Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

Manufacturing and Associated Industries and Occupations Award 2010 – Applicable Hourly Rate Issue (AM2014/75)

11 November 2016

4 YEARLY REVIEW OF MODERN AWARDS

REPLY SUBMISSION – APPLICABLE HOURLY RATE ISSUE MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010 (AM2014/75)

1. INTRODUCTION

1. This reply submission is made in response to the Directions issued by Commissioner Bissett on 9 September 2016. It should be read in conjunction with our submission dated 28 October 2016.

2. This submission is made in reply to the 31 October 2016 submission of the Australian Manufacturing Workers' Union (**AMWU Submission**).

3. The AMWU submission:

   - Confirms that Ai Group, the AMWU, the Australian Workers Union (**AWU**) and the Construction Forestry Mining and Energy Union (**CFMEU**) have reached agreement on wording for clauses 14.1(b), 14.5(a), 14.5(b), 15, 23, 27.4(e)(i), 30.10(b), 30.10(c), and 20.13 of the Exposure Draft[1] of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**);

   - Confirms that, in respect of clause 39.3, Ai Group, the AMWU, the AWU and the CFMEU have agreed that the wording of this clause should be resolved through the plain language redrafting of standard clauses process; and

   - Expresses opposition to Ai Group's proposed wording for clause 34.5(a)(i) - Rostered day off falling on public holiday.

4. Given the above, this submission only deals with the AMWU's submissions on clause 34.5(a)(i) and on the procedural issue referred to in section 2 below.

[1] The clause numbers reflect those in the 4 November 2015 Exposure Draft.

2. CAN THE MATTER BE DEALT WITH ON THE PAPERS?

5. The Commission's Directions of 9 September 2016, included the following request:

> In filing materials in reply, parties are asked to indicate if they consider a hearing is required or the matter can be dealt with on the papers.

6. In Ai Group's view, this matter can be dealt with on the papers, and a formal hearing is not necessary.

3. CLAUSE 34.5(a)(i) – ROSTERED DAY OFF FALLING ON A PUBLIC HOLIDAY

7. As set out in our submission of 28 October 2016, Ai Group proposes that clause 34.5(a)(i) should use the phrase *"ordinary hourly rate"* for the following reasons:

   a. The phrase *"ordinary hourly rate"* reflects the intent of the current provision as is evident from the draft award that Ai Group and the MTFU jointly submitted to the Australian Industrial Relations Commission (**AIRC**) during the award modernisation process. The relevant phrase in the clause in that draft award was *"ordinary rates".* The Commission changed the agreed phrase to *"ordinary time rates"* but there is nothing in any of the submissions or materials to indicate that the AIRC intended to alter the agreed entitlement.

   b. The phrase *"ordinary hourly rate"* reflects the widespread current industry practice regarding the payment of this entitlement.

   c. The phrase *"ordinary hourly rate"* is consistent with the wording in the equivalent clauses in the various predecessor awards, including:

      - Clause 22(k) in the *Metal Trades Award 1971*;
      - Clause 22(k) in the *Metal Industry Award 1984 – Part I;*
      - Clause 7.5.4 in the *Metal, Engineering and Associated Industries Award 1998*.

d. In the *Metal Trades Award 1971*, the *Metal Industry Award 1984* and the *Metal, Engineering and Associated Industries Award 1998*, the shiftwork clauses specified that shift loadings were payable in addition to the *"ordinary rate".* This clarifies that the phrase *"ordinary rate"* in these awards did not include shift loadings.

e. In *Kucks v CSR*,[2] Madgwick J rejected the argument that the phrase *"ordinary rate of pay"* included shift allowances and other penalties. He stated: *"When the framer(s) of the award wished to indicate that full, usual pay should be paid, they had no difficulty in making their meaning plain".* Similarly, if the phrase *"ordinary rate"* in the Rostered Day Off Falling on a Public Holiday clause was intended to have a different meaning to the phrase "ordinary rate" in the Shiftwork clause in the *Metal Trades Award 1971*, the *Metal Industry Award 1984* and the *Metal, Engineering and Associated Industries Award 1998*, the award would have made this plain.

