

**IN THE FAIR WORK COMMISSION**

**Matter: [2019] FWCFB AM 2019/17**

**Tranche 2 Exposure Drafts Vehicle Repair, Services and Retail Award**



## **Submissions of the AMWU**

**27 November 2019**

### **About the Australian Manufacturing Workers' Union**

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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## THE VEHICLE REPAIR, SERVICES AND RETAIL AWARD

The Australian Manufacturing Workers' Union (AMWU) makes the following submissions in relation to the exposure draft issued by the Full Bench on 14 October 2019.

In its 14 October 2019 Decision,<sup>1</sup> the Full Bench invited interested parties to comment on its:

*provisional* view that the variation of the modern awards in Tranche 2 in accordance with the draft variation determinations set out at **Attachment C** is, in respect of each of these awards, is necessary to achieve the modern awards objective.<sup>2</sup>

The comments in this submission are directed specifically to the Full Bench's provisional view that the draft variation to the *Vehicle Manufacturing, Repair, Services and Retail Award* is necessary to achieve the modern award objectives. With respect to this submission, the AMWU notes in particular the following objectives provided for under section 134 of the *Fair Work Act 2009* (Cth) (**the Act**):

- (da) the need to provide additional remuneration for:
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours;

[...]

- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards;

The submissions below predominantly focus on making a change to the exposure draft to clarify the intent of clause 22.3.

### 1 Clause 22.3

[1] Clause 22.3 in the ED provides that:

“Employees may be required to work up to a maximum of 10 ordinary hours per day.”

[2] This clause was introduced into the ED by agreement in order to clarify the maximum number of ordinary hours employees may be rostered to work per day in the work cycle.

[3] However, the AMWU has become concerned the current wording of clause 22.3 may lack sufficient clarity as to its intent. Specifically, the AMWU is concerned that clause 22.3 may be misinterpreted

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<sup>1</sup> [2019] FWCFB 6861

<sup>2</sup> [2019] FWCFB 6861, [7]

as allowing for a practice whereby the number of ordinary hours a full-time employee works are varied day to day **without notice**.

- [4] This misinterpretation is possible because clause 22.3 does not appear to place an explicit condition on the application of a “requirement” for an employee to work up to a maximum of 10 ordinary hours per day.
- [5] The AMWU detected this potential issue after becoming aware of a large employer in the vehicle industry who has recently commenced implementing this practice up to a maximum of 12 ordinary hours per day under the current *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (2010 Award)*. That is, the AMWU makes this submission on the basis of a practice that has just recently come alive in the industry.
- [6] This practice would be contrary to the intent of clause 22.3 of the ED and, in the AMWU’s view, is contrary to the ordinary hours of work and rostering and overtime provisions that have governed full-time employees under the various publications of the *Vehicle Industry Repair, Services and Retail Award (pre-modern Award)* as well as the 2010 Award, since at least the introduction of the 38 hour week into the Award in October 1989.<sup>3</sup>
- [7] The practice is easily explained through the example of a full-time employee whose average of 38 ordinary hours per week in a 7-day work cycle are worked in the following way:
- Monday 7.6 hours
  - Tuesday 7.6 hours
  - Wednesday 7.6 hours
  - Thursday 7.6 hours
  - Friday 7.6 hours
- [8] By way of an example, clause 22.3 in the ED is not intended to allow this full-time employee to be required to work an additional 2.4 ordinary hours on Thursday **without notice** (a total of 10 hours work). These additional hours are outside the employee’s ordinary hours of work on that day and should, under clause 24.2(a) of the ED, be defined as overtime. Yet because clause 22.3 currently states that an employee “*may be required to work up to a maximum of 10 ordinary hours per day*”, it is plausible the clause could be misinterpreted as allowing the employee, in this particular example, to be required to work the additional 2.4 hours of work on the Thursday as ordinary hours and not overtime.
- [9] It should be noted that, ordinarily, the scenario described above at paragraph [8] would result in the additional hours worked on Thursday being clearly defined as overtime once the work-cycle is completed. That is, once this employee has worked until the end of his or her shift on the Friday, the employee would have worked a total of 40.4 hours in the week (i.e., 2.4 hours of overtime calculated on a weekly basis as hours in excess of 38 ordinary hours per week). However, it is also possible that an employer may be minded to require this employee to leave early **without notice** on

