



Fair Work Commission: 4 Yearly Review of Modern Awards

**AM2016/15 & AM2014/89 4 YEARLY REVIEW OF
MODERN AWARDS - PLAIN LANGUAGE -
SECURITY SERVICES INDUSTRY AWARD 2010**

SUBMISSION

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

18 SEPTEMBER 2018

1. BACKGROUND

1.1 These reply submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009*.

1.2 ABI and NSWBC have a material interest in these proceedings and appreciate the opportunity to provide this submission.

2. THE APPLICATION BY ASIAL

2.1 On 25 June 2018, the Australian Security Services Industry Association Limited (**ASIAL**) made an application to vary clause 24.10 of the Security Services Industry Award 2010 (**Award**), which relates to the monetary entitlements to be paid to employees in respect of accrued annual leave at termination of employment.

2.2 ASIAL asserts that clause 24.10 contains a drafting error, as it provides for the payment of two loadings upon termination of employment.

2.3 In its reply submission filed on 7 September 2018, United Voice indicated that it opposes the ASIAL application. In short, United Voice rejects the characterisation by ASIAL that clause 24.10 contains a drafting error, and asserts that the clause provides a specific entitlement in respect of annual leave for employees who have not been dismissed for misconduct.

3. SUBMISSIONS IN RESPECT OF THE ASIAL APPLICATION

3.1 Our clients support the ASIAL application.

3.2 Our clients consider that there is force to ASIAL's contention that the inclusion of the additional payment under clause 24.10 is a drafting error.

3.3 Separately, our clients submit that even if it cannot be established that there is a drafting error in clause 24.10, there are other strong merit bases for granting the ASIAL application.

3.4 Clause 24 of the Award regulates annual leave entitlements, and is expressed in clause 24.1 to supplement or deal with matters incidental to the NES, as is permitted by section 55(4) of the *Fair Work Act 2009* (Cth) (**FW Act**).

3.5 There are two provisions in clause 24 dealing with payment for annual leave, namely:

- (a) clause 24.6, which deals with payment when taking annual leave; and
- (b) clause 24.10, which deals with payment of any accrued but untaken annual leave upon termination of employment.

3.6 As is clear from the headings of those clauses, each of the clauses deal with two different subject matters. In that sense, there is no conflict between the provisions. However, the two provisions provide for different levels of payment, despite the fact that the payments are made in respect of an employee's annual leave entitlement.

3.7 Clause 24.10 provides that:

Where an employee is entitled to a payment on termination of employment as provided in s.90(2) of the Act, the employer must also pay to the employee an amount calculated in accordance with clause 24.6(a). The employer must also pay to the employee a loading of 17.5% in accordance with clause 24.6(b) unless the employee has been dismissed for misconduct.

3.8 The practical operation of clause 24.10 is that employees will effectively receive the 17.5% annual leave loading twice, save for where an employee is dismissed for misconduct.

3.9 ASIAL's contention is that clause 24.10 contains a drafting error, as the makers of the Award could not have intended to entitle employees to be paid the annual leave loading twice.

3.10 ASIAL refers to and relies on the applicable pre-reform awards to demonstrate that no such entitlement existed under any of the pre-reform awards or Notional Agreements Preserving State Awards (**NAPSAs**). On that basis, ASIAL effectively submits that it is reasonable to conclude that clause 24.10 contained an error by having the practical effect of including payment of annual leave loading twice.

3.11 In considering the ASIAL application, it is relevant to consider what occurred during the award modernisation process undertaken by the Australian Industrial Relations Commission (the **AIRC**) between 2008 and 2010.

3.12 The AIRC published an exposure draft for the Security Services Industry Award on 12 September 2018 (the **Exposure Draft**). Clause 23.7 of the Exposure Draft was in similar terms to the Award that was ultimately made by the AIRC.

3.13 However, we have not been able to identify the source of clause 23.7 of the Exposure Draft. In particular we note that:

- (a) it does not appear that any interested party had at that time submitted a 'party draft' award;
- (b) we have not been able to identify any clause in identical or substantially similar terms in any of the relevant pre-reform instruments; and
- (c) although the Statement¹ handed down by the AIRC at the time of making the Exposure Draft stated that the wages had been taken from the *Security Industry (New South Wales) Award 1998*, the Statement did not make it clear where the other terms and conditions had derived from.

3.14 This particular clause was not the subject of any explicit consideration by the AIRC in any of the decisions or statements made in the course of making the Award. It is notable, however, that an application was made by ASIAL in 2009, following the making of the Award in December 2009, to vary what was, at that time, clause 24.4 of the Award (now clause 24.6).² In granting that application, the AIRC accepted ASIAL's submission that the proposed wording of the clause did "not reflect the standard prevailing in most of the industry". The AIRC also had regard to the "relevant instruments" and found that those

¹ [2008] AIRCFB 717.

² [2009] AIRCFB 963.

- instruments generally provided different entitlements to what was contained in the award.
- 3.15 The fact that the AIRC was prepared to grant the ASIAL application in 2009, based on the fact that the proposed award term deviated from the relevant terms contained in the pre-reforms instruments, lends weight to the inference that:
- (a) clause 24.10, like the original clause 24.4, deviated from the terms prevailing in the industry at that time; and
 - (b) had ASIAL identified that departure at the time and pursued a variation like the one pursued in 2009 in respect of clause 24.4, the AIRC would have granted that variation.
- 3.16 As provided in ASIAL's application, the pre-reform award, *Security Industry (New South Wales) Award 1998* specifically sets out this set of circumstances and it does not provide for the same entitlement.
- 3.17 The pre-reform Award states that in relation to payment in lieu of annual leave on termination; '*where the employment of a permanent employee is terminated for any reason [emphasis added] by either party...*'³ is to be calculated in accordance with clause 25.3 of that Award. Clause 25.3 of the pre-reform Award sets out the entitlement now included in clause 24.6 of the Security Services Industry Award 2010.
- 3.18 Clause 25.3 and clause 25.4 of the pre-reform Award mirror the way in which the Award would operate if the application that has been made by ASIAL to vary the Award was implemented.
- 3.19 There does not exist in the pre-reform Award set out above, nor any other pre-reform Award or NAPSA, an entitlement to an extra loading or payment upon termination if the employment is terminated for a reason other than misconduct.
- 3.20 For these reasons we support the ASIAL application to vary the Security Services Industry Award 2010.

4. MERIT BASIS FOR GRANTING APPLICATION

- 4.1 Separately to the submissions advanced above, the Commission is not required to find that clause 24.10 contains a drafting error in order to grant the ASIAL application. The 4 yearly review of modern awards is a broader process, and the Fair Work Commission is ultimately required to be satisfied that the Award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.
- 4.2 The operation of clause 24.10 of the Award results in the unusual situation whereby an employee is entitled to receive a greater payment on termination in respect of accrued annual leave compared to the entitlement when taking annual leave during their period of employment.
- 4.3 This 'two-tier' rate of payment for annual leave has the effect of creating a disincentive for employees to take annual leave whilst employed (for example, if an employee is

³ *Security Industry (New South Wales) Award 1998*, clause 25.4.

aware that they can save their leave until termination knowing that it will be paid out at a higher rate).

- 4.4 The ASIAL application meets the modern awards objective by:
- (a) removing an incentive for employees to not take any time off in order to receive more money when their employment ceases with that employer;
 - (b) simplifying the way in which an employer is required to calculate annual leave payments, whether it be during the course of employment or upon termination; and
 - (c) removing an unnecessary regulatory burden on employers by having a two-tier payment system for annual leave.
- 4.5 For the reasons outline above, the ASIAL application should be granted.



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd