

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

**Submission on Outstanding  
Technical and Drafting Issues**

Group 3 Exposure Drafts

**10 April 2018**

**Ai**  
GROUP

# 4 YEARLY REVIEW OF MODERN AWARDS

## GROUP 3 EXPOSURE DRAFTS

### OUTSTANDING TECHNICAL AND DRAFTING ISSUES

#### 1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to the decision<sup>1</sup> issued by the Fair Work Commission (**Commission**) on 13 March 2018 (**13 March 2018 Decision**) regarding awards allocated to group 3 in the current 4 yearly review of modern awards.

#### 2. SUGAR INDUSTRY AWARD 2010

2. We note the following extract from the Commission's 13 March 2018 Decision, regarding the *Sugar Industry Award 2010* (**Sugar Award**):

##### **2.10 Sugar Industry Award 2010**

###### *Item 23 – Hours of work – altering the spread of hours*

[185] In our *October 2017 decision*, we dealt with an issue relating to altering the spread of hours in the exposure draft. The parties agreed to delete clauses 11.3(c) and (d) and insert a new clause 11.3(c) (see [3 June 2016](#) exposure draft).

[186] We noted that, in our view, the agreed position of the parties alters the operation of the provision in the current award. Having considered the parties' agreed position, we expressed a view that item (ii) should not be contingent on item (i). Our *provisional* view is that existing clauses 11.3(c) and (d) should be retained but that 11.3(d) should be amended to clarify when overtime is payable as follows:

**(c)** Altering the spread of hours

The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer. The spread of hours may be altered by up to one hour at either end of the spread by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.

- (d)** Work done outside the hours of 6.00 am to 6.00 pm, other than in accordance with clause 11.3(c), will be paid at overtime rates and will be deemed to be part of the ordinary hours of work for the purposes of clause 29—Ordinary hours of work and rostering—other than shiftworkers.'

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<sup>1</sup> [2018] FWCFB 1405

(emphasis added)

[187] Parties were invited to comment on the proposed amendment to clause 11.3(d). 3 submissions were received.

[188] Both the AWU and the Australian Manufacturing Workers' Union (AMWU) note that this is one of a group of awards containing similar ambiguous phraseology in relation to the alteration of the spread of hours. The AMWU submit that the issue 'should be considered at the conclusion of the Award stage of the Review in accordance with the decision of the Full Bench [2015] FWCFB 7236 at [159]'.

[189] The AWU strongly oppose the proposed additional words 'other than in accordance with clause 11.3(c)' as the AWU submits that it does not reflect the current provision in the award. The AWU submits that the current provision makes overtime payable for work done outside the spread of hours regardless of whether the spread has been altered by agreement. The AWU further submits that the current provision is not ambiguous and that the change would result in a reduction of the entitlement to overtime.

[190] The NFF makes no further submission on the issue.

[191] We have considered the argument put by the AWU but find it unpersuasive. We see little utility in the ability to alter the spread as provided in clause 29.3(c) if work done within the agreed altered spread is to be paid at overtime rates. The clause enabling the spread of hours to be altered, by agreement is intended to provide the flexibility of a longer span in which to roster ordinary hours without having to pay overtime.

[192] We have decided to confirm our *provisional* view that 11.3(c) and 11.3(d) be retained and our redrafted clause 11.3(d) will be inserted into the exposure draft. The remaining issue of the potential ambiguity in clause 11.3 will be dealt with at the conclusion of the Award stage of the Review.

3. The common facilitative provision in awards which allows the spread of hours to be varied by up to one hour at each end can be traced back to a proposal of one of Ai Group's predecessor organisations (the Metal Trades Industry Association of Australia) that was adopted by Senior Deputy President Marsh in Her Honour's 11 March 1998 [Metal Industry Award Simplification Decision](#) (Print 9311).
4. The relevant extract from the decision is as follows:

#### 6.1.1(c)

##### **MTFU**

*The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm.*

##### **MTIA**

*The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The*

*spread of hours (ie. 6.00am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or in appropriate circumstances, between the employer and an individual employee.*

I adopt the reasoning in 6.1.1(b) in relation to the potential impact of the additional flexibility sought by MTIA. It may well be that access to more a flexible span of ordinary hours meets the needs of particular employees while achieving greater workplace flexibility. The appropriate safeguards should ensure arrangements are genuinely agreed to by an employee or the majority of employees.

This provision will be inserted into the award and will be subject to the safeguards in clauses 2.2.2 (Facilitation by Individual Agreement) and 2.2.3 (Facilitation by Majority Agreement).

The wording of this clause is agreed and it will be inserted into the award in the following terms:

*"Any work performed outside the spread of hours is to be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work."*

5. The relevant clauses inserted into the simplified *Metal, Engineering and Associated Industries Award 1998* were:

- (c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.
- (d) Any work performed outside the spread of hours is to be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work.

6. The relevant clauses currently contained within the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)* are:
- (c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.
  - (d) Any work performed outside the spread of hours must be paid for at overtime rates. However, any work performed by an employee prior to the spread of hours which is continuous with ordinary hours for the purpose, for example, of getting the plant in a state of readiness for production work is to be regarded as part of the 38 ordinary hours of work.
7. It can be seen that the wording in the Manufacturing Award is virtually identical to that proposed by MTIA in the 1996-98 *Metal Industry Award Simplification Case*.
8. When the history of the award clauses in the Manufacturing Award is considered, it is obvious that there was no intention for overtime penalties to be paid for the additional hour at each end of the spread of hours, where the spread is expanded in accordance with the facilitative provision.
9. The provisions in the Sugar Industry Award are obviously based on the provisions in the Manufacturing Award.
10. Accordingly, it is clear that the AWU's arguments in relation to the interpretation of clause 11.3(d) in the Exposure Draft are not correct and that the Full Bench has made the correct decision in adding the following underlined words to this clause:
- (d) Work done outside the hours of 6.00 am to 6.00 pm, other than in accordance with clause 11.3(c), will be paid at overtime rates and will be deemed to be part of the ordinary hours of work for the purposes of clause 29—Ordinary hours of work and rostering—other than shiftworkers.'

### **3. WINE INDUSTRY AWARD 2010**

11. Outstanding issues relating to the Exposure Draft for the *Wine Industry Award 2010* (i.e. casual conversion and ordinary hours of work) and Ai Group's position on those issues is set out in the Commission's 13 March 2018 Decision.