



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

7 May 2017

Commissioner Lee
Fair Work Commission
11 Exhibition Street
Melbourne Vic 3000

By email: chambers.lee.c@fwc.gov.au

Dear Commissioner,

Re. AM2014/268 Food, Beverage and Tobacco Manufacturing Award 2010 – draft report and outstanding technical and drafting issues

We refer to the above matter, a conference held before the Commission on 12 April 2017 at which the Australian Industry Group (**Ai Group**) was in attendance and a draft report subsequently published on 2 May 2017. The purpose of this correspondence is to provide “comments on the draft report” in accordance with paragraph [3] of the draft report and to respond to submissions filed by the Australian Manufacturing Workers’ Union (**AMWU**) and the Australian Workers’ Union (**AWU**) on 21 April 2017.

Item 4 – draft report

We respectfully suggest that “employee” as it appears in the second line should be replaced with “employee’s”. This is consistent with clause 2 of the *Exposure Draft – Food, Beverage and Tobacco Manufacturing Award 2016 (Exposure Draft)* and our understanding of the resolution reached during the conference.

Item 4 – draft report

We respectfully suggest that the words “and include the same definition in clause 2” be deleted from the end of the paragraph as they are unnecessary. If the two amendments set out at that paragraph are made, the issues arising from the definitions at clause 2 and B.1.1 would be remedied and, specifically, the definitions would thereafter be consistent. This is consistent with our understanding of the resolution reached during the conference.



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Items 9 and 10 – response to AMWU and AWU submissions

We here propose to briefly respond to the various contentions of the AMWU and AWU regarding Ai Group's proposal that the references to clause 24.10 and 24.13 be deleted from clause 7.2(a):

- An employee who elects to cash out annual leave or take annual leave in advance is *not* “departing from the established Award provision, which is that an employee accrues annual leave progressively and takes paid time off work”. Self-evidently, the *Food, Beverage and Tobacco Manufacturing Award 2010 (Award)* does not create an award standard from which an employer and employee are departing when cashing out annual leave or when leave is taken in advance. It is the NES that:
 - Proceeds on the basis that annual leave can be taken only once it has been accrued; and
 - Makes provision for an award to include a term enabling the cashing out of annual leave.
- The dictionary definition of “facilitate” is of no relevance to the matter here before the Commission. A decision as to whether the relevant clauses are referenced at clause 7.2(a) must be made having regard to clause 7.1(b) and the well-understood industrial meaning of “facilitative provisions”.
- That we have not suggested any “detriment” flowing from the inclusion of the references is entirely irrelevant. Such a submission ignores the purpose of this process, which is to ensure that the Exposure Draft is accurate, simple and easy to understand whilst only containing terms that are “necessary” to ensure that the Award achieves the modern awards objective (s.138 of the *Fair Work Act 2009*).
- No amendment to clause 7.1(b) should be made as suggested by the AWU. It reflects a longstanding provision in the Award (clause 8.1) and is similar to provisions found in other awards such as the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*. It finds its origins in decisions of the AIRC regarding safety net adjustments and reviews:

“A ‘facilitative provision’ is that part of an award clause which enables agreement at enterprise level to determine the manner in which that clause is applied at the enterprise. A facilitative provision normally provides that the standard approach in an award provision may be departed from by agreement between an individual employer and an employee or the majority of employees in the enterprise or part of the



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enterprise concerned. Where an award clause contains a facilitative provision it establishes both the standard award condition and the framework within which agreement can be reached as to how the particular clause should be applied in practice." (September 1994 Review decision, Print L5300, p.30)

No cogent reason has been proffered by the unions for changing clause 7.1(b) of the Exposure Draft. If the Commission nonetheless moves to do so, Ai Group may seek an opportunity to be heard.

Item 18 – draft report

We respectfully request that the second sentence be amended as follows, to properly reflect our position:

AIG do not oppose the retention of the words as sought by the AMWU.

Item 27 – draft report and response to AMWU submission

Ai Group does not oppose the insertion of clause 15.10 of the Manufacturing Award or the insertion of clause 14.2 of the Award, as proposed by the AMWU.

Item 33 – response to AMWU and AWU submissions

We note the unions' opposition to Ai Group's proposal. We continue to rely upon paragraphs 166 – 168 of our submission dated 18 January 2017 in this regard.

Item 35 – response to AMWU submissions

We remain of the view that the changes proposed by the AMWU are unnecessary and would be inconsistent with the approach taken by the Commission in other exposure drafts. If the Commission adopts the changes sought, we respectfully request that we be granted an opportunity to review any revised Exposure Draft to ensure that no substantive changes result from the amendments and that the necessary changes to all cross-references and Schedule C are made.



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Item 40 – Issue 2 – draft report

We respectfully request that the words “plus any all purpose allowance” be deleted from the fourth line. This is consistent with our understanding of the agreed resolution during the conference. Further the words are unnecessary because the term “ordinary hourly rate” is defined to include any all purpose allowances.

Item 43 – draft report

The draft report notes that Ai Group was not advise if it had any concerns with the proposed amendment there described. I confirm that we do not seek to raise any concerns in this regard.

Item 45 – response to AMWU and AWU submissions

We note the unions’ opposition to the amendments we have sought. The AWU’s submissions request that Ai Group express its concerns in writing. We direct the AWU’s attention to paragraphs 179 – 181 of our submission dated 18 January 2017, which we reiterate below.

Pursuant to the current clause 31.3(d) of the Award, an employee is entitled to a 30% allowance where an employee works on a night shift described in subclauses (i), (ii) and (iii). The allowance is not payable for any other shift or time worked:

- (d)** *An employee who:*
 - (i)** *during a period of engagement on shift, works night shift only; or*
 - (ii)** *remains on night shift for a longer period than four consecutive weeks; or*
 - (iii)** *works on a night shift which does not rotate or alternate with another shift or with day work so as to give the employee at least one third of their working time off night shift in each shift cycle,*

must, during such engagement, period or cycle, be paid 30% extra for all time worked during ordinary working hours on such night shift.



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We are concerned that the proposed clause 23.3(d) of the Exposure Draft has a substantively different effect. It appears to require the payment of the allowance for all ordinary hours worked on an engagement, period or cycle on permanent night shifts, including ordinary hours that do not in fact constitute a night shift as described in clause 23.1(e):

- (d) *An employee who works on permanent night shift must be paid 130% of the ordinary hourly rate for all time worked during ordinary working hours on an engagement, period or cycle on permanent night shifts.*

This amounts to a substantive change. It is for this reason that Ai Group has proposed that:

- Clause 23.1(e) of the Exposure Draft be deleted; and
- Clause 23.3(d) of the Exposure Draft be replaced with clause 31.3(d) of the Award.

The AMWU submits that the issue “could likely be remedied by minor variation to the Exposure Draft clause”, however it has not proposed any such amendment. We would of course welcome an alternate proposal from the unions which seeks to address the issue we have raised in a manner that differs from that which we have proposed.

Yours sincerely,

A handwritten signature in blue ink that reads 'R. Bhatt'.

Ruchi Bhatt
Senior Adviser – Workplace Relations Policy