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<sup>3</sup> V019 V022 M Print H8305.

the Friday such that the full-time employee would **not** end up working 2.4 hours in excess of 38 ordinary hours per week.

- [10] In this example, if clause 22.3 is misinterpreted as allowing for a practice whereby the number of ordinary hours per day that a full-time employee works may be varied day to day **without notice**, the employee would not be entitled to overtime rates for the additional 2.4 hours worked on the Thursday. That is, under the misinterpretation these additional 2.4 hours could be defined as “ordinary hours” because they are not in excess of 38 hours in a week or 10 hours on any day.
- [11] As stated above, this is not an outcome that is intended to be made available under the newly introduced clause 22.3 of the ED.
- [12] Clause 22.3 is intended to allow an employer to implement a work-cycle in which an employee may be required to work up to a maximum of 10 ordinary hours per day.
- [13] Clause 22.3 is **not** intended to allow the employer to vary the number of ordinary hours worked by an employee day to day without notice up to a maximum of 10 ordinary hours per day.
- [14] It should be noted that this intent under clause 22.3 is subject to clause 22.4, which allows for the **commencing time** of any permanent employee’s daily hours once fixed to vary from day to day in a week, but not by more than 2 hours. However, clause 22.4 does not allow for the rostered number of ordinary hours worked to vary day to day. That is, if an employee is required to start 2 hours early under clause 22.4, they are required to also finish 2 hours early such that the actual number of ordinary daily hours of work is not varied.
- [15] The AMWU’s view is that the intent of clause 22.3 in the ED requires an additional clarifying clause 22.4 (adjusting the following clause numbering accordingly) as follows:
- A permanent employee’s daily hours once fixed may vary with at least 7 days’ notice.
- [16] It is the AMWU view that clause 22.3 in the ED presents a significant issue that should be dealt with before the Commission is fully satisfied that the draft variation to the *Vehicle Manufacturing, Repair, Services and Retail Award* is necessary to meet the modern award objectives under section 134 of the Act. If clause 22.3 of the ED is introduced without qualification, it risks implementing a major unintended consequential change to the Award that has not, with respect to this unintended consequence, received proper consideration from interested parties (including those that initially agreed to its implementation).
- [17] Specifically, the AMWU submits that clause 22.3 of the ED risks undermining the need to provide additional remuneration to employees for overtime and unpredictable hours, and the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia. For this reason, the AMWU invites the Full Bench to reconsider its provisional view that it is satisfied the draft variation in clause 22.3 of the ED is necessary to meet the modern award objectives.

## 2 Clause 24.2(a) – Definition of Overtime

[18] Clause 24.2(a) of the ED provides that:

For a full-time employee, overtime is any time worked outside the ordinary hours prescribed by clause 22—Ordinary hours of work and rostering.

[19] Consistent with clarifying the intent of clause 22.3, the AMWU proposes deleting the current clause 24.2(a) and substituting it with a new cause 24.2(a):

For a full-time employee, overtime is any time worked outside the ordinary hours prescribed by clause 22—Ordinary hours of work and rostering, *and calculated on a daily basis.*

[20] The amendment would seek to clarify that an employee’s ordinary hours of work and rostering defined under clause 22, are worked on daily or shift basis, with overtime calculated accordingly. This principle that “each day stands alone” has been the historical arrangement under the Award and remains industry practice today. The AMWU understands that the VACC currently advises its members that overtime is to be calculated on a daily basis under the 2010 Award.

**END.**