

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Reply Submission**

Plain Language Re-Drafting –  
*Cleaning Services Award 2010*  
(AM2016/15, AM2014/69)

**24 August 2018**

**Ai**  
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS**  
**AM2016/15 PLAIN LANGUAGE RE-DRAFTING**  
**CLEANING SERVICES AWARD 2010**  
**(AM2016/15)**

**Introduction**

1. This submission in reply is made in accordance with the directions issued by the Commission on 29 June 2018 concerning the revised plain language exposure draft of the *Cleaning Services Award 2010* (**the revised PLED**).
2. Ai Group and United Voice were directed to have further discussions concerning Item 35 (paragraph 25.3(c) of the revised PLED) and provide a joint report of the outcome of the discussions. A joint report was duly filed on 13 August 2018.
3. The parties were also directed to file submissions in reply.
4. This submission responds to the following:
  - ) Joint Report of United Voice and Australian Industry Group – 13 August 2018;
  - ) Submission of United Voice – 13 August 2018
5. Ai Group acknowledges that whilst the scope of the discussions associated with Item 35 were to be directed at issues associated with payment of annual leave on termination (pursuant to cl. 25.3(c) of the PLED), they have revealed broader difficulties with the PLED's provisions dealing with payment of annual leave that is taken. We accordingly here raise these issues for the Commission's consideration.
6. In short, these submissions relate to whether 25.3 of the PLED requires amendment in order to clarify:

- ) That employees do not receive the penalty rates for shift work and weekend work twice when accessing annual leave
- ) That employees do not receive penalties for shift work and weekend work as well as the 17 ½ percent loading on termination
- ) The rate that the 17 ½ loading should be applied to when an employee is paid out upon termination
- ) The description, or characterisation, of various premiums payable under the PLED

### **The relevant provisions of the Current Award and PLED regarding payment of annual leave**

7. Before identifying our concerns relating to clause 23.5 of the PLED, it is appropriate to address the current award provisions relating payment of annual leave. Relevantly, Clauses 29.3 and 29.4 of the *Cleaning Services Award 2010* (the **Current Award**) provide as follows:

#### **29.3 Definition of ordinary pay**

*For the purposes of payment of annual leave, an employee's ordinary pay means remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay and in addition will include:*

- (a) leading hand allowance;*
- (b) first aid allowance;*
- (c) penalty rates paid for shiftwork or rostered ordinary hours of work on Saturday and/or Sunday; and*
- (d) part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday and/or a Sunday.*

#### **29.4 Payment of annual leave**

- (a) The terms of the NES prescribe the basis for payment for annual leave, including payment for untaken leave upon the termination of employment. In addition to the terms of the NES, an employer is required to pay an additional leave loading of 17.5% calculated on an employee's ordinary time rate of pay.*

*(b) Provided that where the employee would have received a saved or transitional rate of pay, or shift, weekend (Saturday or Sunday), or public holiday penalty payments according to the roster or projected roster, had the employee not been on leave during the relevant period, and such saved, transitional or penalty payments would have entitled to employee to a greater amount than the loading of 17.5% on the rates set out in clause 16—Minimum wages of this award, then such rates will be paid instead of the 17.5% loading.*

8. The terms of the Current Award are problematic in that, while clause 29.3 purports to defines the term “ordinary pay” for the purpose of payment of annual leave, the provisions of clause 29.4 dealing with payment of annual leave do not actually refer to the term “ordinary pay”.
9. Clause 29.4(a) appears to proceed on the assumption that employees will be paid for a period of annual leave in accordance with the NES (which would not include any separately identifiable amounts<sup>1</sup>) but affords an employee an additional entitlement to a 17.5% loading calculated on an employee’s ordinary time rate of pay. The phrase “ordinary time rate of pay” is not defined.
10. Clause 29.5(b) appears to deliver an employee an entitlement to receive certain shift, weekend and public holiday rates that they would have worked, if the payment of such amounts is greater than the relevant 17.5% loading.
11. Read together, these clauses imply that penalties for shiftwork and ordinary hours worked on a weekend could be paid under both cl. 29.3(c) and 29.4(b) in connection with a single period of annual leave where the relevant penalties under cl. 29.4(b) are higher than the 17.5% annual leave loading. This results in ‘double dipping’ and cannot be considered the intention of the AIRC during the Award modernisation process, or justiciable in the context of a fair and relevant minimum safety net of terms and conditions.<sup>2</sup>

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<sup>1</sup> S.16

<sup>2</sup> S.134(1)

12. Ai Group suggest that the current award provisions should properly be read as entitling an employee to a payment for annual leave that reflects the employee's minimum wages under the award and the relevant allowances (i.e. the leading hand allowance, first aid allowance and the part-time allowance), plus either applicable penalties or the relevant 17.5% loading.