f. In *Fonterra Brands (Australia) Pty Ltd v AMWU*,[3] a Full Bench of the FWC relevantly stated that: *"(t)he term 'ordinary pay' has a well-established and common industrial meaning and usage, namely remuneration for an employee's weekly hours but excluding any amount paid for shift work, overtime or other penalty".*

g. Compensating employees for a public holiday that falls on a day off at the *"ordinary hourly rate"* under clause 34.5(a)(i) of the Manufacturing Award would be far more consistent with s.116 of the *Fair Work Act 2009* (**FW Act**) than the unions' proposed approach. Under s.116 of the FW Act, if an employee is absent from his or her employment on a day or part-day that is a public holiday the employer must pay the employee at the employee's *"base rate of pay"* for the employee's ordinary hours of work on that day. *"Base rate of pay"* is defined in s.16 of the Act as the rate of pay payable to the employee for his or her

[2] *Kucks v CSR Ltd* (1996) 66 IR 182

[3] [2015] FWCFB 3423

ordinary hours of work, but not including: incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts.

8. The AMWU submission raises the following three arguments in support of its position that the phrase *"applicable rate of pay"* should be used in clause 34.5(a)(i), rather than *"ordinary hourly rate"* as proposed by Ai Group:

   a. There is no "*ordinary or usual meaning*" ascribed to the term "*ordinary time*" in the relevant provisions of the Manufacturing Award and the meaning of the term must therefore be determined by its context in light of the relevant authorities on award interpretation;

   b. It would be inconsistent with the entitlements in clauses 34.5(a)(ii) and (iii), if clause 34.5(a)(i) did not include shift loadings; and

   c. The AMWU's proposal is consistent with the AIRC's 1994 *Public Holidays Decision* [4] and the AIRC's 1995 *Public Holidays Non Standard Workers Decision.*[5]

9. Each of the above AMWU arguments are dealt with below.

10. Before dealing with these arguments, we need to correct the AMWU's suggestion at paragraph 2 of its submission that Ai Group saw no problem with the Exposure Draft wording. The numerous submissions which Ai Group has made in the Manufacturing Award proceedings during the 4 Yearly Review demonstrate that Ai Group has consistently and strongly opposed the use of the phrase *"applicable rate of pay"* in the relevant clauses. In paragraph 2 of the AMWU submission, the following paragraph of Ai Group's submission of 12 November 2014 is referred to:

> **Clause 16.1 – Minimum wages and classifications**
>
> The AMWU seeks the insertion of the words "no less than" after the words "the following minimum wages …". The union's rationale is so to make it clear that the

[4] Print L4534

[5] Print L9178

rates in the table are minimums only. As awards are a safety net only, Ai Group does not see any problem with the terminology used in the Exposure Draft.

It is obvious that the above reference to Ai Group having no problem with the Exposure Draft wording was related specifically to the wording of clause 16.1 which did not use the terminology *"applicable rate of pay"* and had nothing to do with the issue which is the subject of the current submissions. It is ridiculous for the AMWU to suggest that the relevant sentence in our November 2014 submission was intended to express the view that we supported all provisions of the Exposure Draft. Indeed, that same reply submission, and our main submission of 24 October 2014, expressed concern about numerous provisions in the Manufacturing Award Exposure Draft.

AMWU argument 1 – Principles of award interpretation

11. At paragraph 10 of its submissions, the AMWU contends that there is no "*ordinary or usual meaning*" ascribed to the term "*ordinary time*" in the relevant provisions of the Manufacturing Award and that the meaning of the term must therefore be determined by its context in light of the relevant authorities on award interpretation.

12. The first point that needs to be made is that the relevant phrase in clause 44.3(a)(i) of the current award is *"ordinary time rate"*, not *"ordinary time"*. The words *"ordinary time"* cannot be artificially separated from the word *"rate"* when interpreting the phrase, as the AMWU is attempting to do. The issue in contention is – how is the rate intended to be calculated?

13. We agree that the phrase *"ordinary time rate"* needs to be determined in accordance with its context. The parties have already agreed that the context surrounding the use of the phrase *"ordinary time rate"* in certain clauses of the current award (e.g. the standing by clause) demonstrates that the phrase is intended to mean the *"ordinary hourly rate"* for the purposes of those clauses. However, we accept that the context surrounding clause 44.3(a)(i) needs to be considered in interpreting the phrase *"ordinary time rate"* for the purposes of this clause.

14. The relevant authorities on award interpretation support Ai Group's argument that the phrase *"ordinary time rate*" in clause 44.3(a)(i) of the current award is intended to mean the *"ordinary hourly rate".* The authorities do not support the AMWU's argument.

