

From: Richard Krajewski

Sent: Friday, 3 March 2017 4:50 PM

To: Chambers - Gostencnik DP

Cc: Jason O'Dwyer; Gordon Jervis; Cameron Young; Guy Noble; Vasuki Paul;

louise.hogg@ablawyers.com.au

Subject: Modern Award Review - Electrical, Electronic and Communications Contracting Award 2010
- shift work proposal

Ms. Suzie Kairouz

Associate to Deputy President Gostencnik.

Dear Ms. Kairouz,

Please find attached two documents which it is hoped will assist the parties in a better understanding of the proposed changes to the Hours of Work clause as per the *Electrical, Electronic and Communications Contracting Award* (and subsequent Exposure Award), raised as part of the four year Modern Award Review process.

The first attachment is the outcome of a discussion yesterday, 2nd March 2017, between parties other than the Australian Industry Group and Australian Business Lawyers. This meeting took place following the Conference chaired by his Honour on Tuesday 28th February 2017 concerning this Award. This meeting of 2nd March 2017 considered the responses by the Australian Industry Group (correspondence to the Fair Work Commission dated 9th February 2017) and Australian Business Lawyers (and NSW Business Chamber) (correspondence dated 10th February 2017) to an Fire Protection Association Australia outline of a shift work proposal dated 3rd February 2017.

The second attachment is a copy of a draft Determination which supplements the draft hours of work – shift work related matter.

Should there be a need for clarification, please do not hesitate to contact me.

Regards

Richard Krajewski

Workplace Relations Manager

Fire Protection Association Australia

3rd March 2017

Deputy President Gostencnik
Fair Work Commission
80 William Street,
MELBOURNE, NSW

Four yearly review of modern awards
s.156 – 4 yearly review of modern awards
Electrical, Electronic and Communications Contracting Award 2010 – AM2014/265

Dear Deputy President,

Following the Conference chaired by your Honour with respect to this matter on Tuesday 28th February 2017, a meeting took place on Thursday 2nd March 2017 to discuss, amongst other things, the proposal to change the current award (and Exposure Award) Hours of work clause to better identify with shift work and shift workers. It was decided that perhaps by responding to earlier comments which were in opposition to the proposal that a response to that opposition be prepared with the view that it may assist in a better understanding of the proposal.

Accordingly, the following sets out a response to comments raised by the Australian Industry Group (AIG) in its correspondence dated 9th February 2017. Those comments were in connection with technical and drafting issues associated with the ***Electrical, Electronic and Communications Contracting Award 2010***:

- (a) the most recent draft removed the distinction between non-continuous shift workers and continuous shift workers;
- (b) the recent draft removed flexibilities provided to employers employing continuous shift workers.

No information has been provided by AIG to explain its opposition to the hours of work proposal that seeks to do no more than to more clearly identify hours of work arrangements between day workers and shift workers. All that is set out in the correspondence dated 9th February 2017 are broad comments and that the proposal should be dealt with as a substantive matter.

With respect to correspondence from Australian Business Lawyers (ABL) and the NSW Business Chamber (NSWBC) dated 10th February 2017, that correspondence states that the proposal to Hours of Work, re shift work/shift workers falls within the substantive change area of award modernisation and not that of technical and drafting. To support that view, ABL refer to 2 items:

- (a) sub-clause 13.2 which is said to apply ordinary hours worked by shift workers, Monday to Friday; and
- (b) the ordinary hours of work for continuous and non-continuous shift workers which have been merged into one clause. The effect of this is, it is said, is that it fails to take into consideration the different employment circumstances of continuous and non-continuous shift workers and so possibly impacting upon the operation of other clauses of the award.

As with the AIG commentary, since the hours of work – shift work proposal was raised, no details of the opposition have been fully provided or provided in a way that would assist in responding these comments. Nevertheless, a response to the above points raised by both AIG and ABL are set out below. It is also noted that AIG has raised a matter concerning **“rest breaks” as to the application of this provision to shift workers. Comments regarding this point** are also set out below. It is hoped that the following explanations can assist and allow for a consent situation arising.

