

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission
Tranche 1 Exposure Drafts

23 October 2019

Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS TRANCHE 1 EXPOSURE DRAFTS

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the following 'first tranche' of exposure drafts published by the Fair Work Commission (**Commission**) on 2 September 2019:
 - (a) *Aluminium Industry Award*;
 - (b) *Cement, Lime and Quarrying Award*;
 - (c) *Premixed Concrete Award*;
 - (d) *Salt Industry Award*; and
 - (e) *Wool Storage, Sampling and Testing Award*.

2. The submission is filed in relation to various issues that were ventilated during the proceedings before the Commission on 11 October 2019. Ai Group has participated in discussions with the Australian Workers' Union (**AWU**) and Australian Business Industrial and the NSW Business Chamber (**ABI**) about the relevant issues and provided them with a draft of this submission before it was filed.

2. ALUMINIUM INDUSTRY AWARD

Clause 22.1(b): Annual leave

3. Ai Group opposes the proposed deletion of clause 22.1(b) of the exposure draft. Contrary to the AWU's written submission¹, the conversion of an employee's annual leave entitlement to an hourly amount is not of itself inconsistent with the NES or the Commission's decision in *RACV Road Service Pt Ltd v ASU*² (**RACV**). If the Commission is minded to deleting the provision in its entirety, Ai Group may seek to be heard further in this regard.
4. Ai Group does not accept that the example contained in brackets at clause 22.1(b) is inconsistent with the NES or that its deletion is warranted.
5. It is also relevant that:
 - (a) Proceedings instituted in the High Court of Australia by Mondelez Australia and the Minister for Industrial Relations, regarding the proper interpretation of the NES to the extent that it relates to personal/carer's leave,³ may have implications for the interpretation of the NES provisions concerning annual leave.
 - (b) The example is, by its very nature, only an example. The clause does not purport to mandate that where annual leave is converted to an hourly amount, it must be converted in accordance with the example.
6. Nevertheless, Ai Group does not oppose the deletion of the example in order to address the AWU's concern. If the example is deleted the provision would simply state that "an employer may convert the annual leave entitlement in the NES to an equivalent ordinary hour entitlement for administrative ease". The provision

¹ Paragraph 6 of the AWU submission.

² [2015] FWCFB 8554.

³ M110 of 2019 – Application by Mondelez Australia for special leave to appeal the decision of the Full Court of the Federal Court in *Mondelez v AMWU* [2019] FCAFC 138; M113 of 2019 – Application by the Minister for Industrial Relations for special leave to appeal the decision of the Full Court of the Federal Court in *Mondelez v AMWU*.

would not specify the equivalent number of hours that the annual leave entitlement would be converted to for a particular employee.

7. It is our understanding that:
 - (a) The AWU considers the matter it has raised to have been resolved if the bracketed example is deleted.
 - (b) ABI does not oppose the deletion of the example.

3. CEMENT, LIME AND QUARRYING AWARD

Clause 11.4: Casual conversion

8. We refer to the following exchange during the proceedings on 11 October 2019:

JUSTICE ROSS: The next point is about casual conversion. That goes for pages but the short point and the provisional view is at paragraph 81 and that is that the current casual conversion clause be inserted into the variation determination. That is, the one and the current award. There are here two awards. Is there any difference between them in the two clauses?

MS BHATT: I've not had an opportunity to undertake that exercise, your Honour.

JUSTICE ROSS: All right. So that's the provisional view, that the current award be inserted. I don't apprehend there is any objection to that. But we'll provide parties with an opportunity to just check whether there's a difference between the clauses in the two awards, and if there is, which one should be inserted, and if you can let us know that by 4 pm next Wednesday.⁴

9. Ai Group has since reviewed the casual conversion clause currently contained in the *Cement and Lime Award 2010* and the *Quarrying Award 2010*. In our view, there is no substantive difference between the provisions contained in those awards. We understand that the AWU and ABI share this view.

⁴ Transcript of proceedings on 11 October 2019 at PN150 – PN152.

4. PREMIXED CONCRETE AWARD

Clause 20.2: Overtime rates

10. We refer to the following exchange during the proceedings on 11 October 2019:

JUSTICE ROSS: ... The next issue deals with clause 20.2. The AWU makes a submission in relation to this issue at paragraph 153. Is there any opposition to the AWU's submission?

MS BHATT: There's no opposition, but just to be clear that table also deals with minimum payments. As we understand it there is no minimum payment required on a public holiday.

COMMISSIONER BISSETT: So it won't specify one?

MS BHATT: It shouldn't specify one.

...

MR CRAWFORD: Can I just maybe have until the time next Wednesday that you've given for other parties just to consider whether a casual or part-time minimum engagement might be relevant for inclusion?

...

JUSTICE ROSS: No, no, that's fine. Perhaps if we can deal with it on this basis, if you can have a discussion with Ai Group and put as a joint note by 4 pm next Wednesday. It'll either set out what you agree on, or if you don't agree about something set out what your respective positions are. Okay.⁵

11. We understand that the AWU does not oppose Ai Group's submission that the table at clause 20.2, if amended to specify public holiday rates, should not prescribe a minimum payment for public holidays. It is our understanding that ABI supports our submission.

⁵ Transcript of proceedings on 11 October 2019 at PN239 – PN251.

5. SALT INDUSTRY AWARD

Clause 21.1: Overtime definition

12. Ai Group, ABI and the AWU agree that in order to address the concern raised by the AWU about clause 21.1⁶ of the exposure draft, it should be deleted.
13. In Ai Group's submission, this will not result in any substantive change to the circumstances in which overtime is payable pursuant to the current award.

Clause B.1.1: Summary of hourly rates

14. We understand that the AWU no longer presses its submission in respect of B.1.1.⁷

⁶ Paragraph 33 of the AWU submission.

⁷ Paragraph 34 of the AWU submission.

6. WOOL STORAGE, SAMPLING AND TESTING AWARD

Clause B.1.1: Summary of hourly rates

15. Ai Group does not oppose the following changes being made to the exposure draft:
- (a) The deletion of the 'Saturday' and 'Sunday' column from B.1.1.
 - (b) The insertion of the following columns at B.1.2:
 - (i) Saturday, first 2 hours: 150% of the minimum hourly rate;
 - (ii) Saturday, after 2 hours: 200% of the minimum hourly rate; and
 - (iii) Sunday: 200% of the minimum hourly rate; and
 - (iv) Public holidays: 250% of the minimum hourly rate.
16. It is our understanding that the AWU considers the concern it has raised⁸ to have been resolved if the aforementioned changes are made.
17. ABI consents to the proposed approach outlined above.

⁸ Paragraph 42 of the AWU submission.