

Fair Work Commission
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East Sydney NSW2011
By email: amod@fwc.gov.au

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Re: AM2014/280 AWU submissions on the Exposure Draft for the *Plumbing and Fire Sprinklers Award 2016*

BACKGROUND

1. On 10 May 2016 the President, Justice Ross published a Statement and Directions regarding a plain language pilot and Group 4 awards.
2. The Directions require the filing of submissions regarding drafting and technical issues in Group 4A, B and C exposure drafts by 30 June 2016.
3. The submissions of the Australian Workers' Union (AWU) in relation to the exposure draft for the *Plumbing and Fire Sprinklers Award 2016* ('the Exposure Draft') as published on 26 May 2016 appear below.

DRAFTING AND TECHNICAL ISSUES

'Early start' facilitative provision

4. Clause 7.2: The table at this clause summarises the facilitative provisions contained in this Award for flexible work arrangements. The Commission brings our attention to clause 15.3 in relation to arranging an 'early start', and asks if the table should refer instead to 'a majority of employees' in column 3. The AWU respond in the affirmative.
5. The substantive clause targets 'the employer and its employees' creating some ambiguity. However, the wording is plural ('employees'), and when compared to clauses 15.4, 16.2 and 26.2, there is no apparent logic as to why 'early start' arrangements should not also be made by a majority of employees. The AWU suggest adding the word 'affected' to read 'the majority of affected employees' to improve these facilitative clauses – so that only those affected by an agreement can form the majority.

Ordinary hours – part time, casual, and apprentice employees

6. Ordinary hours are incompletely drafted for the above classes of employees. We refer to section 147 of the *Fair Work Act 2009* (Cth) ('the FWA') which states:

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award

7. Clause 11.3(b): To complete the span of hours for part time employees, this clause should include the additional (underlined) words: ‘...the hours...the days...commencing and finishing times for the work.’
8. Clause 12: A span of hours is not specified for casual employees. We suggest the wording at clause 15.2(c) be inserted after clause 12.1 to rectify this issue. The use of this wording includes a cross-reference to 15.3, which will also make clear that a casual employee is consulted for an early start agreement. The remainder of the ordinary hour provisions do not apply to a casual employee, as they are peculiar to employees working over a four-week cycle.
9. Clause 13.8: The maximum ordinary hours for an apprentice is specified as 38 hours, but no further guidance is provided. Taking into account that an apprentice can work part time or full time, we suggest a cross-reference to clauses 11 and 15.

Adult apprentices – age discrimination and ambiguity

10. Clause 13.14(d): There are a number of issues with both subclauses (i) and (ii), despite the Commission only enquiring into subclause (ii).
11. Subclause (i) encourages the employment of adult apprentices currently employed with the employer ‘where possible’ in order to provide ‘genuine career development’. Subclause (ii) ensures the observance of (i) will not be at the expense of other apprentices. This appears to nullify the entitlement. It might be the case that subclause (ii) was intended to refer to ‘employees’ rather than ‘apprentices’ in order to remove most of the discrimination *between employees*.
12. The purpose of 13.14(d) at the time of its inclusion was clearly to address apparent disadvantage experienced by adult employees seeking apprenticeships in the plumbing and fire sprinkler industries as a form of positive discrimination. Parties can assume the Award Modernisation Full Bench considered the relevant provisions when the Award was made. The AWU are content the terms above meet the modern awards objective, are allowable in accordance with section 139 and are not prohibited by section 153 of the FWA.
13. However, considering the ambiguous and aspirational nature of the entire subclause (d), if no disadvantage (per paragraph 12 above) can be identified, the AWU would support the deletion of clause 13.14(d). It is difficult to interpret, and difficult to enforce due to the wording ‘where possible’. Should the AWU become further enlightened to this issue revealing the necessity of clause, we may make further submissions.

