

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Health Professionals and Support Services
Award 2010 &
Horse and Greyhound Training Award 2010
(AM2019/2)

24 May 2019

Ai
GROUP

AM2019/2 HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010 & HORSE AND GREYHOUND TRAINING AWARD 2010

1. In a decision¹ issued by the Fair Work Commission (**Commission**) on 26 September 2018 (**Decision**), the Commission dealt with an issue arising from the part-time provisions contained in the exposure drafts for the *Health Professionals and Support Services Award 2010 (HPSS Award)* and the *Horse and Greyhound Training Award 2010 (Horse and Greyhound Training Award)* (collectively, **Awards**).
2. For convenience, the relevant excerpts of the Decision are extracted below: (our emphasis, footnotes omitted)

2.7 Health Professionals and Support Services Award 2010

Item A1—Part-time employment

[109] Ai Group submits that the provision currently appearing at clause 6.3(a)(iii) should be deleted and replaced with a clause mirroring the terms of clause 10.3(d) of the current award. The clauses relate to part-time employment.

[110] Clause 10.3(d) of the current award is in the following terms:

‘The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.’

[111] Clause 6.3(a)(i) of the exposure draft is in the following terms:

‘(a) A part-time employee:

...

(iii) receives, on a pro-rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.’

[112] Ai Group submits that the change represents a substantial deviation from the existing award provisions, as the clause in the exposure draft ‘purports to deal with all pay and conditions’ rather than those specifically the subject of the award. Ai Group submits:

‘It is neither necessary (in the sense contemplated by s.138) nor appropriate for an award to deal with over-award terms and conditions of employment. A provision that appears to require that a part-time employee receive, on a pro rata basis, over-award terms and conditions to which a full-time employee is entitled, is not *necessary* to ensure a fair and relevant *minimum* safety net of terms and conditions. This is consistent with the Commission’s decision that

¹ 4 yearly review of modern awards – Award stage – Group 2 [2018] FWCFB 5986.

penalties payable under the award are to be calculated by reference to the minimum rate prescribed by the award; the relevant provisions do not require that the penalty be calculated on a rate that includes over-award components.'

[113] Furthermore, Ai Group submits that, 'as the entitlement to pro-rata payments under the current award arise if a part-time employee has an entitlement to that amount or condition by virtue of the terms of the relevant provision that provides that term or condition', the inclusion of the reference to full-time employees 'who do the same kind of work' is confusing and unnecessary.

[114] The redrafted provision does change the effect of the equivalent provision in the current award. However, the current provision is deficient in a number of respects. As Ai Group have pointed out in relation to a number of other instruments the statement that the "terms of this award apply on a pro-rata basis to part-time employees" is not entirely correct. Some terms such as the quantum of annual leave and personal/carer's leave apply on a pro-rata basis but other provisions such as allowances, penalty rates and loadings may not.

[115] We refer to the Statement [\[2018\] FWC 411](#) where Hatcher VP considered a clause that the *Clerks—Private Sector Award 2010* applied in the same way to part-time and full-time employees. The Vice President noted that 'on normal principles of interpretation, the award would be read as applying to everybody covered by it unless it specifically provided otherwise, and that on this basis the clause may be deleted.'

[116] This issue will be determined by a separately constituted Full Bench.

...

2.8 Horse and Greyhound Training Award 2010

...

Item 1A—Part-time employment

[140] Ai Group submit that the part-time employment provision appearing at clause 6.3(a)(iii) of the exposure draft deviates substantially from those provisions appearing in the current award. Ai Group submit that clause 6.3(a)(iii) of the exposure draft should be deleted and a new provision, in the same terms as that which appears at clause 10.3 of the current award, should be inserted at clause 6.3(b) of the exposure draft.

[141] Clause 6.3(a)(iii) of the exposure draft is as follows:

'(a) A part-time employee:

...

(iii) receives, on a pro-rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.'

[142] Clause 10.3 of the current award states the following:

'A part-time employee means an employee who works a regular pattern of hours from week to week which is less than the standard ordinary hours in any

week. The terms of this award apply pro rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.’

[143] Ai Group submit the following:

‘It is neither necessary (in the sense contemplated by s.138) nor appropriate for an award to deal with over-award terms and conditions of employment. A provision that appears to require that a part-time employee receive, on a pro rata basis, over-award terms and conditions to which a full-time employee is entitled, is not *necessary* to ensure a fair and relevant *minimum* safety net of terms and conditions. This is consistent with the Commission’s decision that penalties payable under the award are to be calculated by reference to the minimum rate prescribed by the award; the relevant provisions do not require that the penalty be calculated on a rate that includes over-award components.’

[144] Similar arguments were advanced by Ai Group in relation to the Health Professionals Award which are dealt with above at paragraphs [\[109\]](#) – [\[115\]](#). As this issue is similar to that raised in the Health Professionals Award, it will also be determined by the same separately constituted Full Bench (mentioned at [\[117\]](#) above).²

3. On 11 April 2019, the Commission issued directions providing the Australian Industry Group (**Ai Group**) with an opportunity to file “any additional written submissions they wish to make”. This submission is filed in response to those directions.
4. As is apparent from the extract of the Decision above, Ai Group has previously made submissions about the substantive changes made to the relevant current provisions of the Awards in the exposure drafts. Those submissions are summarised at paragraphs [\[112\]](#) – [\[113\]](#), [\[140\]](#) and [\[143\]](#) of the Decision. At paragraph [\[114\]](#), the Commission accepted that the “redrafted provision does change the effect of the equivalent provision in the current award” in the context of the HPSS Award. Respectfully, we submit that the same conclusion should be reached in relation to the Horse and Greyhound Training Award.

² 4 yearly review of modern awards – Award stage – Group 2 [2018] FWCFB 5986 at [\[109\]](#) – [\[116\]](#) and [\[140\]](#) – [\[144\]](#).

5. We note in this regard that in the exposure draft for the Horse and Greyhound Training Award, published on 15 February 2019, clause 6.3(a)(iii) has been deleted and the following new clause 6.3(b) has been inserted:
 - (b) The terms of this award apply pro rata for part-time employees on the basis that ordinary weekly hours for full-time employees are 38.
6. It appears that this change has been made in light of paragraph [114] of the Decision. Ai Group supports the change and submits that it should be retained. We further submit that a similar amendment should be made in respect of clause 6.3(a)(iii) of the HPSS Award.
7. At paragraph [114] of the Decision, the Commission observes that the current provisions are “deficient in a number of respects”. Nonetheless, no amendment to address the perceived deficiency has been suggested by the Commission or any interested party. To that extent, there is no specific proposal to which we can respond at this stage.
8. For completeness, and in light of the Commission’s reference to proceedings concerning the *Clerks – Private Sector Award 2010* (**Clerks Award**), in which a similar issue was considered by the Commission, we submit that the relevant clause should not be deleted from the Awards or the exposure drafts to the Awards. Whilst we acknowledge that the clause does not have application in relation to certain provisions such as penalty rates or meal breaks, at the very least the clause potentially has work to do in relation to allowances expressed as a weekly amount. The application of other provisions of the Awards may also be substantively varied by the clauses here being considered. Without an exhaustive analysis of each provision of both Awards, an assessment in this regard cannot be made.