



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

16 October 2017

Vice President Hatcher
Fair Work Commission
80 William Street
East Sydney NSW 2011

Dear Vice President,

Re. AM2016/15 Plain Language Re-drafting – Clerks – Private Sector Award 2010

I refer to the above matter and a conference before the Fair Work Commission (**Commission**) on 15 September 2017 (**Conference**). During the Conference, the Australian Industry Group (**Ai Group**) was granted a period of seven days to respond to the Commission in relation to various issues taken on notice. The Commission subsequently granted Ai Group an extension of time to provide such advice, which is the purpose of this correspondence.

Item 13: Clause 4.5 of the Exposure Draft

During the Conference, a question was raised as to the formulation of words that appears at clause 4.7 of the *Clerks – Private Sector Award 2010* (**Award**) (see PN205 – PN207 of the transcript) and more specifically, the use of the word “environment”.

To the extent that it assists, Ai Group has since undertaken a review of other modern awards. It appears to us that the relevant clause is a common provision that appears in the very vast majority of modern awards and that the term “environment” is used consistently therein. We also refer the Commission to a decision¹ issued during the Part 10A Award Modernisation process in which the AIRC considered the drafting of the clause.

Item 24: Clause 11.1 of the Exposure Draft

During the Conference, Ai Group sought an opportunity to give further consideration to the issue at item 24. We continue to rely on our submissions of 28 February 2017 at paragraphs 123 – 131 in this regard and in addition, note the following in light of the various comments made during the Conference (PN275 – PN307 of the transcript):

- Clause 10.1 of the Exposure Draft is arguably substantively different to clause 11.1 of the Award. Clause 11.1 of the Award defines a part-time employee as one who performs less than full-time hours at the workplace on a reasonably predictable basis. Read alone and in the context of clause 12.1, it does not *deem* an employee who performs less than full-time hours at the workplace on a reasonably predictable basis as a part-time employee.

¹ *Award Moderation* [2008] AIRCFB 1000 at [28] – [30].



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- Further, when read with clause 12.1 of the Award, an employee who performs less than the full-time hours at the workplace on a reasonably predictable basis may be engaged as a casual employee. The Award does not mandate that they must be engaged as a part-time employee.
- By contrast, clause 10.1 of the Exposure Draft appears to deem any employee who is engaged to work fewer than full-time ordinary hours and whose hours of work are reasonably predictable as a part-time employee. When read with clause 11.1 of the Exposure Draft, it appears that such an employee cannot be employed as a casual employee. To this end, the legal effect of the Award has been changed.
- With respect, we do not accept the proposition that this difficulty arises squarely from the drafting of the current clause 11.1 (PN280 – PN282 of the transcript). Rather, we consider that:
 - The subtle redrafting in the Exposure Draft of clause 11.1 of the Award alters its operation; and
 - That redrafting is especially problematic when read with clause 11.1 of the Exposure Draft, which purports to replace clause 12.1 of the Award.

In our view, the Exposure Draft has the effect of fundamentally altering the definition of casual employment; a matter that was central to the reasoning applied by a Full Bench in its recent decision to introduce casual conversion provisions in a significant number of awards.²

Should the Commission consider that, notwithstanding our submissions, clause 11.1 of the Exposure Draft should be retained, Ai Group respectfully requests that it be granted a further opportunity to be heard in relation to this issue given its potential significance. We note also that to the extent that the Commission forms the view that the issue is one that pertains to the drafting of clause 11.1 of the Award, we seek an opportunity to be heard further in relation to that issue also, given the potential implication that this may have for other modern awards.

Items 35 – 37: Clause 13.7 of the Exposure Draft

Ai Group has further considered clause 13.7 of the Exposure Draft and the proposal put by the Commission during the Conference (PN351 of the transcript). With respect, we are concerned that the redrafting there proposed will not resolve the various concerns raised by Ai Group (see paragraphs 171 – 186 of our submissions dated 28 February 2017) and other interested parties.

Accordingly, we continue to press for the replacement of clause 13.7 with our proposal at paragraph 186 of the aforementioned submissions on the basis that it would properly restore the legal effect of the current clause 25.1(b).

² 4 yearly review of modern awards – Casual and Part-time employment [2017] FWCFB 3541 at [362] – [368].



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Item 38: Example at Clause 13.7 of the Exposure Draft

In light of the above, we submit that the example should be amended as set out at paragraph 187 of our submissions dated 28 February 2017.

Item 39: Clause 13.8 of the Exposure Draft

During the Conference, the Commission suggested the following in relation to clause 13.8 in response to various concerns raised by Ai Group (PN382 of the transcript):

THE VICE PRESIDENT: It might be that it should be broken up to say something to this effect: "Ordinary hours of work shall be (a) worked continuously and (b) otherwise worked at the discretion of the employer in accordance with the provisions of this award." Something like that.

Adopting the Commission's suggested form of words, we submit that if clause 13.8 were replaced with the following, the concerns raised by Ai Group would be resolved and the provision would properly reflect the current clause 25.2:

- 13.8** Ordinary hours of work are to be worked:
- (a)** continuously, except for rest breaks and meal breaks as specific in clause 15 – Breaks (employees other than shiftworkers); and
 - (b)** at the discretion of the employer in accordance with the provisions of this award.

In the alternate, clause 13.8 could be replaced with the following two provisions:

- 13.8** Ordinary hours of work are to be worked continuously, except for rest breaks and meal breaks as specific in clause 15 – Breaks (employees other than shiftworkers).
- 13.9** Ordinary hours of work are to be worked at the discretion of the employer in accordance with the provisions of this award.

Clauses 13.9 and 13.10 of the Exposure Draft would subsequently require renumbering as clauses 13.10 and 13.11.

In our respectful submission, the second proposal is potentially clearer than the first and in our view, will address any concern as to whether an employer's discretion is subject to the requirement that ordinary hours must be worked continuously.

Item 44: Clause 14.7(a) of the Exposure Draft

It appears that the proposed wording at clause 14.7(a) of the Exposure Draft appears to ensure that overtime penalties do not accrue. The current wording at clause 25.4(d) of the Award is however broader in effect because it provides that "no payments or penalty



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payments are to be made". To that extent we are concerned that the Exposure Draft alters the legal effect of the Award.

Item 145: Clause 37.3 of the Exposure Draft

Clause 31.2 of the Award enables "an employer and the employees" to substitute a public holiday by agreement. Whilst the clause does not expressly enable facilitation by agreement with the majority which subsequently binds all employees, the clause certainly does not preclude agreement between an employer and an individual employee or multiple such employees.

The variations made in the amended Exposure Draft at clauses 7.2 and 37.3, which have the effect of requiring that a public holiday may be substituted only by agreement with the majority, alter the legal effect of the Award. Accordingly, both should be amended such that clause 37.3 operates by agreement with the majority of employees or individual employees.

Yours sincerely,

Ruchi Bhatt

Senior Adviser – Workplace Relations Policy