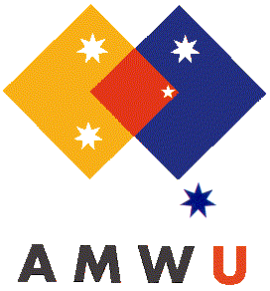

s.156 Review of Modern Awards

AM2014/75

Exposure Draft of 4 November 2015 Submission

COVER SHEET

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INTRODUCTION

1. The Commission's decision of 23 October, 2015[1] (the Decision) determined various issues regarding the exposure drafts in Group 1C-1E awards. The Manufacturing and Associated Industries and Occupations Award 2010 (the Manufacturing Award) is in Group 1C. The Decision requested feedback from parties regarding revised exposure drafts by 20 November, 2015. The revised exposure draft for the Manufacturing Industry Award was published on 4 November, 2015.

2. The AMWU identifies the following issues regarding the exposure draft.

4.5 Award Flexibility- Time and Wage Record

3. The award flexibility clause is the first instance where the term "time and wages record" appears in the Award. On a slightly pedantic note the Act no longer refers to a "time and wages record", instead referring to employee records and specifically "records pay" at regulation 3.33. There is now a note included in all modern awards referring parties to the regulation for "pay records" (eg refer to Note following Clause 24.6(c) of the ED).

4. The ED contains 8 references[2] to "time and wage record" and we propose those references be replaced with "pay record".

5.3 Facilitation by majority or individual agreement

5. The reference in Clause 5.3(a) to clause "14.1(a)" should be replaced by reference to "14.1(b)".

5.4 Facilitation by majority agreement

[1] [2015] FWCFB 7236
[2] See Clauses 4.5, 5.2(b), 5.3(b)(ii), 5.3(c), 5.4(b), 6.5(f0(iv), 16.1(g)(ii) and D.5.2

6. Two sub-clause references in clause "5.4 Facilitation by majority agreement" require amendment due to the inclusion of additional clauses within the hours of work provisions. The references in Clause 5.4(a) to Clause "13.3(b)" and "13.4(a)" should be amended to read respectively "13.3(d)" and "13.4(c)".

6.3(i)(ii) Part time employment- public holidays(refer paragraph 19 below)

6.4 Casual Employment: calculation of casual loading

7. The Decision reviewed the calculation of causal loading in the context of the Hydrocarbons Industry (Upstream Award) 2010. In doing so the Commission cited its determination in the September 2015[3] decision that:

> "the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain <u>any</u> all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain and such allowances"[4] (emphasis added)

8. The Manufacturing Industry Award contains all purpose allowances (refer 27.1 of the exposure draft (ED)). Clause 6.4(b)(i), dot point 2 is still expressed as "25% of the minimum hourly rate" where it should refer to a casual employee's "ordinary hourly rate" as per the September decision.. We propose that the ED be varied as follows below (new text is identified by underlining). An amendment to the definition of "casual ordinary hourly rate" at Schedule H is also required and will be addressed later in this submission.

(b) Casual loading

(i) For working ordinary time, a casual employee must be paid:

[3] [2015]FWCFB6656
[4] Ibid, paragraph 110 cited in [2015] FWCFB @ 58

• the ~~minimum~~ casual ordinary hourly rate as ~~specified~~ defined in ~~clause 16.1~~ Schedule H- definitions, for the appropriate classification ~~work being performed; plus~~ inclusive of;

• a loading of 25% of the ~~minimum~~ casual ordinary hourly wage.

(ii) The casual loading constitutes part of the casual employee's all purpose rate.

13.1 Hours of Work

9. The decision inserted new provision, 13.1(b). The AMWU submits that the new clause should be varied as indicated below by the additional text below to comprehend that the provisions at Clause 13.3(d) and 13.4(c) fall within the facilitative arrangements at Clause 5.4 in addition to the facilitative provisions falling within5.3, for example, Clause 13.3(d) ordinary Hours of Work, continuous shiftwork:

"(b) Facilitative provisions in clauses 13.2 to 13.5 operate in conjunction with clauses 5.3 and 5.4".

13.5 Methods of arranging ordinary working hours

10. The Decision reviews the relationship between the additional obligation on employers to consult an employee in circumstances where the employer proposes to change the employee's regular roster or ordinary working hours[5]. The Decision confirms that an employer's right to change an employee's regular roster or ordinary working hours is subject to consultation requirements. Consultation requirement re hours of work are contained at Clause 40.2 of the ED.

