

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

AM2014/203 Graphic Arts, Printing
and Publishing Award 2010

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/203 GRAPHIC ARTS, PRINTING AND PUBLISHING AWARD 2010

1. On 26 September 2018, the Fair Work Commission (**Commission**) handed down a decision¹ (**Decision**) concerning various awards allocated to 'group 2' of the 4 yearly review of modern awards, including the *Graphic Arts, Printing and Publishing Award 2010* (**Graphic Arts Award** or **Award**).
2. The Australian Industry Group (**Ai Group**) files this submission in response to the Decision, to the extent that it deals with certain issues arising from the *Exposure Draft – Graphic Arts, Printing and Publishing Award 2016* (**Exposure Draft**), published on 13 June 2017.

Items 1, 2 and 3 – Payment of wages and overtime, penalties and public holidays & the 'ordinary hourly rate'

3. The Decision states as follows in relation to items 1 and 2: (our emphasis)

Items 1 and 2—Payment of wages and Overtime, penalties and public holidays

[79] Ai Group submits that, consistent with earlier decisions of the Commission, the term 'time and a half' appearing in clause 18.5 should be replaced with '150% of the ordinary hourly rate'. Ai Group submits this 'will make clear that the relevant penalty is to be calculated by reference to the award-prescribed rates and does not include over-award amounts.'

[80] Clause 18.5 of the exposure draft appears in the following terms:

'If an employee is paid wages by cash and wages are not paid within ordinary working hours, all non-working time during which an employee is kept waiting for payment of wages will be paid at **time and a half**. The penalty in clause 18.5 will not apply where the delay is beyond the employer's control.' (original emphasis)

[81] Ai Group raises the same issue in relation to clauses 24.2(b), 24.3(a), 24.3(b), 24.4(a), 31.3 and 31.4, submitting that the terms 'time and a half', 'double time', and 'double time and a half' should be replaced with the terms '150% of the ordinary hourly rate', '200% of the ordinary hourly rate', and '250% of the ordinary hourly rate', respectively.

[82] This issue was raised by the Ai Group in earlier submissions in 2015. The AMWU and Printing Industries Association of Australia (IPAA) sought to retain the

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

current wording in the award. ABI & NSWBC were not opposed to changing the overtime amounts to percentages.

[83] Deputy President Bull conducted a conference of interested parties on 18 November 2015 and produced a Report to the Full Bench on 8 December 2015 which outlined the matters discussed at the conference and the outcome reached between the parties. In relation to this issue, the Report indicates that there is to be no change to percentages “as overtime appears to be compounding on shift work rates”.⁷

[84] The Report to the Full Bench indicates that this matter was agreed between the parties, however it appears that Ai Group, at least, no longer agrees with keeping the provisions as they appear in the current award.

[85] In the *July 2015* decision we stated the following in relation to the terms “double time” and “200%”:

‘(vii) Double time versus 200%

[95] The AMWU and TCFUA, supported by a number of other unions submitted that replacing terms such as ‘time and a half’ and ‘double time’ with ‘150% of the minimum hourly rate’ or ‘200% of the minimum hourly rate’ (or ‘200% of the ordinary hourly rate’ in awards where there is an all purpose payment) reduces an employee’s entitlements under the award. They argue that where an employee is receiving an overaward payment, it is the higher rate that should be multiplied to calculate the amount payable.

[96] Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings. We are not persuaded by the submissions advanced by union parties and do not propose to replace the terms 150% and 200% with time and a half or double time, etc.’

[86] There is some complexity in this award as to how rates of pay are to be calculated in relation to the interaction with penalty rates. Clause 31.3 of the current award, which is reflected in clause 21.3(c)-of the exposure draft, is as follows:

‘(c) The shift allowance is part of the employee’s weekly wage for the purpose of calculating the overtime rate payable in accordance with this award.’

