

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards – Award Stage – Group 1 awards

Matter Number: AM2014/78
Meat Industry Award 2010

Outline of submissions of the Australasian Meat Industry Employees' Union

1. These submissions relate to the matters identified in relation to the modern Meat Industry Award 2010 [“the Award”], as summarised in the report to the Full Bench in relation to this matter, of 17 July 2014 [PR553284].

Issue 1: Amendment to Clause 36 – Overtime

2. The principal employer organisation in the industry, the Australian Meat Industry Council [AMIC], has proposed an amendment to Clause 36.
3. The proposal is to insert the words ‘on any day’ after the words ‘ordinary working hours’ in clause 36.1(a).
4. The intent of the proposed amendment is to clarify the manner in which overtime is to be calculated.
5. The AMIEU supports the amendment of clause 36.1(a) in accordance with AMIC’s proposal.

Issue 2: Amendment to Clause 24 – Payment by results

6. The AMIEU understands that AMIC has indicated it is not pursuing its proposed amendment to Clause 24.

Issue 3: Amendment to Clause 11 – Types of Employment

7. The AMIEU proposed amendment of clause 11.4 by including at the end of the clause a proviso in the following terms:

“Nothing in clause 11.4 authorises an employer to require an employee to transfer to casual employment.”

8. The AMIEU understands that AMIC and other employer organisations have no objection to the proposed amendment.

Issue 4: Amendment to Clause 40.2

9. The AMIEU has proposed an amendment to Clause 40.2 of the Meat Industry Award 2010, which provides for the payment for work performed on a public holiday.

10. Section 40.2 of the Meat Industry Award 2010 currently provides:

40.2 Payment for work on public holidays

Employees including casuals who work on:

- (a) Christmas Day and Anzac Day will be paid at double the ordinary hourly rate for all time worked;*
- (b) Good Friday will be paid for all time worked at the rate of time and a half for the first four hours and double time thereafter based on the ordinary hourly rate; and*
- (c) any other public holiday will be paid at time and a half for the first two hours and double time thereafter based on the ordinary hourly rate.*

For full-time employees, the above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate.

11. The AMIEU submits that the last sentence of clause 40.2 should be amended so that it reads:

“For all employees other than casuals, the above payments will be in addition to the ordinary weekly, daily, or hourly rate of pay as appropriate.”

12. In other words, the provision should be broadened to include not just full-time employees, but also part-time employees, daily hire employees, and part-time daily hire employees.

13. The AMIEU understands that the principal employer organisation in the industry, the Australian Meat Industry Council [AMIC], accept that Clause 40.2 is anomalous, and supports the inclusion of these categories of employee within the scope of Clause 40.2.

14. However, AMIC submits that the last sentence of Clause 40.2 should read as follows:

For all employees other than casuals, the above payments will be in addition to the daily rate for the hours worked as calculated by reference to ordinary hourly rate in clause 3.2(a).¹

15. The AMIEU is opposed to the above wording proposed by AMIC. The controversy between AMIEU and AMIC relates to what constitutes the ‘ordinary hourly rate’ for employees working in accordance with an incentive payment system, made under Clause 24 of the *Meat Industry Award 2010*. The AMIEU submits that the ordinary hourly rate for incentive workers, for the purpose of Clause 40.2 is not the ordinary rate of pay identified in clause 3.2(a); rather, the appropriate ‘ordinary’ rate of pay for incentive workers is that calculated with reference to clause 24.12 of the Award.

The Position Prior to Award Modernisation

16. Prior to the award modernisation process undertaken in 2008-2009, the meat industry in Australia was regulated by three federal awards. Each award regulated a separate sector of the industry. Those three awards were the *Federal Meat Industry (Processing) Award 2000*, the *Federal Meat Industry (Smallgoods) Award 2000*, and the *Federal Meat Industry (Retail and Wholesale) Award 2000*.

