FAIR WORK ACT 2009 (Cth)

s. 159 – Four Yearly Review of Modern Awards

DRAFTING and TECHNICAL ISSUES

ELECTRICAL, ELECTRONIC and COMMUINICATIONS CONTRACTING AWARD 2016

EXPOSURE AWARD (AM2014/265)

MODERN AWARD REVIEW

SUBMISSION

This is a submission by Fire Protection Association Australia in connection with the Electrical, Electronic and Communication Contracting Award 2016 – Exposure Award.

INTRODUCTION

1. On 10th May 2016, the President, His Justice Ross, issued a Statement and Directions ([2016] FWC 2924) setting out an amended timetable with respect to the 4 yearly review of Group 4 awards identifying with a plain language pilot.

2. The amended Timetable invited interested parties to make submissions on drafting and technical issues with respect to Group 4 exposure draft awards by 30th June 2016.

3. Fire Protection Association Australia (FPA) makes a submission with respect to the Electrical, Electronic and Communications Contracting Award 2016 – exposure award ("Exposure Award").

4. The Exposure Award was released on 23rd May 2016 and included a comparison with the existing the Electrical, Electronic and Communication Contracting Award 2010 ("Electrical Contracting Award"). The exposure draft does not seek to amend any entitlements but raises a number of structural issues.

5. Matters raised in the Exposure Award cover specific Award conditions as well as matters currently before the Fair Work Commission that will affect more than just Group 4 awards.

6. The broader matters before the Fair Work Commission such as Annual Leave (AM2014/47 – subject of decisions including those of 23rd May 2016 and 24th June 2016); Part-Time Employment (AM2014/196); Casual Employment (AM2014/197); Overtime (AM2014/300) and Public Holidays (AM2014/301) – are acknowledged as matters that can affect the Electrical, Electronic and Communication Contracting Award.

7. Notwithstanding the importance of these broader Award matters, which are of significant interest to FPA, this submission focuses on the specific Award conditions.

8. It is also noted that the 4 yearly modern award review is intended, pursuant to modern award objective (section 134) of the Fair Work Act 2009 (Cth), *to take into account the need to ensure a simple, easy to understand, stable and sustainable modern system (… that avoids unnecessary overlap of modern awards*) (s. 134 (1) (g)). Also, as the headnote of various Decisions of the Commission indicate a reference to plain language of modern awards. This submission supports those principles.

SPECIFIC AWARD PROVISIONS

9. Turning to the specific Award matters raised in the Exposure Award.

Part-Time Employment

10. Commencing with clause 10 – Part-time employment, there is a cross reference between shift workers and part-time employment as well as Overtime.

11. Specifically, sub-clause 10.5 provides:

> *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).*

12. The point raised and question asked is that "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)?"

13. Without detailing the entirety of sub-clause 13.15 (Rate for working on a Sunday and public holiday shifts) , this sub-clause, which is provided for under Part 3 – Hours of Work, Clause 13 – Ordinary hours of work and rostering, relates to shift workers.

14. Paragraph 13.15 (b) refers to rates for working on Sunday and Public Holidays, by "shiftworkers on other than continuous work". Those rates are: Sunday – 2T or 200%; and for working on a Public Holiday – 2½T or 250%.

15. Paragraph 19.4 (b) provides for the same payment for working Overtime on a Public Holiday: 2½T or 250%.

16. Whilst the current Award provisions are able to be distinguished and not altering employee entitlements, it is submitted that:

16.1 there be a separation of provisions of Clause 13: i.e., provide for new Clause 13 – Ordinary Hours – Day workers (which includes all the provisions of current Clause 13 at sub-clauses 13.1 to 13.9);

16.2 provide for a new clause 14 – Shift Work which includes current sub-clauses 13.10 to 13.17 (i.e., new 14.1 to 14.8);

16.3 a new Daylight Saving clause – clause 15 (no change in content) and subsequent re-numbering of following clauses;

16.4 vary sub-clause 10.5 (b) to read: *"(b) Where the employee works on a holiday, such employee must be paid 250%"*;

16.5 vary sub-clause 13.15 (b) (now paragraph 14.6 (b)) to read in part *"(b) The rate at which shiftworkers **(including part-time/casual workers)** on other than continuous work are to be paid for all time worked on a Sunday or public holiday is as follows:*

(i) Sunday – 200% of the ordinary hourly rate;
(ii) Public holidays – 250% of the ordinary hourly rate".

