

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION

Matter Number: AM2014/72 and others

Fair Work Act 2009

Part 2-3, Div 4 –s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – award stage – Exposure Drafts – Group 1C, 1D and 1E awards

REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) ON THE REVISED EXPOSURE DRAFT OF THE MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2015

4th December 2015

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1. Introduction

- 1.1 On 23rd October 2015, the Full Bench handed down their decision¹ (the October 2015 decision) on a number of issues relating to the exposure drafts of awards falling within sub-groups 1C, 1D and 1E of the Award stage of the 4 yearly review of modern awards (the Review). In the decision the Full Bench indicated that revised Exposure Drafts for each award in group 1C, 1D and 1E would be published on 30th October 2015, and parties were asked to provide feedback on the revised Exposure Drafts by 20th November 2015 and any reply material to be filed on 4th December 2015.²
- 1.2 The Manufacturing and Associated Industries and Occupations Award 2010 is one of the awards that is dealt with in the October 2015 decision. The CFMEU Construction and General Division (CFMEU C&G) has an interest in this award and a number of our members are covered by the award. It is on this basis that we file this reply submission.
- 1.3 Feedback, by way of submissions, on the revised Exposure Draft of the Manufacturing and Associated Industries and Occupations Award 2015 was filed by the following organisations:

Unions:

- AMWU³
- AWU⁴
- CEPU⁵

Employer Organisations:

- Australian Business Industrial and the NSW Business Chamber Ltd (ABI/NSWBC)⁶
- Australian Federation of Employers & Industries (AFEI)⁷
- Australian Industry Group (AIG)⁸
- Business SA⁹

It is these submissions to which this reply submission is directed.

2. Reply to Union Submissions on the Exposure Draft

- 2.1 The CFMEU C&G generally supports the submissions of the other unions. We have however identified one issue where we suggest further changes could be made to clarify the award provisions.
- 2.2 In the AWU submission of 24th November 2015, at paragraph 11, they suggest that the tables in schedule B.2.2 and B.2.3 should be expressed as a percentage of the ordinary

¹ [2015] FWCFB 7236

² Ibid at [357] and [358]

³ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475-sub-AMWU-201115.pdf>

⁴ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475-sub-awu-241115.pdf>

⁵ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475-sub-CEPU-201115.pdf>

⁶ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475-sub-abiandanor-201115.pdf>

⁷ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475andors-sub-afei-231115.pdf>

⁸ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475andOrs-sub-AIG-231115.pdf>

⁹ <https://www.fwc.gov.au/sites/awardsmodernfouryr/AM201475andors-BusSA.pdf>

hourly rate instead of the minimum hourly rate. We agree, as the amounts set out in the tables are the ordinary hourly rates for employees who are not entitled to be paid all purpose allowances. In the table in B.2.2 it should refer to “% of ordinary hourly rate” and in the table in B.3.2 it should refer to “% of casual ordinary hourly rate”.

2.3 We also suggest that changes need to be made to B.2.2, B.3.1 and B.3.2 so that they read as follows:

“B.2.2 The ordinary hourly rates in the table below do not contain any Clause 27.1 all purpose allowances. Where an employee is entitled to a Clause 27.1 all purpose allowance an employee’s ordinary hourly rate is calculated according to B.2.1.”

“B.3.1 The casual ordinary hourly rate includes the casual loading which is payable for all purposes. Where an allowance is payable for all purposes in accordance with clause 27.1, this forms part of an employee’s casual ordinary hourly rate and must be added to the applicable ordinary hourly rate in B.2 prior to the application of the 25% casual loading to form the employee’s casual ordinary hourly rate. The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime.

B.3.2 The rates in the table below do not contain any Clause 27.1 all purpose allowances. Where a casual employee is entitled to a Clause 27.1 all purpose allowance the employee’s casual ordinary hourly rate is calculated according to B.3.1.”

2.4 If the above changes are accepted then the headings for the 2nd column in B.1 should be changed to “% of ordinary hourly rate/casual ordinary hourly rate”.

2.5 We further submit that the wording in clause 6.4(b) should be changed to reflect that the casual employee is also entitled to any all purpose allowances contained in clause 27.1 and that the 25% loading is payable on the ordinary hourly rate (inclusive of any all purpose allowances from clause 27.1).

3. Reply to Employer Organisation Submissions on the Exposure Draft

3.1 The submission by Business SA only deals with what may be characterised as typographical or cross referencing issues. The CFMEU C&G does not take any issues with the changes that they propose.