17. These three awards were created following lengthy proceedings before the Australian Industrial Relations Commission which applied the award simplification principles to the earlier, Federal Meat Industry Award 1996. The decision of the Australian Industrial Relations Commission separated the single industry award into the three sector awards: *Federal Meat Industry Decision (1999) 91 IR 414*

¹ See <http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM201478-sub-AMIC-090714.pdf>

18. Section 31.5 of the (Pre-reform) *Federal Meat Industry (Processing) Award* [AP781451] (“the Processing Award”) provided for payment for work on public holidays:

31.5 Payment for work on public holidays

31.5.1 *Employees including casuals who work on:*

31.5.1(a) *Christmas Day, Anzac Day and Union Picnic Day will be paid at double the ordinary hourly rate for all time worked;*

31.5.1(b) *Good Friday will be paid for all time worked at the rate of time and a half for the first four hours and double time thereafter based on the ordinary hourly rate; and,*

31.5.1(c) *any other public holiday will be paid at time and a half for the first two hours and double time thereafter based on the ordinary hourly rate.*

31.5.2 *The above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate.*

31.5.3 *Notwithstanding any other provision of this clause, when an employee agrees to work on a public holiday which is part of their ordinary working week, they will be paid at the rate prescribed by this clause for the particular holiday, or by agreement between the employee and employer they may be paid the appropriate ordinary rate and given equivalent ordinary time off in lieu within 28 days of the holiday occurring unless other arrangements are agreed to.*

31.5.4 *Where an employee is absent from employment on their working day (or part thereof) before or after a public holiday without reasonable excuse, or without the consent of the employer, the employee will not be entitled to payment for such holiday, provided that an employee will not lose payment for more than one holiday where consecutive public holidays occur.*

31.5.5 *If any employee other than a casual employee is dismissed within fourteen days before any of the holidays and is re-engaged within fourteen days after any of the holidays, the employee will be deemed to have been dismissed for the purpose of evading payment for such holiday and any payment so evaded will be due and payable to the employee.*

31.5.6 *Employees who ordinarily receive rostered days off shall not be required to take such rostered days off on a day which is to be observed as a public holiday.*

19. The equivalent provision of the (Pre-reform) *Federal Meat Industry (Retail and Wholesale) Award 2000* [AP805114] (“the Retail and Wholesale Award”) provided as follows:

32.3 *Payment for work on public holidays*

31.3.1 *Employees including casuals who work on:*

31.3.1(a) *Christmas Day or Anzac Day will be paid at double the ordinary hourly rate for all time worked;*

31.3.1(b) *Good Friday will be paid for all time worked at the rate of time and a half for the first four hours and double time thereafter based on the ordinary hourly rate; and*

31.3.1(c) *any other public holiday will be paid at time and a half for the first two hours and double time thereafter based on the ordinary hourly rate.*

32.3.2 *For full-time and part-time employees, the above payments will be in addition to the ordinary weekly or hourly rate of pay.*

32.3.3 *Notwithstanding any other provision of this clause, when an employee agrees to work on a public holiday which is part of their ordinary working week, they will be paid at the rate prescribed by this clause for the particular holiday or by agreement between the employee and employer they may be paid the ordinary daily rate and given a paid day off in lieu within 28 days of the holiday occurring unless other arrangements are agreed to.*

32.3.4 *Where an employee is absent from employment on the working day (or part thereof) before or after (or part thereof), a public holiday without reasonable excuse or without the consent of the employer, the employee will not be entitled to payment for such holiday, provided that an employee will not lose payment for more than one holiday where consecutive public holidays occur.*

32.3.5 *If any employee other than a casual employee is dismissed within fourteen days before any of the holidays and is re-engaged within fourteen days after any of the holidays, the employee will be deemed to have been dismissed for the purpose of evading payment for such holiday and any payment so evaded will be due and payable to the employee.*

32.3.6 *Employees who would not attend work on the public holiday because of their hours of work arrangement will not be required to take a day off on a day which is to be observed as a public holiday.*