[87] This means that overtime is compounded on the penalty rate. If we were to make the overtime rates a percentage of the ‘ordinary hourly rate’ this would remove the compounding of the penalty and lower the overtime rates for shiftworkers. We do not wish to introduce a new term or reference rate into the exposure draft as this risks increasing the already complex nature of these provisions. It is not our intention to change entitlements as part of the technical and drafting stage of this process. We have decided that the references to the terms ‘time and a half’, ‘double time’, and ‘double time and a half’ in the exposure draft, which reflect the current award, will be maintained.

4. The above extract of the Decision relates to the following provisions of the Award and the Exposure Draft (**Impugned Clauses**):

Award Clause	Exposure Draft Clause	Subject
Clause 28.4	Clause 18.5	Late payment of wages
Clause 33.2	Clause 24.2(b)	Overtime
Clause 33.3(a)	Clause 24.3(a)	Overtime on a Saturday or Sunday
Clause 33.3(b)	Clause 24.3(b)	Overtime on a Saturday or Sunday
Clause 33.4	Clause 24.4	Overtime – work on a rostered day off
Clause 41.3	Clause 31.3	Public holidays – ordinary hours and overtime
Clause 41.4	Clause 31.4	Public holidays – ordinary hours and overtime

5. The Commission has decided to not vary the Impugned Clauses of the Exposure Draft to require the calculation of the relevant rate by reference to the ordinary hourly rate on the basis that such a change would result in the diminution of shiftworkers' entitlements during the performance of overtime.
6. The Impugned Clauses, however, are not confined in their application to the performance of overtime by shiftworkers. For instance:
- a) Clause 28.4 of the Award and clause 18.5 of the Exposure Draft apply to employees performing shiftwork **and daywork**.
 - b) Clause 33.2 of the Award and clause 24.2(b) of the Exposure Draft apply to employees performing shiftwork **and daywork**.
 - c) Clause 33.3(a) of the Award and clause 24.3(a) of the Exposure Draft apply to employees performing shiftwork **and daywork**.
 - d) Clause 33.3(b) of the Award and clause 24.3(b) of the Exposure Draft apply to employees performing shiftwork **and daywork**.
 - e) Clause 33.4 of the Award and clause 24.4 of the Exposure Draft apply to employees performing shiftwork **and daywork**.
 - f) Clause 41.3 of the Award and clause 31.3 of the Exposure Draft apply to employees performing shiftwork **and daywork** during overtime **and ordinary hours**.

g) Clause 41.4 of the Award and clause 31.4 of the Exposure Draft apply to employees performing shiftwork **and daywork** during overtime **and ordinary hours**.

7. Various other provisions of the Exposure Draft use the term 'ordinary hourly rate':

a) Clause 20.3(e)(iii);

b) Clause 20.4(c)(iii);

c) Clause 20.5(e)(iii);

d) Clause 20.7(e)(ii);

e) Clause 20.10(b);

f) Clause 20.10(e);

g) Clause 20.11(b;) and

h) Clause 25.

8. We submit that the term 'ordinary hourly rate' should be defined consistent with earlier decisions of the Commission², such that it incorporates the minimum hourly rate prescribed by the Award and any all purpose allowances. We deal with this issue in greater detail later in this submission.

9. We are concerned that by maintaining the references to 'time and a half', 'double time' and 'double time and a half' in the Exposure Draft, the Impugned Clauses may lend themselves to being interpreted to require the payment of an amount other than what is required by the Award during the performance of ordinary hours and/or in relation to employees performing daywork. This is particularly so in circumstances where the Exposure Draft uses different terminology (i.e. the term 'ordinary hourly rate') in a number of other provisions.

² 4 yearly review of modern awards [2015] FWCFB 4658 at [42].

