

IN THE FAIR WORK COMMISSION

Section 156 - 4 Yearly Review of Modern Awards

(AM2019/17)

AWARD STAGE

FINALISATION OF EXPOSURE DRAFTS – TRANCHE 3

Timber Industry Award 2010

(Exposure Draft and Draft Determination published 29 January 2020)

**SUBMISSION IN REPLY OF THE
CONSTRUCTION, FORESTRY, MARITIME, MINING & ENERGY UNION
(MANUFACTURING DIVISION)**

(10 March 2020)

CFMEU – Manufacturing Division	Contact Person: Vivienne Wiles Senior National Industrial Officer	Address: 165 Bouverie Street, Carlton VIC, 3053	Tel: Email:	0419 334 102 vwiles@cfmeumd.org industriamd@cfmeu.org.au
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BACKGROUND

1. On 29 January 2020, the Fair Work Commission (FWC) issued its Decision [2020] FWCFB 421¹ (*January 2020 Decision*) and published various Exposure Drafts and Draft Determination for Tranche 3 modern awards as part of matter AM2019/17, Award Stage – Finalisation of Exposure Draft proceedings.
2. In Tranche 3 the Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division ('CFMMEU – MD') has an interest in the Textile, Clothing, Footwear and Associated Industries Award 2010 ('TCF Award') and the Timber Industry Award 2010 ('Timber Award').
3. On 6 March 2020, the CFMMEU – MD filed submissions with respect to the TCF Award.²
4. These submissions relate to the Timber Award. They specifically relate to the terms of the Exposure Draft, but they equally apply to the Draft Determination for the Timber Award.
5. In the January 2020 Decision the Full Bench stated:

It is our *provisional* view that the variation of the modern awards in Tranche 3 in accordance with the draft determinations set out in Attachment C is, in respect of each of these awards, necessary to achieve the modern awards objective.³

¹ 4 yearly review of modern awards – finalisation of exposure drafts – Tranche 3 awards; [2020] FWCFB 421 (29 January 2020)

² (AM2019/17) CFMMEU – Manufacturing Division submission in relation to the Textile, Clothing, Footwear and Associated Industries Award 2010 (6 March 2020)

³ [2020] FWCFB 421 at [6]

6. The CFMMEU – MD submits that the Timber Award Exposure Draft and Draft variation determination does not meet the modern awards objective for the reasons outlined below.

TIMBER AWARD – SPECIFIC PROVISIONS

7. All references to clause numbers are references to the relevant clauses of the Timber Award Exposure Draft, unless otherwise specified. All references to the Timber Award are references to the version of the award as varied to 19 December 2019.

Clause 2 (Definitions)

8. Clause 2 (Definitions) of the ED includes a definition of ‘stand by’ as follows:

***stand-by** means all times between 10:00am and 6:00pm on a Saturday, Sunday or public holiday during which period a fire fighting employee will be available, either at home or at such other place as is mutually agreed between the employer and the employee, in readiness for an immediate call to work.*

9. Currently, clause 3 (Definitions) of the Timber Award does not contain a definition of ‘stand-by’. Rather, the definition is found in clause 13.3(p) of the Timber Award.

10. The inclusion of the definition of ‘stand by’ in the ED originates from clause 14 (Fire fighting employees), specifically clause 14.3(p) which provides:

***stand-by** means all times between 10:00am and 6:00pm on a Saturday, Sunday or public holiday during which period a fire fighting employee will be available, either at home or at such other place as is mutually agreed between the employer and the employee, in readiness for an immediate call to work (except for the times as provided in clause 14.3(p)(iv)). [emphasis added]*

11. That is, the definition of 'stand by' in the substantive provision is qualified by the additional sentence as outlined above.

12. In our submission, for consistency, the definition of 'stand-by' in clause 2 of the ED should also contain the qualification in clause 14.3(p).