**Payment of annual leave under the revised PLED – *the potential for double dipping***

13. The revised PLED clarifies some of these matters but also gives rise to a potential issue of 'double dipping' with regard to the penalties paid for shift work and ordinary hours worked on weekends. Relevantly, cl. 25.3 of the PLED provides as follows:

**25.3 Payment for annual leave**

(a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:

- (i) a leading hand allowance; and
- (ii) a first aid allowance; and
- (iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and
- (iv) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.

(b) The employer must pay an employee for the employee's ordinary hours of work in a period of paid annual leave an additional payment that is the greater of the following amounts:

(i) 17.5% of the employee's ordinary hourly rate (that is the employee's rate of pay for ordinary hours of work not including any shift, weekend or public holiday penalties);

(ii) the shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave.

(c) Clause 25.3 also applies in calculating the amount payable to an employee by the employer for a period of untaken paid annual leave when the employment of the employee ends.

14. Clause 25.3(a)(iii) includes "penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday" in the base rate of pay to be used to calculate the amount that an employer is required to pay an employee for a period of annual leave by s. 90 of the *Fair Work Act 2009* (Cth) (**the Act**).
15. However, cl. 25.3(b)(ii) requires an employer to pay an employee for the employee's ordinary hours of work in a period of paid annual leave, the "shift, weekend or public holiday penalty rates that the employee would have received for ordinary hours of work for which the employee would have been rostered in the period had the employee not been on leave" where this amount would be greater than the 17.5% annual leave loading. The revised PLED has therefore not resolved the issue of 'double dipping' with regard to payment of shift and weekend penalty rates during a period of annual leave.
16. Put simply, because 25.3(b) is worded so as to provide for a payment that is "*an additional payment*" it appears to suggest that employees get both the payments under s25.3(a) and 25.3(b). This results in a level of unjustifiable (and we presume unintended) double dipping.
17. The submissions filed by United Voice on 13 August 2018 do not address payment for annual leave that is taken in any detail. Nonetheless, Ai Group understands that United Voice does not believe that the current award entitles an employee to be paid the relevant shift, weekend or public holiday penalties

twice in relation to a period of leave that is taken. Moreover, we understand that it is common ground between the parties that the Award should only provide that an employee receives either the relevant penalties or the 17% loading. As such, we understand that the contest between the parties relates to whether the drafting of PLED properly reflects this position. Ai Group contend that the proposed provisions require amendment.

### **Ai Group's Proposed Amendment to the PLED**

18. Ai Group proposes rectifying the issue of double dipping with regard to the penalties payable for shift work and ordinary hours worked on a weekend as well as the inadvertent provision for payment of both annual leave loading as well as these rates, during a period of annual leave, by deleting cl. 25.3(a)(iii) of the revised PLED as follows:

#### **25.3 Payment for annual leave**

(a) For the purpose of calculating the amount that the employer is required by section 90 of the Act to pay an employee for a period of paid annual leave, the employee's base rate of pay for the employee's ordinary hours of work in the period must be taken to include any of the following that are payable to the employee:

(i) a leading hand allowance; and

(ii) a first aid allowance; and

~~(iii) penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday; and~~

~~(iv)~~ (iii) a part-time allowance for part-time employees working shiftwork (Monday to Friday) or rostered ordinary hours on a Saturday or a Sunday.

19. This suggested amendment preserves the entitlement to the rates listed in cl. 25.3(b)(ii) where these are collectively higher than the 17.5% annual leave loading payable under cl. 25.3(b)(i).

## **Clause 25.3(c) of the revised PLED – Payment on termination**

20. Clause 29.7 of the Current Award currently provides for payment of the 17.5% annual leave loading where an employee is entitled to payment of untaken annual leave on termination of employment under the NES. As opposed to the situation where payment is made with respect to a period of annual leave which is taken, no provision is made for payment of the penalties referred to in cl. 29.4(b). The Current Award states:

### **29.7 Payment of accrued leave on termination**

Where an employee is entitled to payment of untaken annual leave on termination of employment under the terms of the NES, the employer must also pay the employee a loading of 17.5% calculated on an employee's ordinary time rate of pay.

21. United Voice has stated in its submission that the proposed amendment in relation to Item 35: Clause 25.3(c) in the document titled 'AM2016/15 – summary – agenda items for conference – Cleaning Award dated 28 February 2018 (Proposed Amendment) accurately reflects clause 29.7 of the Current Award.<sup>3</sup>
22. The Proposed Amendment mandates calculation of the 17.5% loading payable for periods of untaken annual leave owing on termination on a 'base rate of pay' which is taken to include "penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday". This is not required by the current award.
23. Clause 29.7 of the Current Award states that the annual leave loading is calculated on an "employee's ordinary time rate of pay". As outlined above, there is currently no definition of "ordinary time rate of pay" in the Current Award. However, given the fact that this is the same wording used to describe the rate on which the loading in clause 29.4(a) is calculated, Ai Group submits

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<sup>3</sup> United Voice, *Submission – Four Yearly Review of Modern Awards – Plain Language redrafting – Cleaning Services Award 2010*, 13 August 2018, [8].



that the correct reference rates to be used are the applicable minimum wages in clause 16 of the revised PLED.