20. In the (Pre-reform) *Federal Meat Industry (Smallgoods) Award 2000* [AP805128]

(“the Smallgoods Award”), clause 31.3 provided:

31.3 *Payment for work on public holidays*

31.3.1 *Employees including casuals who work on:*

31.3.1(a) *Christmas Day or Anzac Day will be paid at double the ordinary hourly rate for all time worked;*

31.3.1(b) *Good Friday will be paid for all time worked at the rate of time and a half for the first four hours and double time thereafter based on the ordinary hourly rate; and*

31.3.1(c) *any other public holiday will be paid at time and a half for the first two hours and double time thereafter based on the ordinary hourly rate.*

31.3.2 *For full-time and part-time employees, the above payments will be in addition to the ordinary weekly rate of pay.*

31.3.3 *Notwithstanding any other provision of this clause, when an employee agrees to work on a public holiday which is part of their ordinary working week, they will be paid at the rate prescribed by this clause for the particular holiday or by agreement between the employee and employer they may be paid the ordinary daily rate and given a paid day off in lieu within 28 days of the holiday occurring unless other arrangements are agreed to.*

31.3.4 *Where an employee is absent from employment on the working day (or part thereof) before or after (or part thereof), a public holiday without reasonable excuse or without the consent of the employer, the employee will not be entitled to payment for such holiday, provided that an employee will not lose payment for more than one holiday where consecutive public holidays occur.*

31.3.5 *If any employee other than a casual employee is dismissed within fourteen days before any of the holidays and is re-engaged within fourteen days after any of the holidays, the employee will be deemed to have been dismissed for the purpose of evading payment for such holiday and any payment so evaded will be due and payable to the employee.*

31.3.6 *Employees who would not attend work on the public holiday because of their hours of work arrangement will not be required to take a day off on a day which is to be observed as a public holiday.*

21. All three awards, therefore, provided for circumstances in which payment for work

performed on a public holiday to be paid in addition to the “ordinary” pay for the public holiday itself.

22. Under the pre-reform Processing Award, all categories of employees would receive the additional ‘ordinary’ pay. This included daily hire, part-time daily hire, full-time, part-time, and casual employees.
23. Under the pre-reform Retail and Wholesale Award, full-time and part-time employees would receive the additional ‘ordinary’ pay, but casual employees would not. The employment categories of daily hire employment and part-time daily hire employment did not exist under the Retail and Wholesale Award.
24. Under the pre-reform Smallgoods Award, full-time and part-time employees would receive the additional ‘ordinary’ pay, but casual employees would not. The employment categories of daily hire employment and part-time daily hire employment did not exist under the Smallgoods Award.

The Award Modernisation Process

25. The award modernisation process saw the three existing federal awards that regulated the industry recombined into a single modern award.
26. During the award modernisation process, the AMIEU submitted for a position that all employees who worked on a public holiday should receive, in addition to payment for time worked on the public holiday, their ‘ordinary’ pay for the day. The AMIEU essentially submitted that the modern award should adopt the position represented by the Processing Award.²
27. The principal employer organisation, AMIC, submitted that the proviso [to the current clause 40.2] should read:

² See the AMIEU’s Parties Draft Award at http://www.airc.gov.au/awardmod/databases/meat/Draft/AMIEU_meat_draft.pdf . The AMIEU proposed that the proviso should read, “*The above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate,*” replicating the language of the Processing Award.

For full-time and part-time employees, the above payments will be in addition to the ordinary weekly or hourly rate of pay.³

28. The AMIC submission replicated the language of the Retail and Wholesale Award.
29. When the Full Bench of the Australian Industrial Relations Commission published the exposure drafts of Stage 3 Awards (which included the meat industry), in [2009] AIRCFB 450, it observed the following:

[131] We now publish an exposure draft of a Meat Industry Award 2010.