Clause 16 (Classifications)

13. In the opening sentence of clause 16 of the ED, there is missing text after the word 'Minimum'.

16.1 The definitions of the classification levels in clause 20 – Minimum, are contained'

14. We submit clause 16 be amended as follows:

16.1 The definitions of the classification levels in clause 20 – Minimum Rates, are contained'

Clause 18 (Rostering arrangements)

(Clause 18.1 – Rostered days, or shifts, off)

15. Clause 18.1 of the Timber Award ED, provides:

18.1 Rostered days, or shifts, off

(a) Notwithstanding provisions elsewhere in this award and subject to clause 34.2, the employer and the majority of affected employees may agree to establish a system of rostered days off to provide that an employee may elect, with the consent of the employer to:

- (i) take a rostered day, or shift, off at any time;*
- (ii) take rostered days, or shifts, off in part day amounts; or*

(iii) accrue some or all rostered days off for the purpose of creating a bank to be drawn upon by the employee at times mutually agreed by the employer, or subject to reasonable notice by the employee or the employer.

(b) Once a decision has been taken to introduce a system of rostered day off flexibility, in accordance with clause 18.1, its terms must be set out in the time and wages records.

(c) An employer must record rostered day off arrangements in the time and wages record each time this provision is used.

16. Clause 27.9 of the Timber Award contains an essentially identical provision except for one additional term as follows at clause 27.9(b):

27.9

(b) Clause 27.9(a) is subject to the employer informing each union which has members employed at the particular enterprise of its intention to introduce an enterprise system of rostered day off flexibility and providing a reasonable opportunity for the union to participate in negotiations.

17. It is unclear to the CFMMEU – MD as to rationale for the removal of this term, including whether it has been deleted in error. In our submission, clause 27.9(b) is a substantive provision and its deletion represents a diminution of a current beneficial condition for employees covered by the Timber Award. Consequently, we submit the term should re-inserted into clause 18.1 of the ED.

(Clause 18.4 – Rostered days or shifts off – substitute days or shifts)

18. Clause 18.4 (a) (Rostered day off not to coincide with public holiday) provides at 18.4(a) (i) as follows:

(a) Rostered day off not to coincide with public holiday

(i) In cases where, by virtue of the arrangement of the ordinary hours of work, the employee is entitled to a day, or shift, off during the work cycle, the weekday to be taken off must not coincide with a public holiday fixed in accordance with the NES or clause 31 – Community service leave. [emphasis added]

19. The reference to 'clause 31 – Community service' leave is incorrect. We submit the correct reference is 'clause 33 – Public Holidays'.

Clause 19 (Breaks)

(Clause 19.5 – Paid crib breaks – continuous work)

20. Clause 19.5 of the Timber Award ED provides:

19.5 Paid crib breaks – continuous work

Where a shift roster provides for continuous work, a 20 minute paid crib break will be allowed to shiftworkers each shift and will be counted as time worked. The crib break will be taken at a time and in a method agreed upon between the employer and the individual employee or majority of affected employees so as to meet the needs of the establishment. [emphasis added]

21. The equivalent award provision is clause 29.5 of the Timber Award which provides:

29.5

Where a shift roster provides for continuous shifts over 24 hours of the day a 20 minute paid crib break will be allowed to shiftworkers each shift which will be counted as time worked. Such crib will be taken at a time and in a method agreed upon between the employer and the employee or majority of employees concerned so as to meet the needs of the establishment. [emphasis added]

22. There is potentially an intended consequence in the change of terminology from ‘continuous shifts over 24 hours of the day’ at clause 29.5 of the Timber Award, as compared to ‘continuous work’ at clause 19.5 of the ED.

23. In the Timber Award ED, the expression ‘continuous work’ is defined in clause 2 (Definitions) as follows:

Continuous work means work carried on with consecutive shifts of persons throughout the 24 hours of each of at least 6 consecutive days without interruptions except during breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer. [emphasis added]

24. That is, in clause 19.5 of the ED the use of the term ‘continuous work’ (as defined in clause 2), constitutes an additional qualifier of ‘at least 6 consecutive days’ which currently does not exist under clause 29.5 of the Timber Award.

25. In our submission, the terminology in clause 19.5 should be amended to reflect the existing terminology in clause 29.5 of the Award, thus making it consistent with the current condition.

Clause 20 (Minimum rates)

(Clause 20.4 – Adult apprentices)

26. Clause 20.4(a) (Adult apprentices in the Wood and Timber Furniture Stream) at 20.4(a)(ii) provides a table of applicable adult apprentices' rates of pay for employees who commenced on or after 1 January 2014. The second column of the table has a heading '*% of Level 5 adult ordinary hourly rate*'.
27. The equivalent provision in clause 17.6 (a) (ii) of the Timber Award contains a heading titled '*% of level 5 minimum weekly wage*'.
28. It is not clear to the CFMMEU – MD whether the change in terminology of the heading in the second column of clause 20.4(a)(ii) is intentional or an error.