Comments re AIG and ABL:

1. The removal of the distinction between continuous and non-continuous shift workers: it is respectfully submitted that this is not the case as the result of the proposed clause. The proposal, firstly, seeks to remove any duplication between these two categories of worker. In fact the proposal seeks to maintain the distinction between the two categories. Sub-paragraph 13.10 (b) (ii) set out the shift cycles for non-continuous shift workers. This is in line with the current and proposed Exposure Award provisions.

The provision also maintains the continuous shift work reference to 152 hours. This maintains the distinction between the 2 categories of shift worker.

By inserting sub-paragraph 13.10 (b) (iii), the proposal combines the current award provisions of continuous shift worker regarding crib breaks as well as the 20 minute period for both continuous and non-continuous workers.

Sub-paragraph 13.10 (b) (iv) includes the 5 hour break entitlement that applies to both categories of shift worker.

Therefore, it is suggested that the claim of removing the distinction between continuous and non-continuous shift workers, is incorrect.

2. There is no area pointed to by AIG with respect to the removal by the hours of work – shift work proposal, of flexibilities. Had there been such examples provided, this would have provided an opportunity to review those concerns. Accordingly, as no examples have been provided, there is little that can be done in responding except to point to the above response where the distinction between the two categories of shift worker is respectfully maintained. Therefore it is suggested that no flexibilities have been lost as a result of the proposal.

The same comments are subscribed to both AIG and ABL.

3. ABL states that sub-clause 13.2 of the Exposure Draft states that ordinary hours may be worked by shift workers Monday to Friday, inclusive. Sub-clause 13.2 of the Exposure Draft is almost identical to the provisions of sub-clause 24.2 of the current

award with the exception that that the Exposure Award does not include the current award words "prescribed **herein**".

Accordingly, ABL has misquoted sub-clause 13.2 of the Exposure Draft which is headed "**Ordinary hours of work – day workers.**" It is well known that shift workers can work day work, afternoon shifts or night shifts Monday to Sunday as part of a shift system.

The proposed clause adopts the words of the Exposure Draft for day workers and also provides a similar provision for shift workers. This added provision in fact provides the flexibility that is said to have been removed by the proposed clause. This is enhanced by the wording in the new ordinary hours shift workers reference to "***may be worked Monday to Sunday inclusive***".

4. It is suggested that the above points address the respective concerns raised by AIG and ABL.
5. **With respect to the "rest break" which has been raised** previously by AIG but not directly in relation to the shift work proposal, the response to that point is as follows: it is suggested that rest breaks do not apply to shift workers. This implies that the only break that a shift worker has is their crib break. This view is not agreed to by others. The view in support of including shift workers under this provision is taken from a practical point of view of the length of time that a worker performs their duties including the well-known disadvantages and inconveniences that shift work imposes on shift workers and from that point alone, it would be practical to assume that shift workers were entitled to a rest break as set out under the award. To not do so, disenfranchises this group of worker.

This is further explained by referring to sub-clause 13.9 of the Exposure Award. Sub-clause 13.9 of the Exposure draft and sub-clause 24.9 of the current award both say '***Employees must be allowed a rest break of 10 minutes each day between the time of commencing work and the usual meal break. The rest break must be counted as part of time worked***'. The Exposure draft then asks "**Does clause 13.9 apply to day workers?**" Sub-clause 13.9 (as is sub-clause 24.9) is clearly distinct from other sub-clauses in clause 13 of the Exposure draft that refer specifically to day workers (sub-clauses 13.2, 13.3 and 13.4) Continuous shift workers (sub-clause 13.10), Other than continuous shift workers (sub-clause 13.11) and sub-clauses that apply equally to both continuous and non-continuous shift workers (sub-clauses 13.12, 13.13, 13.14, 13.15, 13.16 and 13.17).