[132] This industry has been the subject of a number of inquiries and Full Bench decisions. Significant reform has already taken place and, as such, the three underpinning pre-reform awards covering different sections of the industry are mostly up-to-date.

[133] There is a high level of agreement on the terms of a modern award. With the exception of one matter, the draft combines the three pre-reform awards and follows the decision of the Full Bench and proceedings under its supervision. Where there has been a difference between those most involved in the industry we have preferred to follow the Full Bench decisions and the terms of the existing pre-reform awards. The exception to this is in relation to the salesperson in a retail butchers shop. In light of the rates fixed in the General Retail Industry Award 2010, we have raised the minimum rate for a salesperson to a level closer to the entry rate for a retail employee but maintained internal relativities.

[134] The award contains provisions for incentive payments. The ascertainment of the payments to be made to employees on incentive payments during annual leave is a matter that needs to be addressed in the context of piecework and payment by results provisions generally. We note that in this award employees on incentive schemes are entitled to a minimum weekly payment based on the relevant minimum wage plus a loading. We referred to this matter in the introduction to this statement.

30. There was no detailed explanation as to why particular wording was adopted, but the AMIEU submits that the above comments give some indication of the approach taken by the Full Bench toward the modernisation of the meat industry awards.

³ From the amended AMIC Parties' Draft Award dated 31 March 2009, at http://www.airc.gov.au/awardmod/databases/meat/Draft/AMIC_amend_meat_draft.pdf

31. The actual wording of the proviso (i.e. to the clause regulating payment for work on public holidays) incorporated into the Meat Industry Award 2010 was in the following terms:

For full-time employees, the above payments will be in addition to the ordinary weekly, daily or hourly rate of pay as appropriate.

32. The clause, as written, identifies only full-time employees as receiving the additional 'ordinary' pay for the public holiday.

33. In relation to that clause, the AMIEU notes that:

- (a) the language of the clause is narrower in scope than that submitted by the AMIC in its submissions and draft award, in that the wording of the AMIC provision extended to part-time employees;
- (b) the language of the clause refers only to full-time employees, but when identifying the ordinary rate of pay, it adopts the language of the Processing Award, when it refers to "...the ordinary weekly, daily or hourly rate of pay as appropriate."
- (c) the decision of the Full Bench did not identify any intention to remove or reduce conditions of employees working in the meat processing industry, and such an intention would seem inconsistent with the brief observations of the Full Bench [recorded in paragraph (29), above].

34. The AMIEU submits that the above support a conclusion that the omission of references to daily hire, part-time daily hire, and part-time employment was an error or anomaly, and that it is appropriate for it to be corrected as part of the 2014 four-yearly review of modern awards.

35. The AMIEU notes that while the Processing Award made provision for casual employees to receive their 'ordinary' pay for the public holiday in addition to remuneration for time worked on the public holiday itself, it was the one of the pre-reform federal awards to do so. Neither the Retail or Wholesale Award, nor the

Smallgoods Award, made provision for casual employees to receive this additional payment. The AMIEU accepts that there is no basis for arguing that the omission of casual employees from the last sentence of Clause 40.2 was an error or anomaly, rather than a determination of the Commission to apply the threshold found in the Retail and Wholesale Award and the Smallgoods Award.

36. The AMIEU understands that AMIC agrees that the omission of daily hire, part-time daily hire, and part-time employment was an anomaly, and supports amendment of the final sentence of the current clause 40.2

37. However, AMIC submits that additional words should be incorporated into clause 40.2 which would specify the ordinary rate of pay for this clause to be the rate specified in clause 3.2(a) of the Award. Clause 3.2(a) provides a definition of ordinary hourly rate of pay for all purposes of the award, “*except where otherwise expressly provided.*”

3.2 Ordinary hourly rate for overtime and other purposes

For all purposes of the award, except where otherwise expressly provided:

*(a) ordinary hourly rate means the award rate of pay per week prescribed in clause **Error! Reference source not found.** for the classification of the employee, divided by 38;*

(b) time and a quarter means the ordinary hourly rate increased by 25%;

(c) time and a half means the ordinary hourly rate increased by 50%; and

(d) double time means the ordinary hourly rate increased by 100%.