Clause 22 (Wage-related allowances)

(Clause 22.12 – Wet places allowance)

29. Clause 22.12 – Wet places allowances, of the Timber Award ED provides (in part):
- (a) All allowance of \$0.52 per part of day or shift is payable to an employee who is required to work in any place where clothing or boots become saturated, whether by water, oil or otherwise, for the part of the day or shift as they are required to work in wet clothing or boots. [emphasis added]*
30. Clause 22.12(a) of the ED introduces a qualification 'required to work' which currently does not exist in the equivalent provision in the Timber Award, which provides (at clause 21.15) as follows:
- (a) An employee working in any place where clothing or boots become saturated, whether by water, oil or otherwise, will receive an allowance of 0.06% of the standard rate whilst so engaged.*
31. The introduction of the qualifier in clause 22.12(a) arguably changes the meaning of the clause, is not necessary and does not reflect the current, substantive provision in the

Timber Award. In our view, the words 'required' should be deleted from clause 22.12(a) of the ED.

Clause 23 (Expense-related allowances)

(Clause 23.7 – Protective clothing, footwear and covering allowance)

32. Clause 23.7(a) – Allowance for the supply of clothing, provides at 29.7(a)(i):

- (i) Where an employee is required to wear protective clothing and equipment covered by this award; the employer must reimburse the employee for the cost of purchasing that clothing and equipment.*

33. We submit, grammatically, the use of the semicolon after the word 'award' above is unnecessary and should be replaced with a comma instead.

(Clause 23.13 – Travelling allowance – bushworkers other than pieceworkers)

34. Clause 23.13 of the Timber Award ED provides:

- (a) Each employee in the bush will have a fixed starting place which will be the existing starting place.*
- (b) An employer and the employee may agree to a new starting place in the bush. Between the starting place and the work for all the time in excess of half an hour back from the work to the starting point.*
- (c) When an employee has a fixed starting place in the bush the employee will be paid at the employee's ordinary hourly rate for all time occupied in travelling between the starting place and the work and for all time in excess of half an hour back from the work to the starting point.*

35. The terminology in clause 23.13 of the ED is identical to the equivalent provision, clause 21.23(d) of the Timber Award, except in 2 respects.

36. Firstly, clause 23.13(b) has substituted the word 'may' for 'will' in the award.

37. We submit that the change is material and potentially affects the meaning of the substantive term. Under clause 21.23(d) of the Timber Award, 21.23(d)(ii) is explicit (in the use of the word 'will') that any change to the 'fixed starting place' must be by agreement between the employer and the employees. This is not so clear under clause 23.13(b) of the ED.

38. Secondly, clause 21.23(d)(ii) of the Timber Award requires agreement of the 'employer and the employees' (i.e. majority agreement) rather than under clause 23.13(b) of the ED which requires agreement of the 'employer and the employee'. Again, this is a material change, particularly given the context and purpose of this award provision – the entitlement to a travelling allowance for bushworkers (other than pieceworkers).

39. For these reasons, we submit that the existing wording in clause 21.23(d) of the Timber Award should be reinserted.

Clause 26 (Overtime)

(Clause 26.15 – Time off instead of payment for overtime)

40. Clause 26.15 of the Timber Award ED contains the (modified) model award TOIL term.

41. However, the existing additional term in the Timber Award – clause 32 (Make-up time) appears not have been included in the Timber Award ED. Clause 32 provides as follows:

32. Make-up time

32.1 Notwithstanding provisions elsewhere in the award, the employer and the majority of employees at an enterprise may agree to establish a system of make-up time provided that:

(a) an employee may elect, with the consent of the employer, to work make-up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in the award;

(b) an employee on shiftwork may elect, with the consent of their employer, to work make-up time under which the employee takes time off ordinary hours and works those hours at a later time, at the shiftwork rate which would have been applicable to the hours taken off.

42. It is not apparent to the CFMMEU – MD as to the basis upon which clause 32 of the Timber Award has not been included in the Timber Award ED. We submit that at the time of the insertion of the model TOIL term in the Timber Award, both clauses (clauses 31 and 32) were intended to co-exist.

