

Fair Work Commission
Level 10, Terrace Tower, 80 William Street
East Sydney NSW2011
By email: amod@fwc.gov.au

19 April 2016

**Re: AM2014/226 AWU submissions on the Exposure Draft for the
*Electrical Power Industry Award 2016***

Background

1. On 23 March 2016 the President, Justice Ross published a Statement directing parties to file submissions on drafting and technical issues for Group 3 exposure drafts by 14 April.
2. The Australian Workers' Union (AWU) set out the submissions below in relation to the Exposure Draft for the *Electrical Power Industry Award 2016* ('the Exposure Draft' for 'the Award') as published on 15 January 2016.

Drafting and technical issues

Regular pattern of work for part-time employees

3. Clauses 6.4(b) and (c): At subclause (b) a "regular pattern of work" can be agreed upon to form an employee's part-time engagement. This includes both the hours to be worked, as well as the start and finish times each day. Subclause (c) needs to be amended to match this complete definition. For this reason "hours of work" should be deleted, and replaced with "regular pattern of work" to establish consistency.

Overtime for full-time employees

4. Clause 8.1: This clause states that a full-time employee works an average of 37.5 hours per week. We suggest that this clause would benefit from the same clarification in relation to overtime as set out for part-time employees. As such, we suggest an additional clause at 6.3:

(b) All time worked in excess of the hours set out at subclause (b) will be overtime and paid for at overtime rates.

This matches the wording as far as possible to clause 6.4(e) in relation to the part-time "regular pattern" which states that "all time worked in excess of the hours as mutually agreed will be overtime".

Casual loading

5. Clause 6.5(d): The Exposure Draft has replaced the word “attributes” in the current award with the word “entitlements” to explain that the casual loading is paid instead of (amongst other benefits)... “other entitlements of full-time or part-time employment.” This amendment is confusing as there are entitlements afforded to casual employees that are also the entitlements of full-time or part-time employees. For example, overtime rates, or allowances. To revert back to the term “attributes” however, will also create ambiguity.
6. We agree with the submissions as previously put by the Construction, Forestry, Mining and Energy Union in relation to the *Mining Industry Award 2014*¹ – that the term “attributes” is vague in this context, and that the term “entitlements” inadvertently expands the clause well beyond its previous scope. In any case, we submit that the wording of the current award should be retained, and the reference to “entitlements” be abandoned.

Casual and part time minimum engagement

7. Clauses 6.4 and 6.5(d): The Exposure Draft is silent on a minimum engagement period for part-time employees under clause 6.4, and sets 3 hours for casuals per clause 6.59(d). We note that the minimum payment/engagement period of four hours is being sought by the ACTU in the common claims proceedings for casual and part-time employees, and that this Award is scheduled to that claim.²

Minimum rate of pay

8. Clause 6.5(e): Replace “ordinary rate of pay” with “minimum rate of pay” as there are no all-purposes allowances in the Award in order to utilise the term. The same amendment should be made at clause 14.7 and at G.1 subclauses (b) (c) and (d) of Schedule G.

Meal break for day workers and shift workers

9. Clauses 9.6 and 9.4: Parties are asked to clarify the interaction between clauses 9.6 and 9.4, and in particular whether clause 9.4 only applies to shift workers and 9.6 to day workers. We interpret both clauses as applying to day work and shift work, with clause 9.4 referring to the continuing into overtime after rostered hours are completed, and 9.6 referring to overtime after a break taken at the completion of a rostered shift.

¹ See <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201479-sub-cfmeu-061114.pdf> at (ii)–(iv).

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014196and197-amendedsub-ACTU-111114.pdf>

10. Clause 9.7(d): The Exposure Draft asks whether this clause is correct given that this clause is often applied as an exclusion in other awards. We do not oppose the expression of this clause.