[5] Ibid @ paragraphs 17-18 and 334-344

11. Accordingly the ED requires updating to ensure the additional requirement is clear and simple for employers and employees to understand. We propose the ED be varied as follows:

> **13.2(d)** The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer, in accordance with Clause 40.2, between 6.00 am and 6.00 pm. …..(clause continues)
>
> **13.3(b)**Subject to clause 13.3(d) , the ordinary hours of continuous shiftworkers are, at the discretion of the employer, in accordance with Clause 40.2, to average 38 hours per week inclusive of meal breaks and must not exceed 152 hours in 28 consecutive days…….. (clause continues)
>
> **13.5(a)** Subject to the employer's right in accordance with Clause 40.2 to fix the daily hours of work for day workers from time to time within the spread of hours referred to in clause 13.2(d) and the employer's right in accordance with Clause 40.2 to fix the commencing and finishing time of shifts from time to time, the arrangement of ordinary working hours must be by agreement between the employer and the majority of employees in the enterprise or part of the enterprise concerned. This does not preclude the employer reaching agreement with individual employees about how their working hours are to be arranged.

12. The requirement to consult is also a necessary inclusion in the definition of "rostered shift" at clause 29.2(a) Definitions as follows:

> "Rostered shift means any shift of which the employee concerned, in accordance with clause 40.2 has had at least 48 hours' notice."

13. The amendments are required as the existing expressions in the ED are not clear that an employer's rights, from "time to time", to fix daily hours for day workers, commencing and finishing times for shift workers and to change a shiftworker's rostered shift are tempered by the requirement to consult at Clause 40.2. Whilst Clause 40.2(d) does state that the

consultation provisions are to be read in conjunction with other award provisions concerning the scheduling of work and notice requirements it is not reasonable to assume, unless pointed to the consultation provisions, that an employer would realise their responsibility under Clause 40.2, when exercising their rights under Clauses 13 or 29.

14. It is noted that the consultation clause is a model clause and that the expression at clause 40.2(d) is found in all modern awards, including the Black Coal Mining Industry Award 2010 and the Wool, Storage, Sampling and Testing Award 2010 where the Decision confirmed that a pointer to the requirement to consult provisions would be embedded in the specific rostering provisions[6]. The AMWU's proposal is consistent with this approach and makes the Award easier to understand.

Applicable rate of pay

15. The Decision[7] proposes a new definition - "Applicable Rate of Pay" to overcome issues raised by the AMWU regarding the replacement of the current term "ordinary rate of pay" (or a version thereof) in various clauses, with the expression "ordinary hourly rate".[8]

16. The solution provided by the Commission, and the clauses identified for the inclusion of the new definition[9], overcomes issues previously raised. We propose however an amendment to the definition of "applicable rate of pay" as the term "plus" may be interpreted as a mathematical addition where in some cases the loading may require a multiplication effect. The amendment also makes clear that in addition to the all purpose allowances included within the definition of "ordinary hourly rate" the "applicable rate" includes relevant penalties, loadings, other allowances and special rates.:

> Applicable rate of pay means the ordinary hourly rate ~~plus~~ and relevant penalties, allowances, special rates and ~~relevant~~ loadings

[6] Refer to the Decision at paragraphs 18 and 344 respectively.
[7] The Decision @ paragraph 103
[8] Refer to AMWU submissions AM2014/75 29 October, 2015 paragraphs 50-60 and 21 April, 2015 paragraphs 49-52 and AM2014/64 and Ors 11 March, 2015 @ paragraphs 11-30 and Attachment A
[9] The Decision @ paragraph 105

30.1 Overtime

17. The Decision[10] dismissed the AI Group's claim regarding casual employees not being eligible for their casual loading on overtime. The highlighted box at the end of 30.1 of the ED is superfluous. There is no claim before the Full Bench in AM2014/197 in respect to the Manufacturing Industry Award to vary the entitlements of casual employees working overtime. We propose that the box be deleted.

18. There is however an AMWU application in AM2014/197 to remove the exclusion for casual employees at Clause 30.11(b) of the ED to the entitlement of a minimum rest period after overtime. It may be appropriate to include a "green box" to that effect at the end of Clause 30.11.

