Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –

Fast Food Industry Award 2010

(AM2016/15)

26 February 2021

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING

– FAST FOOD INDUSTRY AWARD 2010

1. The Australian Industry Group (**Ai Group**) files this further submission in relation to the exposure draft (**Exposure Draft**) of the *Fast Food Industry Award 2010* (**Award**), which was published by the Fair Work Commission (**Commission**) on 21 January 2021, as foreshadowed during proceedings before the Commission on 12 February 2021. The references to 'items' relates to the summary of submissions published by the Commission on 21 January 2021.

Item 20 – Clause 12.2 of the Exposure Draft

2. This submission responds to the SDA's submission of 9 December 2020 at paragraphs 8 – 12.

3. Under the Award, it is clear that the classification level of an employee is determined by reference to the principal functions of the employment, as determined by the employer. That is, an employee's classification level is to be determined according to the skill level that an employee is required to exercise, in order to carry out the principal functions of their employment; those principal functions having been determined by their employer.

4. Clause 12.2 of the Exposure Draft amounts to a substantive change, as is expressly acknowledged by the SDA in its submissions. The union, however, supports the change.

5. Clause 16.2 of the Award has existed in its current form for many years. The SDA has had every opportunity to seek a substantive change to the clause, had it identified that the provision was in fact resulting in unfair or inappropriate outcomes. They have no done so, nor led any material in these proceedings that might support such a variation being made.

6. For the reasons set out above and as articulated in our earlier submissions, clause 12.2 of the Exposure Draft should be amended to re-insert the relevant words from clause 16.2 of the Award.

Item 30 – Clause 14.4 of the Exposure Drafts

7. This submission responds to the SDA's submissions of 9 December 2020 at paragraphs 17 – 18.

8. Contrary to the SDA's submission, the Exposure Draft does not 'merely clarify' the Award; it creates a new substantive requirement. Clause 27.1 of the Award prescribes what breaks will be given and, to some extent, when they must be taken. Save for those parameters, an employer can direct an employee to take their breaks at specific times, subject to their obligations under workplace health and safety laws, which necessarily require that consideration be given to ensuring that employee fatigue is being managed. There is no additional Award-derived obligation on employers to give breaks in a way that 'ensures that the employee has meaningful breaks'. Clause 14.4 of the Exposure Draft amounts to a substantive change to the Award and therefore should not be adopted.

Item 39 – Clause 17.6(a)(ii) of the Exposure Draft

9. This submission responds to the SDA's submission of 9 December 2020 at paragraph 20.

10. The union says that it does not support Ai Group's earlier submission about clause 17.6(a)(ii) of the Exposure Draft, however it has not explained a basis for its position.

11. In our submission of 25 November 2020, we clearly articulated the reasons why we say clause 17.6(a)(ii) of the Exposure Draft is more expansive than the relevant Award provision. The Commission should, in our respectful submission, make the changes we there proposed to the Exposure Draft.

Item 40 – Clause 17.7(b) of the Exposure Draft

12. This submission responds to the SDA's submission of 9 December 2020 at paragraphs 21 – 25.

13. Ai Group continues to oppose clause 17.7(b) of the Exposure Draft, for the reasons set out in our submission of 25 November 2020.

14. In addition, we note that taxi fares are regulated by state and territory governments. It is not appropriate that the minimum safety net require an employer to reimburse an employee for costs incurred in relation to other modes of transport, that are not regulated in that way. Though a ride-share option may, in some cases, be more cost effective than a taxi; as is well known, ride-share operators can (and do) unexpectedly increase their rates because, for instance, the demand for their service is outstripping the number of drivers available (e.g. on a particular day because of a local event or due to bad weather). Further, some ride-share options also enable passengers to choose from a range of different types of vehicles or 'experiences'. Different fares apply to different options. For example, in addition to the basic ride-sharing option, Uber[1] offers 'Premier' rides, which it describes as 'premium rides in luxury cars' and 'Comfort' rides, which involve 'comfortable midsized cars with top-rated drivers'. The fares payable for such trips are higher than a basic Uber ride. It would not be 'fair' to require employers to reimburse an employee for potentially excessive fares in such circumstances.

15. Despite the above, if the Commission nonetheless considers that it is necessary to redraft the extant provision, clause 17.7(b) of the Exposure Draft should be varied as follows:

> **(b)** The employer must reimburse the employee for any cost they reasonably incur in either taking a taxi, or any alternate commercial passenger vehicle that the employer agrees may be used, to travel:

[1] Uber, *Ride Share Options* < https://www.uber.com/au/en/ride/ride-options/> (accessed 16 February 2021).

16. The proposed change would enable an employer and employee to agree that the employee will be transported by a mode of transport other than a taxi, such as a ride-share option; however the employer would be liable to reimburse the employee for expenses incurred only if that is agreed by the employer. This would alleviate some of the concerns we have raised in our submissions.

Item 51 – Clause 22.2 of the Exposure Draft

17. This submission responds to the SDA's submission of 9 December 2020 at paragraph 34.

18. Clause 28.2 of the Award is in the following terms: (emphasis added)

> **28.2 Definition of shiftworker**
>
> For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for seven days a week.

19. Clause 22.2 of the Exposure Draft is in the following terms: (emphasis added)

> **22.2 Additional paid annual leave for certain shiftworkers**
>
> A 7-day shiftworker who is regularly rostered to work on Sundays and public holidays in a business in which shifts are continuously rostered 24 hours a day for 7 days a week is entitled to an additional week of paid leave under the NES. See section 87 of the Act.

20. The SDA submits that:

> … the use at PLED clause 22.2 of the word 'continuous' is substantially different to the current FFIA clause of 'regularly'. This changes the substantive meaning of the provision. It is submitted that the retention of the current definition be retained

21. The issue raised by the SDA does not appear to arise. The Award and Exposure Draft are consistent in the relevant respects. It appears that no change to the Exposure Draft is necessary in response to the SDA's submission.

Items 53 & 54 – Clause 23.3 of the Exposure Draft

22. Ai Group has recently observed potential difficulties flowing from the redrafting of clause 23.3 that we have not previously identified. We have accordingly requested a further 7 days to provide supplementary submissions addressing items 53 and 54, as well as the wording of the clause more broadly.