10. For instance, clause 41.3 of the Award relevantly states: (emphasis added)
- 41.3** An employee required to work on a public holiday or a substitute day, as provided for in the NES or clause 41.5, will be paid double time and a half with a minimum payment of four hours. Provided that: ...
11. Clause 41.3 of the Award applies to employees performing daywork and shiftwork, during ordinary hours and overtime. Ai Group considers that save for circumstances in which an employee performing shiftwork is working overtime, the penalty payable under clause 41.3 of the Award is to be calculated on the minimum rate prescribed by the Award. In light of decisions made by the Commission in this review, it might be accepted that under the Exposure Draft, the comparable clause should also include all purpose allowances.
12. Whilst we understand that the Commission has decided to retain the reference to 'double time and a half' in clause 31.4 of the Exposure Draft for the purposes of preserving the entitlement of shiftworkers during the performance of overtime, the use of that term has potential implications for how the clause may be interpreted to apply to the performance of ordinary hours of work by shiftworkers, the performance of ordinary hours of work by dayworkers and the performance of overtime by dayworkers. The proper interpretation of the provision in those circumstances would be unclear and may be susceptible to the argument that the provision is to be interpreted to require the payment of something *other* than 250% of the ordinary hourly rate in those circumstances; on the basis that the Exposure Draft utilises different forms of expression for describing the rates payable under different provisions and that if it had been intended that the clause require payment at 250% of the ordinary hourly rate, the instrument would have been drafted accordingly.
13. In essence, we are concerned that the Commission's decision may inadvertently create uncertainty about how the Impugned Clauses apply to specific categories of employees or in certain circumstances and as a result, give rise to disputation as to their proper interpretation in such circumstances. We note, for instance, than earlier in this review, the unions sought to argue that such clauses should be interpreted to include over award payments.

14. We now turn to consider how this issue might be addressed.
15. The Decision states as follows in relation to item 3, which concerns the use of the term 'ordinary hourly rate': (our emphasis)

Item 3—Definition of 'ordinary hourly rate'

[88] Ai Group submits that, as the exposure draft contains all-purpose allowances and uses the term 'ordinary hourly rate', a definition of 'ordinary hourly rate' should be included in the exposure draft. Ai Group submits that this would help ensure that the award is simple and easy to understand.

[89] The phrase 'ordinary hourly rate' appears in the exposure draft in two different contexts. The first is as a reference rate in relation to penalties, for example clause 20.3 provides that day workers who work ordinary hours on Saturday or Sunday will be paid at '200% of the ordinary hourly rate'. The expression of these rates differs from the expression in the current award of equivalent provisions which sets the rate at 'double time'. The second is in clause 20.3(e)(ii) and relates to a one off payment for work on a Saturday which is 'equal to four times the ordinary hourly rate of pay calculated on the award classification level rate...'. The exposure draft currently contains a definition of the phrase 'hourly rate which is as follows:

hourly rate means the weekly wage prescribed by this award for the work performed divided by the number of hours which constitute the employee's ordinary working week. In the event of an employee being employed on shiftwork the penalty payable for work at such hours will be part of the weekly wage of that employee

[90] The definition from the *July 2015 decision* of ordinary hourly rate for awards that have all purpose allowances that apply to some employees is as follows:

ordinary hourly rate means the hourly rate for the employee's classification specified in clause X, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purpose.

[91] There are a number of options to address this issue. There are a number of problems with retaining the exposure draft in its current form. Firstly, the exposure draft now contains a number of provisions expressed as a percentage of the ordinary hourly rate and it would be unclear how the definition for hourly rates interacts with this definition. Secondly, the 'hourly rates' definition does not account for the fact that the award now contains hourly rates of pay as it provides how to calculate the hourly amount from the weekly amount. This is unnecessarily complex as the award now contains minimum hourly rates that have been calculated based on the 38-hour week.

[92] One option may be to maintain the hourly rates definition, in some form, and include the standard 'ordinary hourly rates' definition. As the exposure draft currently refers to the 'hourly rate' in a number of places this would mean that those rates would also have a definition. However the two definitions overlap and this would create an ambiguity in the document.

