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4 December 2015

Re: AM2014/72 AWU reply submissions on the Exposure Draft for the *Gas Industry Award 2015*

Background

1. These submissions follow the 4 Yearly Review of Modern Awards Full Bench's Decision on 23 October 2015 regarding Group 1C, 1D and 1E awards.

2. This Decision directed parties to file reply material on the revised Exposure Drafts by 4:00pm on 4 December 2015.

3. The Australian Workers' Union's reply submissions in relation to the Exposure Draft for the *Gas Industry Award 2015* (Exposure Draft) as republished on 30 October 2015 appear below.

Australian Industry Group (AIG)

4. Clause 6.5 (c): We agree this clause should be deleted. Entitlements for casual employees should be determined in accordance with the relevant provisions of the award or the NES.

5. Clause 9.1 (b), (c) and (d): The variation proposed by AIG may substantively reduce current entitlements for employees. Specifically, clause 22 of the current award arguably requires the relevant calculations to include shift and/or weekend penalty rates.

6. We suggest the term "applicable hourly rate" should instead be inserted consistent with the Full Bench's Decision on 23 October 2015 regarding the *Manufacturing and Associated Industries and Occupations Award 2010*.[1]

[1] *4 yearly review of modern awards* [2015] FWCFB 7236 at [103]

7. If this does not occur, there will be an incentive for employers to direct employees to continue or resume work during a meal break on Sundays and public holidays because they will be able to pay 150% of the minimum hourly rate instead of 200% of the minimum hourly rate on Sundays and 250% of the minimum hourly rate on public holidays. These are the applicable rates for ordinary hours as per clause 13.7 and 13.8 of the Exposure Draft.

8. Clause 13.8: At section 2.2 of their submissions AIG raise some general issues about how additional payments are characterised. For example, additional payments for shift work are variously described as a "loading", "penalty" or an "allowance". AIG have raised concerns that changing the terminology used could impact upon whether the extra amounts are included or excluded from long service leave payments and/or workers' compensation payments.

9. We have not encountered any practical problems regarding these issues. We suspect that common sense would prevail and the various forms of legislation would be interpreted in a manner that gives effect to their intended application. For example, AIG have identified that the *Workers Compensation Act 1987* (NSW) refers to pre-injury average weekly earnings including "overtime and shift allowance payments".

10. We submit that the term "shift allowance payments" in the *Workers Compensation Act 1987* (NSW) is clearly intended to capture additional payments made to shift workers and the entitlement is not intended to be activated or deactivated according to whether an award happens to characterise the payment as a "loading", "penalty" or allowance".

11. We also note the importance of interpreting legislation in a manner that allows it to achieve its purpose as opposed to in an overly pedantic manner was highlighted by the High Court again this week.[2]

12. However, we do consider there is merit in using consistent terminology throughout an award. For example, using the term "loading", "penalty" or "allowance" throughout the award to describe additional payments to shift workers.

13. Clause 14.5 (a) (i) and (ii): As mentioned above, we do consider there is merit in referring to a category of additional payment consistently throughout the award – that is, as an "allowance", "loading" or "penalty".

[2] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45

14. Clause 14.6 (a): It does appear this amendment would be consistent with the Full Bench decision to delete NES summaries.

15. Clause 19.2: We agree this typo should be corrected.

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16. Clause 6.5 (c): We have agreed above that this provision should be deleted.

17. Clause 9.1 (b), (c) and (d): We have dealt with this issue above, the reference should be to the "applicable rate of pay" as defined by the Full Bench for the *Manufacturing and Associated Industries and Occupations Award 2010*.

18. Clause 14.6 (a), 19.2 and Schedule G: We are not opposed to these amendments.

Stephen Crawford
SENIOR NATIONAL LEGAL OFFICER