10 minutes worked in the example above arguably amounts to a fine for lateness as in the example provided in the EM and therefore does offend s 326 and is consequently of no effect.

16 There is really no need in the present day with all the current technology available to withhold payment on the basis of any fractional or decimal portion of an hour for time keeping purposes. The provision should be deleted, or amended to read something to the effect that late comers or early finishers will not be paid for the time they are not performing their duties.

**13.9 Rest break**

Employees must be allowed a rest break of 10 minutes on each day between the time of commencing work and the usual meal break. The rest break must be counted as part of time worked.

17 "Does clause 13.9 only apply to day workers?"

18 The CEPU submits that there is nothing in the text of clause 13 limiting the rest break in 13.9 solely to day workers.

> **13.10 Ordinary hours of work—continuous shiftwork**
> **(a)** Clause 13.10 will only apply to continuous shiftworkers as defined in clause 2.2.
> **(b)** The ordinary hours of continuous shiftworkers must average 38 hours per week inclusive of crib time and must not exceed 152 hours in 28 consecutive days.
> **(c)** Continuous shiftworkers must work at such times as the employer may require, subject to the following conditions:
>
> > **(i)** A shift must not exceed eight ordinary hours, inclusive of crib time. Provided that by mutual agreement between the employer and an employee or majority of employees concerned, a shift may be up to 12 ordinary hours;
> > **(ii)** Except at the regular change over of shifts, an employee must not be required to work more than one shift in each 24 hours;
> > **(iii)** 20 minutes must be allowed to continuous shiftworkers each shift for crib which must be counted as time worked; and
> > **(iv)** An employee must not be required to work for more than five hours without a break for a meal.

19 The question asked: "Can 'crib time' in clause 13.10 and 13.11 be replaced with 'rest break'? As a consequence, the definition of 'crib time' in clause 2 would also be deleted."

20 The CEPU submits the term 'crib time' cannot be replaced with 'rest break.' Crib time is not synonymous with rest break – see the definition in clause 2. Crib time and other uses of the term crib are well known and widely used in the industry and should not be disturbed.

> **13.11 Ordinary hours of work—other than continuous shiftwork**
> **(a)** Clause 13.11 will apply to shiftworkers working on other than continuous shiftwork.
> **(b)** The ordinary hours of work must be an average of 38 per week, to be worked in one of the following shift cycles;
>
> > **(i)** 38 hours within a period not exceeding seven consecutive calendar days; or
> > **(ii)** 76 hours within a period not exceeding 14 consecutive calendar days; or
> > **(iii)** 114 hours within a period not exceeding 21 consecutive calendar days; or
> > **(iv)** 152 hours within a period not exceeding 28 consecutive days.
>
> **(c)** Shiftworkers working on other than continuous shiftwork must work at such times as the employer may require, subject to the following conditions:

> **(i)** A shift must not exceed eight ordinary hours inclusive of crib time. Provided that by mutual agreement between the employer and an employee or majority of employees concerned, a shift may be up to 12 ordinary hours.
> **(ii)** The ordinary hours must be worked continuously except for crib time at the discretion of the employer.
> **(iii)** An employee must not be required to work for more than five hours without a break for crib time.
> **(iv)** Except at the regular change-over of shifts, an employee must not be required to work more than one shift in each 24 hours.

21 The question asked: "Is it the timing of the crib time in clause 13.11(c)(ii) which is at the discretion of the employer? If so, parties are asked to comment on whether 'except for crib time at the discretion of the employer' could be deleted from 13.11(c)(ii) and 13.11(c)(iii) amended to read:

> '(iii) The timing of crib time is at the discretion of the employer, provided that an employee must not be required to work for more than five hours without a break for crib time.'"

22 The CEPU agrees with the proposed amendment as better reflecting the intent of the provision.

## 14. Breaks

### 14.1 Meal breaks and rest breaks

**(a)** An employee, other than a shiftworker, is entitled to an unpaid meal break of at least 30 minutes after every six hours worked.

**(b)** A shiftworker is entitled to a paid meal break of 20 minutes per shift.

**(c)** Meal breaks will be at the discretion of the employer. Provided that an employee must not be compelled to work for more than six hours without a break for a meal. Where possible the normal meal break should be as near as practicable to the middle of the period of duty or shift.

23 The question asked and the observation made: "Should clause 14.1(c) be amended to 'The timing of meal breaks will be at the discretion of the employer'?

It is also noted that clause 14.1(c) appears to be inconsistent with 13.11(c)(iii) in relation to the timeframe for a meal break to be taken by shiftworkers working on other than continuous shiftwork."

24 The CEPU agrees with the proposed amendment to 14.1(c). It is, however, the view of the CEPU that there is not an inconsistency between 14.1(c) and 13.11(c)(iii). Clause 13.11(c)(iii) applies only to shiftworkers, whereas

14.1(c) applies to workers other than shiftworkers. Perhaps including the wording 'other than a shiftworker' after 'Provided that an employee,' and before 'must,' in the second sentence of the clause might make it clearer, or in the alternative a note directing the reader to clause 13.11(c) for the provision relating to shiftworkers could be inserted.

> **15. Inclement weather**
> **15.1 Definition of inclement weather**
> **Inclement weather** means the existence of abnormal and extreme climatic conditions by virtue of which it is either not reasonable or not safe for employees exposed to continue working for the duration of such conditions.
> **15.2 Conference procedure for inclement weather**
> The employer or its representative, when requested by the employees or their representative, must confer within a reasonable time (which does not exceed 60 minutes) for the purpose of determining whether or not the conditions referred to in clause 15 apply.
> **15.3 Transfer of work site due to inclement weather**
> **(a)** Employees may be transferred from one location on a site where it is unreasonable to work due to inclement weather, to work at another location on the same site or to another site which is not affected by inclement weather.
> **(b)** Employees may be transferred from one site to another and the employer provides transport where necessary.
>
> **15.4 Payment for lost time due to inclement weather**
> **(a)** An employee will be entitled to payment by the employer for ordinary time lost through inclement weather whilst such conditions prevail.
> **(b)** An employee will not be entitled to payment for time lost through inclement weather as provided for in this clause unless the provisions of this clause have been observed.

25 The question asked: "What provisions of clause 15 need to be observed to satisfy the requirement in clause 15.4(b)? Should 'the provisions of this clause' be amended to 'the provisions of clause 15.2'?"

26 The CEPU submits that the clause is clear and the text should not be narrowed to 15.2 alone. To do so would cast some doubt on the operation of clause 15.3.

27 In response to the question on page 26 of the Exposure Draft, 'How do 16.4(a)(iii) and 16.4(a)(iv) interact?' the CEPU would simply comment that 16.4(a)(iii) directs the reader to the additional allowances that are payable in

addition to the minimum wage rates, and 16.4(a)(iv) simply directs the reader as to how the weekly all-purpose rate is to be calculated.

28 In response to the questions and direction on page 30, namely:

‘Parties are asked to clarify which special allowances are not cumulative. For example, if an employee is entitled to both the first aid allowance and the multi storey allowance, are they entitled only to payment for the higher of those two allowances? Is it just the ‘special allowances—work related allowances’ in clause 17.4 of the current award that are not cumulative?’

29 The CEPU submits that the special allowances that are not cumulative are those which are provided for disability purposes. The text appears quite clear on this. The first aid allowance is not a disability allowance; it is a skill or knowledge based allowance.

30 In response to the question asked on page 35, ‘Parties are asked to clarify which allowances do not apply under clause 17.5(e).’ The CEPU submits that it is simply those allowances under (b), (c) and (d) which would otherwise be payable under 17.5—Travel and expenses.

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