16.6 vary the definition "continuous shiftworker" at sub-clause 2.2 by adding a reference to "part-time" or "casual" employees, to *read "continuous shiftworker means an employee **(including part-time or casual employee)** regularly employed to work in a system of consecutive shifts throughout the 24 hours of each of at least five consecutive days without interruptions (except during breakdown or meal breaks or due to unavoidable causes beyond the control of the employer) and who is regularly rostered to work those shifts"*.

Casual Employment

17. The Exposure draft asks whether clause 11.4 (the application of "clause 19 – Overtime and clause 13.13 apply to casual employees") correctly refers to clause 13.13?

18. As is submitted above with respect to part-time employees, this question is best answered by amending current clause 13 by removing those references to shift work and inserting a new clause – clause 14 – Shift Work (in the same terms as currently exist).

19. With respect to the immediate question, if shift work applies to casual employees (if so it would be rare) then in the scheme of the current Award, sub-clause 11.4 should read: *"The provisions of clause 19 – Overtime, **sub-clause 13.13 – Shift Allowances and sub-clause 13.16 – Overtime on shift work** – apply to casual employees"*.

20. Alternatively and in accordance with the above proposition, it is submitted that a new "Shift work" clause be included in the Award, and sub-clause 11.4 amended to read, due to clause

re-numbering: *"The provisions of **clause 21 – Overtime, sub-clause 14.4 – Shift Allowances and sub-clause 14.7 – Overtime on shift work** – apply to casual employees"*.

Apprentices

21. At sub-clause 12.10, the Parties are asked to confirm clause references.

22. Sub-clause 12.10 of the exposure draft and the current award provision (also 12.10) refers to a combination of the period of lost time (sub-clause 12.15) and wage progression (16.2).

23. Sub-clause 16.2 refers to minimum adult rates whereas sub-clause 16.4 refers to apprentice rates .

24. The inquiry is a correct inquiry and that "16.2" should be "16.4".

Hours of Work

25. Clause 13 commences with a reference to the maximum hours as well as the NES. It is submitted that notwithstanding the accepted level of maximum weekly hours, that sub-clause 13.1 include a reference to "38 hours" as is contained in the NES.

26. It is noted that sub-clause 13.4 refers to "an average of 38 hours per week" and sub-clause 13.7 refers to "Implementation of 38 hour week". It is therefore suggested that it would be appropriate to clearly describe "38 hours" at the commencement of clause 13.

Late comers

27. Sub-clause 13.6 refers to late comers. The clause is not inconsistent with s.326.

28. The question refers to being paid for working less time than actually worked. This is not the case nor is it the intention behind the provision (of payment for working less time than actually worked – it is payment for the time actually worked). An Employee arriving late and being "docked" by a "fraction or decimal proportion" is paid the remaining part of the day/shift at the appropriate rate. An employee arriving late with the intention of ceasing work at normal finish time, should not be rewarded or gain an advantage by being paid for the full day/shift.

29. This provision does not mean payment for working less than actually worked. It is intended to pay the employee the same rate for the hours or time actually worked so that if 15 minutes late, paid for 7.45 hours.

30. This is in accordance with "ordinary hours to be worked" per week and if the employee works less than 38 then the Employer is entitled to pay for the reduced period of time worked, by the reciprocal amount.

31. The practice of attending work at normal start times is an obligations by employees to comply with the provisions of their contract of employment as well as the Award (and enterprise agreement) by working to the maximum ordinary hours (as well as their start and finish times).

32. Perhaps an example of such a situation may be relevant should there be controversy.

Other

33. The next matter is with respect to sub-clause 13.9 (same as 24.9 in current Electrical Contracting Award) – Rest breaks and whether it only applies to day workers.

34. The rest break in sub-clause 13.9 refers only to day workers. See current 24.9 (of the current Electrical Contracting Award) which is "located" under the heading "24. Ordinary hours" with sub-clauses 24.1 to 24.9 applying to day workers with shift work arrangements commencing at 24.10. Therefore sub-clause 24.9 applies to day workers. Exposure award has similar structure here to that of current Electrical Contracting Award.

35. This matter is readily resolved if the current Ordinary Hours of work clause is split off with a separate "Shift Work" clause as submitted, above.

36. Reference to **"crib time"** in sub-clauses 13.10 and 13.11. It is submitted that the reference should remain.

37. The reference is a shift work reference readily understood by all and so should be retained.

Breaks

38. There are 3 types of Breaks referred to in the Award: (a) rest break – e.g., sub-clause 24.9 (before normal meal break); (b) meal break – sub-clause 24.9 and clause 27 (Breaks) (main break during the course of a "shift"; and (c) crib break – also has an association with shift workers (e.g., 24.10 and 24.11).