3.2 The submissions of AFEI, ABI/NSWBC and AIG all raise a concern about, and indeed oppose, the inclusion of the term “*applicable rate of pay*” that is contained in the Exposure Draft. They claim that using the term “*applicable rate of pay*” in the clauses identified by the Full Bench¹⁰ will result in a “*materially higher rate of pay for employees than that which is provided under the current Manufacturing Award*”.¹¹

¹⁰ [2015] FWCFB 7236 at [105]

¹¹ ABI/NSWBC Submission at paragraph 2.4

3.3 We strongly disagree with the employer’s assertions that using the term “*applicable rate of pay*” will result in materially higher rates of pay and the exaggerated claims of AIG that “*the entitlements in the award would be subject to major disturbance at great cost to employers*”¹². We also take umbrage at the condescending attitude of the AIG reflected in their submission towards an employee’s leisure time or time away from work being of some lesser value¹³, and their gratuitous remarks regarding entitlements being arguably more generous because the Commission has included all purpose allowances in the definition of ‘ordinary hourly rate’¹⁴.

3.4 The existing Manufacturing and Associated Industries and Occupations Award 2010 has terms referring to ordinary time rates and extra rates, but does not define them. The Full Bench has recognised that for some workers the ordinary time rate, or the rate payable for ordinary hours of work, will include penalties or loadings.¹⁵ These workers would include for example shift workers and workers who receive penalties for working their ordinary hours on Saturdays and Sundays. The Full Bench has identified a number of clauses where replacing the term ordinary time rate with the new term ordinary hourly rate would have unintended consequences for these workers and potentially mean the employees receiving a lesser rate¹⁶. To address this issue the Full Bench has proposed introducing the new term “*applicable rate of pay*”, the intent of which is set out in paragraph [104] of the October 2015 decision,

“[104] This expression will be used in the relevant clauses to indicate that an employee should be paid for relevant periods in the specified clause at the rate they would otherwise have received for working ordinary hours at that time.”

3.5 If there is an issue as to whether or not the use of the term applicable rate of pay in a particular clause will meet the intent expressed in paragraph [104] then it should be within the capability of responsible parties to find workable solutions through a conference. This is the preferred course of action. Accordingly if the Full Bench sees the need to further consider this issue we suggest that the first step should be the convening of a conference to at least explore workable solutions and narrow the points of contention.

3.6 The only other issues raised by the employer organisations are those contained in the submission of the AIG. The AIG identifies a number of issues under the heading Issues of General Concern, which include:

- The characterisation of premiums payable pursuant to an award
- The manner in which the premium is expressed
- The ordinary hours of work and s.147 of the Act
- The application of penalties and loadings to the ordinary hourly rate
- The calculation of the casual loading
- The application of penalties and loadings to over-award payments
- Schedules summarising hourly rates of pay

¹² AIG at paragraph 150

¹³ Ibid at paragraphs 172, 183-185

¹⁴ Ibid at paragraphs 154, 170, 186, 190 and 194

¹⁵ [2015] FWCFB 7236 at paragraphs [97] and [98]

¹⁶ Ibid at [99] and [102]

- 3.7 In regard to the first three issues the AIG have not identified where the issues arise in the Exposure Draft of the Manufacturing and Associated Industries and Occupations Award 2015. Accordingly we do not intend responding to these issues other than to suggest that if they are to be addressed at all, it should be on an award by award basis.
- 3.8 In regard to the issues of the application of penalties and loadings to the ordinary hourly rate and the calculation of casual loadings, it would appear that what the AIG is really agitating for is to re-argue that casual loadings should only be applied to the minimum rate and not the all purpose rate. Clearly the horse has bolted on this issue as the Full Bench decided this issue in the September 2015 decision and the October 2015 decision¹⁷. The Full Bench has made it clear that the casual loading will only be applied to the minimum rate in those awards that do not contain any all purpose allowances. Where an award contains all purpose allowances the casual loading will be applied to the relevant ordinary hourly rate (which includes any all purpose allowances that are applicable). We submit that the blatant attempt by the AIG to re-agitate this issue is an abuse of process and should be rejected by the Full Bench.
- 3.9 In regard to the issue of the application of penalties and loadings to over-award payments, we submit that this issue has already been determined by the Full Bench, and therefore no further response is necessary.
- 3.10 In regard to the issue of the note in the Schedule containing the Summary of Wage Rates we do not oppose their suggested wording in paragraph 83 of their submission.
- 3.11 The AIG also identify a number of what they term drafting errors in the Exposure Draft. Subject to any final checking we do not take issue with them except for clause 6.4(b)(i) (see 2.5 above).
- 3.12 In regard to the remaining issues we would support the submissions of the AMWU and AWU.

¹⁷ [2015] FWCFB 7236 at [87] to [90]