38. The AMIEU submits that, in respect of employees working in accordance with an incentive system, the award expressly provides for an ‘ordinary’ rate of pay which is different to that identified in clause 3.2(a).

39. In the meat processing sector, employees may work to the terms of incentive arrangements which are made under Clause 24 of the Meat Industry Award, “*Payment by results.*”

40. For incentive workers, 'ordinary' rates of pay for various purposes, including public holidays, are specified in clause 24.12 of the Award. Clause 24.12 provides as follows:

24.12 All payments made to employees working under an incentive payment system for work performed during ordinary hours must be treated as the ordinary time rate for the purpose of calculating payment for annual leave, sick leave, public holidays and other paid leave under the award. The weekly rate of pay for such purposes will be calculated by dividing all payment for work performed in ordinary hours over the 12 months' preceding the taking of leave, by the number of weeks during which any such work was performed. The daily rate of pay will be the appropriate pro rata percentage of the weekly rate.

41. Clause 24 of the modern award closely replicates the provisions of Clause 16 of the pre-reform Processing Award (with some minor numbering differences and references to the NES inserted). Clause 24.12 of the modern Award is identical to Clause 16.12 of the pre-reform Processing Award.

42. Clause 16.12 of the pre-reform Processing Award was in the following terms:

16.12 All payments made to employees working under an incentive payment system for work performed during ordinary hours shall be treated as the ordinary time rate for the purpose of calculating payment for annual leave, sick leave, public holidays and other paid leave under the award. The weekly rate of pay for such purposes shall be calculated by dividing all payments for work performed in ordinary hours over the twelve months preceding the taking of leave, by the number of weeks during which any such work was performed. The daily rate of pay shall be the appropriate pro rata percentage of the weekly rate.

43. It is clear from the structure and language of the pre-reform Processing Award that Clause 16.12 of the Processing Award is not limited to defining the 'ordinary' rate of pay for a public holiday that is actually taken. Such a conclusion is supported by reading the provisions of Clause 16 in conjunction with Clause 31, relating to payment for work on public holidays. In the pre-reform Processing Award, clauses 31.2 and 31.3 made provision for the circumstances in which part-time employees (31.2) and daily hire and part-time daily hire employees (31.3) received an entitlement to payment for a public holiday:

31.2 Part-time employees

Where a part-time employee's normal ordinary hours fall on a public holiday prescribed herein and the employer does not require the employee to perform work on that day, the employee shall not lose ordinary pay for the day. Where the employee works on the holiday, such employee shall be paid in accordance with 31.5.1, 31.5.2 or 16.12, as is appropriate.

31.3 Daily hire and part-time daily hire employees

A daily hire and a part-time daily hire employee shall be paid for a public holiday provided the employee has been required to attend and offer for employment and does not fail to accept work, if offered, without reasonable excuse on their working day before or their working day after the award holiday or, in the case of consecutive public holidays, on the nearest of such working day. Where the employee works on the holiday, such employee shall be paid in accordance with 31.5.1, 31.5.2 or 16.12, as is appropriate.

44. Each of the above provisions references clause 16.12 in relation to the calculation to be made in ascertaining how an employee is to be paid for working on the holiday. The words “as is appropriate” in the last sentence of the clause necessarily refers to whether the employee in question is a timeworker or an incentive worker.
45. Clauses 31.2 and 31.3 relate only to part-time and daily hire (and part-time daily hire) employees. These clauses were included to identify the circumstances in which such employees had an entitlement to a public holiday. Employees referred to in clauses 31.2 and 31.3 could be either time workers or incentive workers, and the clauses clearly indicate the intention that, where an incentive employee is required to work on a public holiday, their ordinary pay for such purpose would be calculated with reference to the averaging provisions of clause 16.12. Clauses 31.2 and 31.3 were omitted from the modern Meat Industry Award because they had been effectively superseded by the National Employment Standards.
46. The decision of the Full Bench in making the modern Meat Industry Award should not be interpreted as reducing the entitlement incentive system employees. For that reason, the AMIEU submits that its proposed amendment to Clause 40.2 should be preferred to that proposed by AMIC.