39. As there is a distinction between day work and shift work, leave "crib time" as is.

40. The definition in clause 2, should be retained.

41. The Parties are requested to consider the **timing of the crib break** in sub-paragraph 13.11 (c) (ii) and whether it is at the discretion of the Employer as well as a further inquiry concerning "crib break".

42. It is submitted that the timing should be at the Employer's discretion.

43. At the Employer's discretion also allows for productivity and efficiency. See the flexibility of a rest break in 13.9 where the 10-minute break is not at a set time and in 14.1 (a), the meal break is within the 6 hour period and not at a set time.

44. Concur with proposed wording change.

45. Retain reference to "crib break".

46. For consistency, it is agreed that the proposed wording with respect to paragraph 14.1 (c) be introduced into the Award.

47. Concerning the noted difference between paragraph 14.1 (c) and sub-paragraph 13.11 (c) (iii), leave as is as there is a distinction between day workers at sub-clause 14.1 and shift workers at 13.10 (and 13.11) which reflects some of the disadvantages of working shift work, such as less access to meals whilst on shift work than is available to a day worker.

48. The above submission proposing a separate "shift work" clause is supported by the concern raised with respect to the inquiry on this specific matter. The next suggestion in this paragraph (#48) goes beyond the above proposition of simply separating the existing "Ordinary Hours" clause from a "Shift work" clause to include all shift work related matters, as best they fit, under the one Shift work clause. However, ensuring no disadvantage results from such a proposition. It is understood another Party may be making the same or similar submissions on the added comment in this paragraph (#48).

49. Whilst not identified in the Exposure draft, it is understood that some clarity is sought by one of the interested Parties with respect to call-outs. That clarity is supported.

Inclement Weather

50. The inquiry concerning "Inclement weather" concerns entitlement to payment concerning inclement weather situations and whether in paragraph 15.4 (b), the provisions should only relate to sub-clause 15.2 (conference procedures)?

51. What would be the situation if the provisions of sub-clause 15.3, for example, were not complied with?

52. The reference in paragraph 15.4 (b) is to "the provisions of **this** clause". The "provisions of **this** clause" are not limited to sub-clause 15.2. Therefore, any change should also include a reference to sub-clause 15.3 as well as 15.2.

Apprenticeship rates

53. The Parties are requested to view the interaction between paragraphs 16.4 (a) (iii) and 16.4 (a) (iv). The "interaction" is between "minimum" rates and "all-purpose" rates.

54. Unless there are improved definitions for these 2 provisions, perhaps it is best to leave as is.

Allowances

55. The Parties' attention is drawn to paragraph 17.1 (b) – Special Allowances and the cumulative nature of allowances.

56. The need to identify the relationship between the respective allowances is important. Where there is no relationship, the cumulative aspect should not apply. So, where a need is required to distinguish between respective allowances and so, for example, where allowances are similar or inter-related, all the Allowances are not payable.

57. As well as the relationship, there is a need to consider the application of the respective allowances and so in the example provided, first aid is clearly distinguishable from the respective "height" allowances in sub-clause 17.3. Therefore the 1st Aid allowance is payable as well as the respective "height" allowances subject to their application.

Travel and Expenses

58. The question here is which allowances do not apply under paragraph 17.5 (e)?

59. It would appear that Motor Vehicle Allowance (17.5 (b); Travel Allowance (17.5 (c); and Start and/or finish on job (17.5 (d) do not apply as per paragraph 17.5 (e) would not apply as they have their own application separate from that of "Starting and/or finishing on the job" and away from the Employer's registered office. Note that the travel time allowance (17.5 (c) is an attendance for work allowance and would apply irrespective of whether the employee starts and finishes at the Employer's registered office, as the provision in 17.5 (c) states, *"All employees must be paid an allowance ..."*.

CONCLUSION

60. As indicated in the introductory paragraph to the Exposure Award, the exposure award/draft (and repeated above), is not intended to amend any entitlements under the Electrical Contracting Award.

61. It is recognised that the Exposure Award and the Electrical Contracting Award are similarly structured with regards to Award content and thereby complying with the intent of the Exposure draft.

62. However, what should not be forgotten is the intention of plain language and simplicity of provisions to allow for clear interpretation and understanding of respective provisions.

63. That simplicity of award provisions is reflected in the proposition that there be a separation of "shift work" from the current "Ordinary hours of work" clause. Such a proposition would

not only confirm consistency with the Fair Work Act in providing for a more user friendly document, but would also address the relevant questions raised by the exposure draft.