15. In *Amcor v CFMEU*[6]*,* Kirby J said: (emphasis added)

> "The nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it served combine to suggest that the construction to be given to cl 55.1.1 should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement. Approaching the interpretation of the clause in that way accords with the proper way, adopted by this Court, of interpreting industrial instruments and especially certified agreements. I agree with the following passage in the reasons of Madgwick J in *Kucks v CSR Ltd*, where his Honour observed:
>
> > "It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.""

16. The above passage from *Kucks v CSR Ltd*[7] was also quoted with approval by Callinan J in *CFMEU v Amcor*.[8]

17. In *Short v Hercus*,[9] Burchett J made the following relevant comments about the construction of a clause in the *Metal Industry Award 1984*:

> "The context of an expression may thus be much more than the words that are its immediate neighbours. Context may extend to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have

[6] *Amcor v CFMEU* (2005) 222 CLR 241 at 271.

[7] *Kucks v CSR Ltd* (1996) 66 IR 182.

[8] *Amcor v CFMEU* (2005) 222 CLR 241 at 282-283.

[9] *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518.

> brought with it some soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not just be assumed, as in an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used. Very frequently, perhaps most often, the immediate context is the clearest guide, but the court should not deny itself all other guidance in those cases where it can be seen that more is needed. In literature, Milton and Joyce could not be read in ignorance of the source of their language, nor should a legal document, including an award, be so read."

18. In *Short v Hercus*,[10] Burchett J went on to state:[11]

> "But even if the language, read alone, appeared pellucidly clear, the tendency of recent decisions… would seem to require the court to look at the full context. Only then will all the nuance of language be perceived….".

19. The above authorities demonstrate the importance of considering the context when interpreting the phrase *"ordinary time rate"* in clause 44.3(a)(i) of the current award, including considering the intentions of the negotiating parties and the history of the award provision. The points summarised in paragraphs 7(a), (b), (c), (d), (e), (f) and (g) of this submission (see above), and set in detail in our 28 October 2016 submission, demonstrate that when considered in context there is no doubt that the phrase *"ordinary time rate"* in clause 44.3(a)(i) of the current award, aligns with the phrase *"ordinary hourly rate".*

20. Accordingly, the phrase *"ordinary hourly rate"* should be used in clause 34.5(a)(i) of the Exposure Draft.

[10] *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518.

[11] *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518-519.

AMWU argument 2 – The entitlements in clauses 34.5(a)(ii) and (iii)

21. Clause 44.3(a) of the current award gives the employer the right to choose from the following three options when a public holiday falls on a full-time employee's day off (other than a Saturday or a Sunday)

    (i) 7.6 hours of pay at the ordinary rate;

    (ii) 7.6 hours of extra annual leave; or

    (iii) A substitute day off on an alternative week day.

22. Even if the AMWU's argument is accepted that a loading is payable on the 7.6 hours of extra annual leave referred to in clause 44.3(a)(ii), the quantum of this loading would never align with the quantum of the shift loading for a shift worker. For example, most shift workers are entitled to a 15% shift loading but the annual leave loading is 17.5%.

23. Also, day workers are not entitled to shift loadings, and therefore if an employee is entitled to annual leave loading on the 7.6 hours of extra annual leave under clause 44.3(a)(ii), a large proportion of employees would be entitled to a more generous entitlement under clause 44.3(a)(ii) than under clause 44.3(a)(i) even if the phrase *"applicable rate of pay"* was used in clause 44.3(a)(ii).

24. Similarly, under clause 44.3(a)(iii), different employees have very different entitlements. For example, if an employer chooses this option for an employee who works 8 ordinary hours per day and who accumulates time towards a rostered day off on every 20th day, the employee's entitlement under clause 44.3(a)(ii) would comprise an 8 hour day off with 7.6 hours' pay for the day.[12] In contrast, if the employee worked 12 ordinary hours per day, the employee's entitlement would comprise a 12 hour day off with 12 hours' pay for the day (assuming that pay is not averaged).

[12] Under the standard RDO averaging system, the employee accumulates 0.4 of an hour of pay per day which totals 7.6 hours over 19 days. For each of the 20 days in the cycle (i.e. 19 working days and 1 RDO) the employee receives 7.6 hours of pay.

25. Even a cursory consideration of clause 44.3(a)(ii) and (iii) shows that the entitlements will differ significantly from one employee to another, and that it could not possibly have been the intention that the entitlements would be equivalent.

26. Unlike the entitlements in clauses 44.3(a)(ii) and (iii) which differ significantly from one employee to another, the entitlement in clause 44.3(a)(i) operates consistently from one employee to another (because each employee receives 7.6 hours of ordinary pay). This is no doubt one of the reasons why this option is very commonly chosen by employers.