Issue 5: Distinction between Daily Hire and Weekly Hire Employment

47. The AMIEU confirms that it is not pursuing this matter.

Issue 6: Amendment to Clause 33 - Shiftwork

48. The AMIEU has proposed an amendment to Clause 33.9(e) of the Award.

49. Clause 33.9(3) of the Award currently provides:

In establishments other than meat processing establishments a shiftworker who works on an afternoon or night shift which does not continue for a least five successive afternoon or night shifts must be paid for each shift 50% for the first three hours and 100% for the remaining hours in addition to their ordinary rate.

50. The AMIEU proposes that the above clause be amended by deletion of the words, “*In establishments other than meat processing establishments...*,” thereby extending the application of the clause to the meat processing sector.

51. A clause in equivalent terms to 33.9(e) was contained in the *Federal Meat Industry Award 1996* [clause 33.5.4 of the 1996 Award]. That clause was of general application, and therefore applied to meat processing establishments.

52. In the course of the award simplification process, the *Federal Meat Industry Award 1996* was dividing into three separate awards, with each award applying to a separate sector of the industry. The Federal Meat Industry (Processing) Award 2000 did not retain a clause equivalent to clause 33.5.4 of the 1996 Award. However, both the Federal Meat Industry (Smallgoods) Award 2000 and the Federal Meat Industry (Retail and Wholesale) Award 2000, contained such a term. The AMIEU is unsure why the term was omitted from the Processing Award, but is not aware of any logical reason for its omission, other than inadvertence.

53. When the pre-reform awards underwent modernisation, the Meat Industry Award 2010 replicated the situation in the pre-reform Awards. That is, the modern Award applied the provision only to meat industry establishments other than processing

establishments. The AMIEU acknowledges that it did not raise the issue during the modernisation process.

54. The AMIEU submits that an analysis of clause 33.9(e) supports a conclusion that its purpose is to prevent the safety net entitlements of the award from being undermined by the manipulation of shiftwork provisions. That is, the Award contains provisions which provide for various penalty rates to be applied work performed outside the spread of ordinary hours, work performed in ordinary hours on Saturday and Sunday, and the like. The purpose of a clause such as 33.9(e) is to ensure that shiftwork provisions are used for genuine shift arrangements, and not used as a means of avoiding other award obligations that might impose a higher financial tariff than shift allowances.

55. In making the Meat Industry Award 2010, the Commission was presumably satisfied the inclusion of such a term was necessary to meet the modern awards objective of providing for a fair and relevant safety net, in relation to meat industry establishments other than processing establishments.

56. The AMIEU submits that there is no sensible basis for distinguishing between processing and non-processing establishments in this matter, and no reason in principle why employees in processing establishments should be deprived of the protection afforded by clause 33.9(3).

57. Accordingly, the AMIEU submits that the Commission should delete the words excluding the application of the clause to processing establishments.

Issue 7: AAO Meat Inspectors and Award coverage

58. The AMIEU notes that it agrees with the submission of AMIC that this matter cannot be dealt with until the arrangements that the industry ultimately makes in respect of AAO meat inspectors are clarified. These arrangements are currently changing, and there is some uncertainty as to the model(s) that might be adopted by the industry. If, for instance, employers revert to the use of government employed inspectors, this may obviate the need to pursue the issue. Implementation of other models which see meat

inspectors employed by employers independent of the meat processing establishments may require an examination of the appropriateness of award coverage.

Submissions for the AMIEU

Craig Buckley
National Industrial Officer
Australasian Meat Industry Employee's Union
12 November 2014