6.3(i)(ii) and 34.2 Payment for Public Holidays

19. There is an incorrect sub-clause reference at 6.3(i)(ii) and 34.2 as highlighted below:

> **6.3(i)(ii)** Where the part-time employee works on the public holiday, the part-time employee must be paid in accordance with clauses 0, 13.2(g) and 30.6.

20. There are also sub clauses regarding payment for public holidays missing from those included in the relevant payment for public holiday provisions. We submit that the amendments proposed below fix the issue:

> **6.3(i)(ii)** Where the part-time employee works on the public holiday, the part-time employee must be paid in accordance with clauses ~~0~~, 13.2(g), 29.1(b), 29.2(i) and 30.6.
>
> **34.2** Where an employee works on a public holiday they will be paid in accordance with clauses ~~0~~, 13.2(g), 29.1(b), 29.2(i) and 30.6

[10] The Decision @ paragraphs 87-88

34.6 Part-day public holidays

21. Further to the determination of the Commission[11] the reference to "2014" in 34.6 and in Schedule G should be deleted and replaced with "2015".

Schedule B- Summary of Wage Rates

22. The NOTE under the heading of Schedule B arises from a decision of the Commission at paragraph 63 of [2015] FWCFB 4658 regarding "ordinary hourly rates". The decision stated:

> [63]…… Contrary to Ai Group's submission 45 the schedules of hourly rates appended to most modern awards will be legally enforceable and a note will be inserted into the schedules stating that 'employers who meet their obligations under this schedule are meeting the obligations under the award'.(emphasis added)

23. The NOTE included in the exposure draft does not reflect the NOTE determined and alters the meaning entirely. The current exposure draft wording is misleading and would lead, for example, to an underpayment where an employee was entitled to an allowance contained in Schedule B.

24. The AMWU proposes that the amendment identified below reflects the intent of the Full Bench:

> NOTE: Employers who meet their obligations under this schedule are meeting the~~ir~~ obligations under the award.

[11] PR573679

B.1.1 Table

25. Consistent with the approach in Table B.1.2 the AMWU proposes that Clause reference numbers be included following the text identifying each specific clause. This may best be left until the end when all renumbering has occurred.

26. We also propose that the percentage identified for *"Work on shift not rostered non-continuous shift worker"* be varied by adding after *"150%"* the text " for the first 3 hours and 200% thereafter" to reflect the current entitlement at 29.2(f)(ii) of the ED.

27. We also suggest for consistency that the last item in the *table "non-continuous shiftworker- public holiday*" be deleted and relocated to underneath *" continuous shiftworker- public holiday*" in the table..

C.1.2 Wage related allowances special rates

28. Clause 27.3(x) of the ED provides an allowance of 125% of the applicable classification rate for employees required to work on second hand work. The provision is not included in the allowances and requires identification in Schedule C. The AMWU proposes that C.1.2 be varied to include the following below *"Boiler cleaning"* in C.1.2

Second Hand Work 27.3(x)	125% of the minimum wage applicable to the employee when engaged on such work

F.3 Coverage

29. The AMWU is still considering the NOTE at the end of F.3.3 and will advise the Commission as soon as practicable.

Schedule H- definitions

30. The AMWU proposes that the definition of "*casual ordinary hourly rate"* be amended to clarify how the rate is calculated. The first part of the amendment reflects the definition of "ordinary hourly rate" appearing later in Schedule H and we submit provides a simple and easy to understand definition ..

> **casual ordinary hourly rate** means the hourly rate for a casual employee for the employee's classification specified in clause 16—Minimum wages, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes, ~~inclusive of~~ multiplied by the casual loading. ~~Where an employee is entitled to an all purpose allowance, this allowance forms part of that employee's ordinary hourly rate~~.

Examples

31. The decision reaffirms that including examples can make an award simple to read and easier to understand and refers to examples[12] provided by the AMWU regarding the application of casual loadings and the payment of overtime[13]. The AMWU continues to press the inclusion of examples and will continue to discuss this issue with interested parties, including additional examples to ones already provided.

32. Parties are invited to contact the AMWU if they have an interest in discussing "examples".

END

[12] See Attachment B, AMWU submission 21 April 2015, https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201475-sub-AMWU-210415.pdf
[13] The Decision 92-94