27. The differences in entitlements under clause 44.3(a)(i), (ii) and (iii) are not problematic because the employer has the right to choose which of the three options will apply in each case. Clause 44.3(a) was always intended to give employers this right to choose, as has always been very clear from the wording of the clause.

28. Accordingly, the phrase *"ordinary hourly rate"* should be used in clause 34.5(a)(i) of the Exposure Draft.

AMWU argument 3 – Alleged inconsistency with AIRC 1994 and 1995 public holiday decisions

29. The AMWU has alleged that clause 34.5(a)(i) is inconsistent with the AIRC's 1994 *Public Holidays Decision*[13] and the AIRC's 1995 *Public Holidays Non Standard Workers Decision.*[14]

30. As the AMWU is well aware, the outcomes from these AIRC decisions have never been reflected in the Metals Award or the Manufacturing Award. Indeed, this is the basis upon which the AMWU is pursuing a claim during the *4 Yearly Review Public Holidays Case* for the Manufacturing Award to by varied to provide that employees must be paid at double time and a half for

[13] Print L4534

[14] Print L9178

work on 25 December even if the Christmas Day public holiday is substituted for another day under the relevant State or Territory legislation.

31. The public holiday decisions referred to by the AMWU were made by the AIRC 22 years ago and 21 years ago respectively. However, a Rostered Day Off Falling on a Public Holiday Clause has existed in the Metals Award for 42 years, i.e. since 1974. The issue to be determined in the current proceedings is – what is the meaning of the phrase *"ordinary time rate"* in clause 44.3(a)(i) of the current award, and did the AIRC Award Modernisation Full Bench intend to change the entitlement when the modern award was made, given that the pre-modern award contained the phrase *"ordinary rates"*? The answer to this question is clearly "No", when all of the relevant materials highlighted by Ai Group are considered. The issue to be determined is not – should the Manufacturing Award reflect the outcomes of the AIRC's public holiday decisions of 1994 and 1995?

32. The current proceedings are not an opportunity for the AMWU to pursue a substantive change in entitlements. As stated by a Full Bench of the Commission in its *4 Yearly Review Group 1A and 1B Awards Decision* of 23 December 2014[15] the exposure draft proceedings are not intended to deal with substantive changes to award entitlements: (emphasis added)

> [140] The Commission has published exposure drafts for each of the Group 1 awards. These exposure drafts incorporate any technical and drafting changes proposed by the Commission and identify provisions that may need further review. <u>The exposure drafts are not intended to incorporate any substantive changes</u> and do not represent the concluded view of the Commission on any issue. A comparison document was published with each exposure draft, providing a direct comparison of each clause in the current modern award with the corresponding clause in the exposure draft. Interested parties have been given an opportunity to make written submissions and submissions in reply in relation to the exposure drafts and proposals for variation in respect of each of the modern awards in Group 1. Hearings in respect of the Group 1A and 1B awards were held on 23 and 24 October 2014.

33. This intent of the Full Bench is also reflected in the wording on the cover page of the Exposure Draft: (emphasis added)

[15] [2014] FWCFB 9412

"This exposure draft has been prepared by staff of the Fair Work Commission based on the Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award) as at 29 October 2015. This exposure draft does not seek to amend any entitlements under the Manufacturing Award but has been prepared to address some of the structural issues identified in modern awards.

34. At the commencement of the Review, in the Commission's *Preliminary Jurisdictional Issues Decision,*[16] the Full Bench emphasised the need for a party to mount a merit based case if it wished to pursue any substantive claims, accompanied by probative evidence: (emphasis added)

> [23] …… where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[17]

35. The AMWU is attempting to misuse the exposure draft process to pursue a substantive and costly change to existing entitlements.

36. The substantive change in entitlements that the AMWU has proposed is inconsistent with s.134(1)(f) of the FW Act which requires that the Commission must take into account *"the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden".*

37. Also, the substantive change that the AMWU has proposed is inconsistent with s.138 of the Act because it is not necessary for clause 34.5(a)(i) to require the payment of shift allowances and other penalties on the 7.6 hours of pay referred to in the clause, in order for the clause to achieve the modern awards objective.

4. CONCLUSION

38. For all of the above reasons, together with those in Ai Group's 28 October 2016 submission, the phrase *"ordinary hourly rate"* should be used in clause 34.5(a)(i) of the Exposure Draft.

[16] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[17] Ibid at [23].