

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

**Additional submissions**  
Concrete Products Award 2010  
(AM2014/70)

**20 APRIL 2015**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS

### AM2014/70 CONCRETE PRODUCTS AWARD 2010

#### 1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes this additional submission in relation to the 4 Yearly Review of the *Concrete Products Award 2010* (Concrete Products Award or Award).
2. This submission is filed pursuant to directions issued by the Fair Work Commission (the Commission) on 19 February 2016 in response to the Australian Workers' Union's (AWU or Union) submissions of 22 March 2016 2014.
3. Ai Group does not oppose the AWU's proposal that the appropriate rate for non-continuous shift workers working on a Sunday should be double time.
4. However, Ai Group opposes the AWU's proposal that the appropriate rate for non-continuous shift workers working on a public holiday should be double time and half. The appropriate rate for such work should be double time.
5. The Union has failed to establish that:
  - (a) Its claim reflects an industry standard, as it pertains to award covered employers.
  - (b) Its claim is necessary ensure that the Award achieves the modern awards objective.
  - (c) The evidence it relies upon supports its proposal that non-continuous shift workers should receive a higher rate than continuous shift workers when working on a public holiday.

## **2. THE STATUTORY FRAMEWORK**

6. The AWU's claim is made in the context of the 4 Yearly Review of Modern Awards, which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (the Act).
7. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).
8. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.
9. Ai Group submits that the AWU has failed to provide the evidence to support its claim that the appropriate rate for working on a public holiday for non-continuous shift workers is double time and half, nor that such an increased penalty is necessary to ensure that the Award achieves the modern awards objective.

## **3. THE APPROPRIATE RATE**

10. Clause 25.9 of the Concrete Products Award provides for the rates payable to shiftworkers for work performed on Sundays and public holidays. It is in the following terms: (underlining added)

### **25.9 Sundays and public holidays**

**(a)** Shiftworkers on continuous shifts for work on a rostered shift the major portion of which is performed on a Sunday or public holiday will be paid as follows:

(i) Sundays—at the rate of double time; or

(ii) public holidays as prescribed by clause 29—Public holidays, at the rate of double time.

(b) Shiftworkers on other than continuous work for all time worked on a Sunday or public holiday will be paid at the rates prescribed by clause 15—Minimum wages. Where shifts commence between 11.00 pm and midnight on a Sunday or a public holiday, the time worked before midnight will not entitle the employee to the Sunday or public holiday rate, provided that the time worked by an employee on a shift commencing before midnight on the day preceding a Sunday or public holiday and extending into a Sunday or public holiday will be regarded as time worked on such Sunday or public holiday.

(c) Where shifts fall partly on a public holiday, that shift the major portion of which falls on a public holiday will be regarded as the public holiday shift.

11. In this matter the Commission has found that:

*“ having regards to the ambiguity of the question in issue at 20 July 1990 hearing, it can be reasonably inferred that it was intended by the AIRC that non-continuous shift workers be paid double time on Sundays and either double time or double time and half on public holidays...<sup>1</sup>*

12. Ai Group submits that the appropriate rate for non-continuous shift workers to receive when working a public holiday should be double time. The penalty rates provided to non-continuous shift workers should be the same as continuous shift workers.

13. The evidence relied upon by the AWU regarding payments for such work in the industry is derived from enterprise agreement terms. As such we say this sets the high water mark regarding the penalty payments and should not be relied upon as setting minimum terms and conditions in an Award.

14. We have in the following table summarised the public holiday penalty payments as set out in the agreements which the AWU chose to rely upon in its witness evidence.

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<sup>1</sup> Para 13 [2016] FWCFB 597

<b>Name of Agreement</b>	<b>Continuous shift Workers</b>	<b>Non Continuous Shift workers</b>
Rocla Pty Ltd- Kewdale Agreement 2013	Double time and half clause 26.10.1	Double time and half Clause 26.10.2 and 36
Ultrafloor ( aust) Pty Ltd Collective Agreement 2014	Double time and half Clause 33.5	Double time and half Clause 33.5
Civilbuild Precast Pty Ltd Enterprise Agreement 2014	Double time and half Clause 13.3.2	Double time and half Clause 13.3.2
<i>Civilbuild Precast Pty Ltd Enterprise Agreement ( replaced by above agreement)</i>	<i>Double time and half Clause 24.2</i>	<i>Double time and half Clause 24.2</i>
Better Concrete Products Pty Ltd Warnervale Enterprise Agreement 2014	Double time and half or alternate day off Clause B16	“rates prescribed by this agreement”  Clause B16
Structural Concrete Industries ( Aust) Pty Ltd Enterprise Agreement 2014	No provision for payment of public holiday penalties except where those hours are deemed overtime	No provision for payment of public holiday penalties except where those hours are deemed overtime
<i>Hanson Precast Pty Ltd (Mulgrave &amp; Riverstone) Enterprise Agreement 2013-2016.</i>	As per Concrete Products Award 2010 [MA000056]	As per Concrete Products Award 2010 [MA000056]
<i>Freshmore (NSW) Pty Ltd t/as Advanced Precast (Aust) Sydney, New South Wales and the AWU Enterprise Agreement 2013.</i>	Double time  Clause 33.9.1	“rates as prescribed by clause 28 -Wage Increases of this agreement.”  Clause 33.9.2
<i>Rocla Pty Ltd - Emu Plains Agreement 2013-2016.</i>	Double time and half Clause 26.10.1	Double time and half Clause 36.1
Humes Blacktown Enterprise Agreement 2013-2016.	Double time Clause 27.9.1	“rates prescribed by clause 22 (Classification structure and wage rates)” 27.9.2