[93] A further option would be to include the standard definition of 'ordinary hourly rate' as set out in the July 2015 decision and remove the definition of 'hourly rate'. Our preliminary view is that it would be unnecessary to modify that definition to include the part of the 'hourly rate' definition that deals with the shift penalty as the award has preserved that distinction by maintaining the language of 'double time' and 'time and a half'. All instances of the phrase 'hourly rate' would be changed to 'ordinary hourly rate'. Our provisional view is that this option would clarify the operation of this award and we propose to insert the following definition:

ordinary hourly rate means the hourly rate for the employee's classification specified in clause 8.2, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes

[94] Parties have until **4.00 pm on Wednesday 10 October 2018** to provide further comment on the proposed definition and the proposed change of any reference from 'hourly rate' to 'ordinary hourly rate'.³

16. Ai Group respectfully agrees with the observations made by the Commission at paragraph [91] of the Decision and on that basis, submits that further consideration should be given to the relevant provisions of the Exposure Draft.
17. Ai Group submits that the Exposure Draft should be amended as follows.
18. **Firstly**, the following definition of 'ordinary hourly rate' should be inserted (suggested amendments to the definition proposed by the Commission at paragraph [93] of the Decision are marked):

ordinary hourly rate means the hourly rate for the employee's classification ~~prescribed by the award specified in clause 8.2~~, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes

19. As we have previously submitted, we consider that the Exposure Draft (and therefore ultimately, the Award) will be made simpler and easier to understand if the term 'ordinary hourly rate' is defined in accordance with the Commission's earlier decisions. At present, the Exposure Draft does not define the term and therefore its meaning is ambiguous.
20. Ai Group has proposed minor amendments to the definition proposed by the Commission at paragraph [93] of the Decision. This is to ensure that the definition does not inadvertently create an entitlement to the rates of pay prescribed in clause 8 of the Exposure Draft for all employees, even if they

³ 4 yearly review of modern awards – Award stage – Group 2 [2018] FWCFB 5986 at [88] – [94].

are in fact a junior employee (see clause 9), an apprentice (see clauses 10 and 11), a trainee (see clause 12) or an employee eligible for a supported wage (see clause 13).

21. The insertion of the definition would ensure that the term 'ordinary hourly rate' as used in various provisions of the Exposure Draft, is given a clear meaning, consistent with the approach adopted by the Commission throughout this review in relation to Exposure Drafts that contain all purpose allowances.
22. **Secondly**, the Impugned Clauses should be amended such that they require the calculation of the relevant penalty:
 - a) on a rate that includes the shift allowances prescribed by clause 21.3 of the Exposure Draft; and
 - b) on the 'ordinary hourly rate' in all other circumstances.
23. In the time available, we have regrettably not had an opportunity to develop and propose amendments to each of the Impugned Clauses. Careful consideration of the interaction between the relevant provisions is required in order to vary the Exposure Draft to achieve the relevant objective, without creating any inadvertent changes to the substance of the provisions.
24. One potential solution may be to insert an additional term that is not dissimilar to the current definition of 'hourly rate' and to amend the Impugned Clauses to refer to it. For instance:

hourly rate means the hourly rate for the employee's classification prescribed by this award, plus any shift allowances payable under clause 21.3.
25. The Impugned Clauses would then require the calculation of the relevant penalty as a percentage of the 'hourly rate'. This would ensure that:
 - a) The relevant penalties are calculated by reference to rates prescribed by the award and the Impugned Clauses do not give rise to any suggestion that they are to be applied to over award amounts (as decided by the Commission in its decision of July 2015).

- b) The relevant penalty would be calculated on a rate that includes shift allowances where such shift allowances are payable.

It would appear that some amendment to clause 21.3 of the Exposure Draft would also be necessary to ensure that clause 21.3(c) does not give rise to a 'double entitlement' to shift allowances in the calculation of overtime rates. We also note that clauses 21.3(a) and 21.3(b), which prescribe the shift allowances, do not in fact require the payment of the allowances during overtime. Accordingly, merely deleting subclause (c) would not suffice.

- 26. In light of the complexity of the issues raised in this submission, we respectfully submit that the Commission should give Ai Group a further opportunity to make submissions about any amendments that it proposes to the relevant provisions of the Exposure Draft.