Overtime meal and rest breaks

14. Clause 16.5 and 16.6: In response to the Commission’s question posed, the AWU do not have a strong opinion as to whether these clauses are placed back at clause 21 – the overtime provisions, or stay placed with the ‘breaks’ provisions. Both methods of grouping are functional. We have only a slight preference for the clauses to be moved back to clause 21. We see readers as being more likely to navigate to the overtime and penalty rate provisions,

rather than the 'breaks' provisions, when considering their rights and obligations in relation to work performed outside ordinary hours.

Payment of wages

15. Clause 18.8: In response to the Commissions' question, we say it is appropriate to update this clause to refer to payment by electronic means. The removal of the words 'bank cheque, bank or similar transfer' should be removed, and 'electronic fund transfer' added.

Allowances for junior fire sprinkler fitter employees

16. Clause 20.3(f): The Commission ask if the industry disability allowance and space, height and dirt money allowance for adult fire sprinkler fitter employees is payable to adults only. The AWU submit both allowances are also payable to junior employees. This interpretation promotes internal consistency under the Award for the following reasons:
 - 16.1. Apprentices, both junior and adult are entitled to the above allowance by way of clause 18.2. It would be an illogical construction to exclude junior employees not undertaking an apprenticeship.
 - 16.2. All plumbing and mechanical services employees are paid the industry and plumbing trade allowances under this Award.

Penalty rates (Saturdays) and overtime – plumbing and mechanical services employees, irrigation installer employees

17. Clause 21.1 and 22.1: The AWU acknowledges there are differential provisions between sprinkler fitting employees and plumbing and mechanical services employees, and are content that these differences meet the modern awards objective as approved by the Award Modernisation Full Bench in the making of this Award.¹
18. However, there remains an inconsistency or ambiguity between the penalty and overtime rates for plumbing and mechanical services employees.
19. On a Saturday the penalty rate for all employees is 150% of the ordinary hourly rate for the first two hours, and 200% thereafter. For plumbing and mechanical services employees, the overtime rate on a Saturday for the first two hours is 150% and 200% thereafter. The correct observance of these two clauses sees the identified class of employees dropping to lower rates during the first two hours of overtime on Saturdays having performed the majority of hours that day at 200%. This construction is consistent with clause 21.1 (b).
20. The AWU do not see this as the intended effect of the modernisation of the overtime and penalty rate provisions, and suggest the rate at clause 21.1 be amended to 200% at column 3, row 5. We refer to section 160 of the FWA in this regard.

¹ [2009] AIRCFB 345 at [106].

Shiftwork provisions – structure and missing terms

21. Clause 22.2(a): The information setting out the terms of engagement for shift workers at this clause is insufficient, and missing vital information provided in the Schedules to the Award. The AWU also note the absence of terms for shiftworkers determining the number of hours worked per day, or over a cycle.
22. The substantive shift work provisions appear identically at footnotes 1-3 in each Table, at C.1.4, C.2.4, C.1.7, D.1.4, and D.1.7. This information should be drafted clearly, placed at clause 22.2(a), and cross-referenced to the hourly rate summaries at Schedules C and D.
23. From the Tables listed above, the shiftwork system appears to function as follows:
 - 23.1. Hours of duty for shiftworkers are set any time between midnight on Sunday and Midnight on Friday, and must commence before 7:00am and / or conclude after 6pm; and
 - 23.2. Where five or more consecutive shifts are worked and at least 48 hours notice is provided prior to commencement of shift work, an employee is paid 133% of the employees ordinary hourly rate; or
 - 23.3. Where less than five consecutive shifts are worked; or less than 48 hours notice is provided prior to commencement of the shiftwork, an employee is paid 150% of the employees ordinary hourly rate for the first two hours and 200% thereafter.
24. If it is preliminarily agreed between the parties that a comprehensive clause for shiftworkers at clause 22.2(a) would benefit the functionality of the Award, the AWU invites parties to confirm and provide additional comment regarding their understanding of shiftwork under this Award.

Shiftwork – apprentices

25. Schedule E: Shift work rates are missing from the Schedule for apprentice hourly rates and should be included.

END



Roushan Walsh
NATIONAL LEGAL OFFICER