Austral Precast Pty Ltd, New South Wales Enterprise Agreement 2014.	Double time and half Clause 6.8.5 (a) (i)	paid at the rates prescribed by clause 28 - Wage Increases of this agreement.  Clause 6.8.5 (a) (iii)
<i>Rockhampton Poles Rocla Collective Agreement 2013</i>	Double time and half Clause 26.10.1	Double time and half Clause 26.10.2 and Clause 36.1
<i>Austrak Pty Ltd Rockhampton Enterprise Agreement 2013- 2017</i>	Clause 4.6.4 provides for all shift workers to receive double time and half  But  Clause 4.6.6 (a) provides a specific public holiday under the agreement being payable at double time	Clause 4.6.4 provides for all shift workers to receive double time and half  And  Clause 4.6.6(b) provides for double time and half.
<i>Humes Laverton and Australian Workers Union (AWU), Victoria Enterprise Agreement 2015.</i>	Double time and half	“paid at the rates prescribed by clause 38” (clause 38 prescribes the wage rates payable)
<i>Bristile Roofing Dandenong Enterprise Agreement 2015.</i>	Incorporates the Concrete Products award 2010 and at Clause 6.2 ( c ) it provides for a public holiday penalty if worked: ”option to take the day in lieu for the time worked or paid overtime rates.”	Incorporates the Concrete Products award 2010 and at Clause 6.2 ( c ) it provides for a public holiday penalty if worked: ”option to take the day in lieu for the time worked or paid overtime rates.”
<i>Boral Roofing Springvale Enterprise Agreement 2014-2017.</i>	Double time and half	Double time and half
<i>CSR Roofing Springvale Operations Victoria Enterprise Agreement 2015</i>	Double time and half	“paid at the rates prescribed by clause 15- Wage rates, of this Agreement”
<i>Rocla Campbellfield Collective Agreement 2013-2016.</i>	Double time and half	Double time and half

15. Of these 17 agreements:

- 7 agreements provide for penalty provisions of double time and a half for working on a public holiday, to both continuous and non-continuous shift workers.
- 7 agreements provide for non-continuous shift workers to be paid in accordance with “rates prescribed by the agreement” or in terms similar to the current Concrete Products Award 2010, when working on a Public Holiday. Three of these agreements also provide for penalty provisions of double time for continuous shift workers for working on a public holiday
- 1 agreement provides for double time and a half for non-continuous shift workers only. It is unclear whether continuous shift workers in this agreement receive double time or double time and a half when working a public holiday.
- 2 Agreements do not provide penalty rates for work on a public holiday for shift workers. Penalty rates are only available where they work overtime.

16. The Agreements do not establish an industry standard providing penalty provisions of double time and a half for non-continuous shift workers working a public holiday. Where such a penalty payment is available, with one exception, it is in circumstances where all shift workers get the same entitlement.

17. If there is an industry standard, then the Agreements referred to above indicate that continuous and non-continuous shift workers receive the same entitlements in relation to public holidays.

18. The AWU’s reliance on non-continuous shift worker provisions in comparable industries is misplaced. The evidence does not indicate that the majority of agreements provide for higher provisions for non-continuous shift workers than continuous shift workers. In fact, it demonstrates that at best non-continuous

shift workers receive the same entitlements as continuous shift workers. Often, they are entitled to less.

19. The provision of double time penalty provisions for working on a public holiday will not cause non-continuous shift workers to “suffer inferior conditions”.<sup>2</sup> To adopt the AWU’s proposal, would result in increased costs to industry.

#### **4. CONCLUSION**

20. Ai Group submits that the more appropriate method of determining the appropriate safety net is to apply the penalty provisions applicable to continuous shift workers working on a public holiday, which in this case is double time.

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<sup>2</sup> Paragraph 28 of the AWU additional submission filed on the 22 March 2016.