As indicated on a number of occasions, there is no intention to substantially change or alter clause 13 – Hours of work. It is not the intention to increase or decrease or remove any current award provision. It is respectfully put that the proposal is in accordance with the technical and drafting principles to better identify with day work and shift work. As has been previously stated (please refer to the following link: . <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014265-reportback-partiesdraft-fpaa-030217.pdf>), the proposal is a simple drafting matter that will make the hours of work clause a much more easily understood provision to the reader. The current structure and wording does not do that as clearly as it might and so the proposal seeks to do no more than to simplify the hours of work provision.

To further assist in the progression of this matter and to summarise the proposed shift work proposal, a draft Determination is attached which itself highlights the minimal changes that are proposed.

Yours sincerely

A handwritten signature in blue ink that reads "R Krajewski". The signature is written in a cursive style and is centered below the "Yours sincerely" text.

Richard Krajewski

Workplace Relations Manager

Fire Protection Association Australia

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DRAFT DETERMINATION

Fair Work Act 2009

s. 156 – 4 yearly review of Modern Awards (AM2014/266)

Electrical, Electronic and Communications Contracting Award 2010 (AM 000025)

Further to the Decision of [XXX] issued on [date], the above award is varied as follows:

1. Amend Clause 13:

1.1. By inserting “*Day Workers and Shift Workers*” into the heading of Part 3 – Hours of Work.

1.2. By inserting sub-clause (b) into clause 13.2 with the following “*The ordinary hours of work for shift workers may be worked Monday to Sunday inclusive.*”, and renumber accordingly.

1.3. By inserting “*day workers and shiftworkers*” into the heading of clause 13.5.

1.4. By inserting “*day workers and shiftworkers*” into the heading of clause 13.6.

1.5. By inserting “*day workers and shiftworkers*” into the heading of clause 13.7.

1.6. By inserting “*day workers and shiftworkers*” into the heading of clause 13.8.

1.7. By inserting “*day workers and shiftworkers*” into the heading of clause 13.9.

1.8. By deleting clause 13.10.

1.9. By deleting clause 13.11.

1.10. By inserting a new clause titled “*Ordinary hours of work – shiftwork – shiftworkers*”

1.10.1. By inserting sub-clause (a) with the following “*The ordinary hours of shiftworkers must average 38 hours per week inclusive of crib time and must not exceed 152 hours in 28 consecutive days and in the case of non-continues shift workers are to be worked in one of the following shift cycles:*

(i) 38 hours within a period not exceeding seven consecutive calendar days; or

(ii) 76 hours within a period not exceeding 14 consecutive calendar days; or

(iii) 114 hours within a period not exceeding 21 consecutive calendar days; or

(iv) 152 hours within a period not exceeding 28 consecutive days.”

1.10.2. By inserting sub-clause (b) with the following:

“Shiftworkers must work at such times as the employer may require, subject to the following conditions:”

(i) a shift must not exceed eight ordinary hours, inclusive of crib time. Provided that by mutual agreement between the employer and an employee or majority of employees concerned, a shift may be up to 12 ordinary hours;”

(ii) except at the regular changeover of shifts, an employee must not be required to work more than one shift in each 24 hours;”

(iii) the ordinary hours must be worked continuously except for crib time which must be counted as time worked and which for continuous and non-continuous shift workers will be 20 minutes; and

(iv) the timing of crib time is at the discretion of the employer, provided that an employee must not be required to work for more than five hours without a break for crib time.”

1.11. By renumbering clause 13.12 and inserting “*shiftworkers*” into the heading.

1.12. By renumbering clause 13.13 and inserting “*shiftworkers*” into the heading.

1.13. By renumbering clause 13.14 and inserting “*shiftworkers*” into the heading.

1.14. By renumbering clause 13.15 and inserting “*shiftworkers*” into the heading.

1.15. By renumbering clause 13.16 and inserting “*shiftworkers*” into the heading.

1.16. By renumbering clause 13.17 and inserting “*shiftworkers*” into the heading.

1.17. By renumbering clause 13.18 and inserting “*shiftworkers*” into the heading.