24. Ai Group therefore submits that the Proposed Amendment does not reflect clause 29.7 of the Current Award with regard to the calculation of the annual leave loading.
25. United Voice argues at [8] – [14] of its Submission dated 13 August 2018 that entitlements to receive shift loadings and annual leave loading with respect to payment for annual leave were not separated in clause 29.7 of the Current Award and that this reflected the benefits which applied under the *Cleaning and Building Services Contractors (State) Award (NSW)*. In response, Ai Group notes that United Voce has not identified any basis for asserting that terms of the *Cleaning Services Award 2010* dealing with payment of annual leave on termination were intended to mirror those previously applicable to NSW employees covered by the *Cleaning and Building Services Contractors (State) Award*.
26. Ai Group nonetheless acknowledges that the NES now deals with payment of annual leave on termination. Relevantly, Section 90(2) of the Act states:

If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.
27. Given this provision, it appears that a simple replication of the Current Award provisions in the PLED may lead to instances where the award delivers an entitlement that is below that mandated by the NES. We accordingly suggest that an appropriate option may be the deletion of clause 25.3(c) of the revised PLED. This would not result in any diminution of current employee entitlements.

## **Characterisation of premiums payable pursuant to the Award**

28. Ai Group expresses concern regarding the manner in which various premiums payable in respect of annual leave are expressed in the revised PLED. Clause 25.3(a)(iii) refers to “penalty rates paid for shiftwork or rostered ordinary hours of work on a Saturday or Sunday”. Similarly, clause 25.3(b) refers to “shift, weekend or public holiday penalty rates”. The characterisation of these premiums as ‘penalty rates’ as opposed to a loading or allowance has the potential to cause confusion and lead to incorrect payment of employees. The ‘penalty rates’ applicable for shiftwork under the revised PLED are expressed in Table 6 – Penalty Rates as percentages of the “minimum hourly rate”, spanning 115% (in the case of a full-time employee working a Monday to Friday shift that starts before 6.00 am or finishes after 6.00 pm excluding a public holiday) to 275% (in the case of a casual employee working on a public holiday). Taking the lowest of these, a literal reading of cl. 25.3(a)(iii) appears to require payment, where applicable, of these rates, on top of the minimum hourly rates of pay during periods of annual leave.
29. A similar issue arises in cl. 25.3(b) of the revised PLED which requires a comparison between the 17.5% loading and “shift, weekend or public holiday penalty rates” which, as demonstrated above, may rise to 275% of the minimum hourly rate. Where an employer is required to compare the applicable premiums in clauses 25.3(b)(i) and 25.3(b)(ii), in order to determine which is the greater, such wording renders this comparison nonsensical as the annual leave loading would never be paid under circumstances where any of the rates described in cl. 25.3(b)(ii) are payable.
30. The characterisation of these premiums as ‘rates’ as opposed to ‘loadings’ or ‘allowances’, gives rise to sufficient ambiguity to warrant amending the revised PLED to ensure greater consistency in the terminology which is used.
31. Ai Group previously raised concerns regarding the terminology used in the exposure drafts of numerous modern awards to describe the particular

premiums payable in its Submission dated 31 August 2016. Ai Group stated at [9]<sup>4</sup>:

- ) An award provision which requires that shiftworkers be paid 15% extra can legitimately be called a “loading” or an “allowance”, but cannot legitimately be called a “penalty rate” or a “shift rate”.
- ) An award provision which stated that shiftworkers are to be paid 115% of the ordinary time rate cannot legitimately be referred to as a “loading” or an “allowance”, but it can be referred to as a “penalty rate” or a “shift rate”.
- ) Other clauses in awards (e.g. annual leave clauses) which refer to entitlements in the shiftwork cannot legitimately refer to the “loadings” or “allowances” in the shiftwork clause if the loadings / allowances (e.g. 15%) have been replaced with penalty rates of pay (e.g. 115%).
- ) The terminology within each award should be consistent.

32. In the Group 3 decision [2017] FWCFB 5536, this matter, applicable to a large number of exposure drafts, was referred to the Plain Language Full Bench.<sup>5</sup> In a Statement dated 21 March 2018, President Justice Ross stated that the Plain Language Full Bench will issue directions dealing with these issues in due course.<sup>6</sup> Ai Group will seek to ventilate these issues in relation to the PLED once directions are issued.

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<sup>4</sup> Australian Industry Group, *Submission – Four Yearly Review of Modern Awards – General Issues arising from Exposure Drafts*, 31 August 2016, [9].

<sup>5</sup> [2017] FWCFB 5536, [582].

<sup>6</sup> [2018] FWC 1544, [24].