Clause 27 (Penalty rates and shiftwork arrangements)

(Clause 27.2 – Shiftwork arrangements)

43. Clause 27.2 (b) (Changes to shifts) of the Timber Award ED, provides (in part):

(b) Changes to shifts

(i) Consultation

Where an employer proposes to change an employee's regular roster or ordinary hours of work, the employer must comply with clause 34.2

[emphasis added]

44. The formulation in clause 27.2(b)(i) is a new term which currently does not exist in the Timber Award.

45. The reference to 'clause 34.2' in clause 27.2(b)(i) is a reference to the '*Consultation about changes to rosters or hours of work*' model award term.

46. However, it is also apparent that clause 34.1 (Consultation regarding major workplace change) in the ED is also relevant. This is because the definition of '*Significant effects*' in clause 34.1 also includes '*the alteration of hours of work*'. As such, it would seem appropriate that in clause 27.2(b)(i) there should be a reference to both clause 34.1 and 34.2.

Clause 28 (Annual Leave)

(Clause 28.11 – Annual leave in advance)

47. The Note under clause 28.11(b) in the Timber award ED provides:

NOTE: An example of the type of agreement required by clause 28.11 is set out at Schedule I – Piece Rates for Workers in Specified Districts. There is no requirement to use the form of agreement set out at Schedule I – Piece Rates for Workers in Specified Districts.

[emphasis added]

48. The references to Schedule I in clause 28.11(b) would appear to be an error. We submit the correct references should be to 'Schedule J – Agreement to take annual leave in advance.'

Clause 29 (Personal/carer's leave and compassionate leave)

(Clause 29.3 – Cashing out of personal/carer's leave)

49. Clause 29.3 of the Timber Award ED reflects the terms of clause 34.4 (a) (i) and (ii) which deals with the subject matter of cashing out of personal/carer's leave for the 'General Timber Stream' and the 'Wood and Timber Furniture Stream.'

50. However, the existing clause 34.4(b) which deals with the payment of accrued personal/carer's leave for the 'Pulp and Paper stream' (in circumstances when an employee's employment ceases) has not been included in the Timber Award ED. Clause 34.4(b) provides as follows:

34.4

(b) In the Pulp and Paper stream, payment of excess accrued sick leave will be made to an employee, of a deceased employee's estate, in respect of accumulated entitlement upon:

(i) retirement due to age or incapacity;

(ii) termination of employment after ten years continuous service for other reasonable cause; or

(iii) death whilst an employee of the business.

51. Clause 34.4(b) is a substantive provision, and its non-inclusion in the Timber Award represents a significant diminution of an existing award entitlement. We therefore submit that it should be included in the Timber Award ED.

SCHEDULES

(Clause 37 of the Award)

52. Clause 37 of the Timber Award provides as follows:

37. Principles relating to the schedules to this award

37.1 The schedules to this award describe special rates and conditions for employees working in various industry sectors. The schedules describe conditions and arrangements for each sector that are unique to each sector.

37.2 The main body of the award describes conditions and arrangements that are common for all sectors.

37.3 The provisions of the main body of this award, as varied, will apply to persons performing work provided for in these schedules unless such provisions are inconsistent with the provisions of this clause.

53. Clause 37 has not been replicated in the Timber Award ED.

54. Whilst the CFMMEU – MD acknowledges that clause 37 may no longer be relevant (in its totality) to the provisions of the Timber Award, its complete deletion may have unintended consequences.

55. Schedule E (Piece Rates for Workers in Specified Districts) has been included in the Timber Award ED and renamed as Schedule H and remains essentially unchanged. Schedule H in the ED provides piece rates for workers (fallers) in the specified districts as follows:

- Bass District, Tasmania – faller’s rate table;
- Eastern District of Tasmania – faller’s rate table;
- Eastern and Bass Districts - softwood falling table; and
- Eastern and Bass Districts – cull falling rates

56. Clause 37 of the Timber Award, inter alia, makes clear that the provisions of the award apply to these categories of employees ‘unless such provisions are inconsistent’.

57. In our submission, this remains an important provision and in principle, a term to this effect should be included in the Timber Award ED for the avoidance of doubt.

Filed on behalf of:

**Construction Forestry Maritime Mining and Energy Union
(Manufacturing Division)**

Vivienne Wiles
Senior National Industrial Officer and Co-ordinator
(10 March 2020)