

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Manufacturing and Associated
Industries and Occupations Award 2010
(AM2014/75) &
Food, Beverage and Tobacco
Manufacturing Industry Award 2010
(AM2014/268)

17 AUGUST 2018

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

THE MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2010 AND THE FOOD, BEVERAGE AND TOBACCO MANUFACTURING INDUSTRY AWARD 2010

1. On 7 August 2018, the Fair Work Commission (**Commission**) issued a decision¹ (**Decision**) concerning various group 4 awards including the *Food, Beverage and Tobacco Manufacturing Industry Award 2010* (**FBT Award**).
2. This submission is filed in relation to the Decision. It also addresses a related issue arising from the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**).

FBT Award: The Applicable Rate of Pay – meal breaks

3. At paragraphs [220] – [235] of the Decision, the Commission dealt with Ai Group’s submissions regarding the use of the term ‘applicable rate of pay’ in the exposure draft for the FBT Award (**FBT Exposure Draft**).
4. We have identified a concern arising from the proposed variation to clause 13.1(b) of the FBT Exposure Draft.²
5. The table below sets out the relevant clauses:

¹ 4 yearly review of modern awards—Award stage—Group 4 awards [2018] FWCFB 4175.

² 4 yearly review of modern awards—Award stage—Group 4 awards [2018] FWCFB 4175 at [225].

	FBT Award	Proposed Amendment to FBT Exposure Draft
Clause	<p>32.1 An employee must not be required to work for more than five hours without a break for a meal except in the following circumstances:</p> <p>...</p> <p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, <u>an employee or employees may be required to work in excess of five hours but not more than six hours at the ordinary time rate without a meal break.</u></p>	<p>13.1 An employee must not be required to work for more than five hours without an unpaid meal break of a minimum of 20 minutes except in the following circumstances:</p> <p>...</p> <p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours at the applicable rate of pay without a meal break. <u>Employees will be paid for the fifth hour at the rate applying immediately prior to the end of the fourth hour.</u></p>

6. The current clause 32.1(b) provides for circumstances in which an employee may be required to work for more than five hours but less than six hours without a meal break. For the time worked during the fifth hour, the employee is to be paid at the 'ordinary time rate'. The issue raised by the Commission in the context of the redrafting of this clause was the specific amounts that are included in the 'ordinary time rate'.
7. We are concerned that the proposed variation may be read to require payment at the prescribed rate for the *entire fifth hour*, including during the break. This is because the clause expressly requires that "employees will be paid *for the fifth hour* at the rate applying immediately prior to the end of the fourth hour" (our emphasis). The clause does not make clear that payment is not required in respect of a meal break during the fifth hour and, to that extent, it potentially alters the substantive meaning of the current clause.

8. For example, an employee may be required to work 5 hours and 30 minutes without a meal break, with a meal break commencing thereafter. Under the current clause, for the fifth hour the employee:
- Would be entitled to payment for the first 30 minutes after the end of the fourth hour; and
 - Would not be entitled to payment for the meal break.
9. If the clause in the FBT Exposure Draft was amended as proposed, however, it may be read to require payment throughout the fifth hour, including the meal break.
10. For the purposes of ensuring that the clause is not substantively altered in this way, we propose that clause 13.1(b) of the FBT Exposure Draft should be varied as follows:
- (b)** by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours ~~at the applicable rate of pay~~ without a meal break, at the rate of pay applying to the employee immediately prior to the end of the fourth hour of work.

Manufacturing Award: The Applicable Rate of Pay – meal breaks

11. We acknowledge and appreciate that the variation proposed to clause 13.1(b) of the FBT Exposure Draft in the Decision is in the same terms that was proposed by Ai Group in its submission of 19 April 2018. That submission adopted the variation determined by the Commission in relation to the exposure draft of the Manufacturing Award (**Manufacturing Exposure Draft**).

12. The issue is summarised in the table below:

	Manufacturing Award, current clause 38.1(b)	Parties' <u>proposed amendment</u> to the Manufacturing Exposure Draft	Amendment <u>Determined</u> by the Commission³
Clause	<p>38.1 An employee must not be required to work for more than five hours without a break for a meal except in the following circumstances:</p> <p>...</p> <p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees <u>may be required to work in excess of five hours but not more than six hours at the ordinary time rate without a meal break.</u></p>	<p>14.1 An employee must not be required to work for more than five hours without an unpaid meal break of a minimum of 20 minutes except in the following circumstances:</p> <p>...</p> <p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours without a meal break, <u>at the rate of pay applying to the employee immediately prior to the end of the fifth hour of work.</u></p>	<p>14.1 An employee must not be required to work for more than five hours without an unpaid meal break of a minimum of 20 minutes except in the following circumstances:</p> <p>...</p> <p>(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours without a meal break. <u>Employees will be paid for the sixth hour at the rate applying immediately prior to the end of the fifth hour.</u></p>

13. As can be seen, the Commission decided to amend clause 14.1(b) of the Manufacturing Exposure Draft in a manner that was different to the proposal put by the parties. In so doing, however, we are concerned that the substantive meaning of the clause was changed, as explained above in relation to the FBT Exposure Draft. We proceed on the assumption that the change was unintended, on the basis that the relevant decision did not evince any intention to deviate from the substance of the parties' proposal. Instead, the decision expressly stated that the Full Bench accepted the parties' proposals.⁴

14. We also note that both the parties' proposal and the Commission's decision erroneously propose amending clause 14.1(b) to require payment at the rate applying immediately prior to the end of the *fifth* hour. Logically, this should

³ 4 yearly review of modern awards – Award stage – Group 1 [2017] FWCFB 3177 at [44].

⁴ 4 yearly review of modern awards – Award stage – Group 1 [2017] FWCFB 3177 at [44].

instead be a requirement to pay the employee at the rate applying immediately prior to the end of the *fourth* hour (i.e. the rate that was payable to the employee immediately prior to the commencement of the fifth hour). We note that the Commission has, of its own motion, addressed this issue in respect of clause 13.1(b) of the FBT Exposure Draft.

15. Accordingly, we respectfully submit that clause 14.1(b) of the Manufacturing Exposure Draft should be amended as follows:

(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours without a meal break. ~~Employees will be paid for the sixth hour~~ at the rate applying immediately prior to the end of the ~~fifth~~ fourth hour.