Higher Duties

11. Clause 10.7: This clause entitles an employee to be paid at the higher applicable rate where they are directed to carry out “the duties of a position classified at a higher pay level” for at least 4 hours. We submit the alternative wording of “work” rather than “duties”, to reflect that not *all* duties must be performed, but rather the work of that higher position, on that occasion. The same amendment was made to the *Asphalt Industry Award 2010* during the review of group 1A and IB awards. We also note that the reference to “accident pay” at subclause (b) is not entitled elsewhere in the Award, and propose its deletion. We suggest the following amendment:

- (a) *An employee directed by the employer to carry out the duties [work] of a position...*
- (b) *Where an employee has performed higher duties [the work of the higher classified position as set out at subclause (a)] for three months continuously prior to a period of annual leave, personal/carer's leave or a period attracting accident pay, the leave or accident pay will be based on the employee's higher duties [rate of the higher classified position.]*

Availability allowance

12. Clause 11.2: The Exposure Draft invites submissions on the application of this clause, and asks: *Are the rates in (i) and (ii) divided by 5 and 4 respectively for each shift in a week the employee is rostered on availability duty, or is payment made on pro rata basis on the day rostered only?*

13. The current award does not include the word “days” in either subclause, and we understand these subclauses as referring to “weeks”. That is, a payment of \$137.75 is made when an employee is on availability duty (per clause 8.5) for one week out of five under 11.2(i), and a payment of \$198.98 is made when rostered for one week out of four under 11.2(ii). This is how the rate is set, however, if an employee were on availability duty for less than the week for some reason, then the payment would be made on a pro rata basis.

Overtime payable

14. Clause 13.1: In response to the note in the Exposure Draft, we say overtime is payable on hours worked outside the ordinary hours for non-continuous shift workers on Monday to Friday, and on Saturdays

after two hours. For continuous shift workers overtime is payable Monday to Saturday. Sundays and Public holidays stand alone.

Payment of the higher wage rate while on annual leave

15. Clause 14.3: We are asked to clarify the interaction of clauses 14.3(a) and 10.7(b). Clause 10.7 refers to the payment of the higher “wage” of a position classified at a higher pay level. It is not an allowance. The reference at clause 14.3(a) to the “allowance” in clause 10.7 is in this respect confusing. Moreover, clause 14.3 significantly amends clause 10.7(b). In respect of the continuing higher duties wage, clause 14.3 makes it conditional that an employee will be resuming those higher duties upon return if they are to be paid the “higher duties allowance” while on annual leave. Clause 10.7(b) clearly states, that all that is required, is the performance of those duties for 3 months in order to access the higher rate while on leave (including annual leave).
16. We submit that clause 10.7 is the substantive clause setting out the entitlements relating to an employee performing higher duties, and that the conflicting clauses be resolved in favour of that clause. We suggest the following amendment at clause 14.3(a):

An employee receiving an allowance on a continuous basis will continue to receive the allowance on all annual leave[.], ~~subject to, in the case of higher duties allowance in clause 10.7, the employee resuming higher duties on completion of the leave.~~

Payment of annual leave entitlements on termination

17. Clause 14.7: Parties are asked to clarify whether an employee will only be paid out accrued annual leave under clause 14.7. This clause states that the employee will be paid out accrued leave at the ordinary rate of pay as applicable at the time of termination. This appears straightforward, and the answer to the question posed in the Exposure Draft, is “yes” an employee is only entitled to be paid for leave entitlements that have accrued but not been taken.
18. We note that this may be inconsistent with the National Employment Standards (‘the NES’). That is, the entitlement to payment of accrued annual leave under section 90(2) of the *Fair Work Act 2009* (Cth) (‘the FWA’) – which states that (our emphasis added):

If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

We understand that payment of accrued annual leave upon termination should include more than the ordinary hourly rate if the Award is to retain consistency with the NES. We take this view given that the

Award provides for payment while on annual leave to include continuous allowances under clause 14.3 of the Exposure Draft, and the payment of the higher wage rate under clause 10.7 (inclusive of our submissions above at paragraphs 15-16). We note, in this respect, that a modern award must not exclude the NES under section 55(1) of the FWA.

We understand this issue is being dealt with by the Full Bench as a common issue, and that the ACTU sought to vary 118 modern awards in order to resolve the inconsistency with section 90(2). This Award was not scheduled to that claim; however, we are seeking a variation on the same basis. We suggest the following amendment:

14.7: Payment on termination of employment

- [(a) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.] ~~Upon termination of employment for any reason, an employee will be paid out accrued leave at the ordinary rate of pay applicable to the employee on the date when the employment terminated provided that, i~~*
- [(b) If the employee is a shiftworker, the employee will also be paid shift allowance and/or Saturday or Sunday penalty rates according to the employee's roster or projected roster.*

Personal/carer's leave

- 19. Clause 15.2: In response to the note in the Exposure Draft, we understand the reference to "personal leave" at this clause refers to "personal/carer's leave", as is consistently grouped under the NES, and in the preceding clause.



Roushan Walsh
NATIONAL LEGAL OFFICER