

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –
Fast Food Industry Award 2010
(AM2016/15)

8 March 2021

Ai
GROUP

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. It relates specifically to clause 22.3 of the Exposure Draft, which deals with annual leave loading.
2. Clause 28.3 of the Award is in the following terms:

28.3 Annual leave loading

(a) During a period of annual leave an employee will receive a loading calculated on the wage rate prescribed in clause 17—Minimum weekly wages. Annual leave loading is payable on leave accrued.

(b) The loading will be as follows:

(i) Day work

Employees who would have worked on day work only had they not been on leave—17.5% or the relevant weekend penalty rates, whichever is the greater but not both.

(ii) Shiftwork

Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including relevant weekend penalty rates), whichever is the greater but not both.

3. In our submission, clause 28.3:
 - (a) Requires that in relation to a *‘period of leave’*, an employee must be paid *‘a loading’*. That is, in relation to a period of leave, *one* additional amount is payable.

- (b) If an employee would have worked on day work had they not been on leave, *'the loading'* payable to the employee in relation to the *'period of leave'* will equate to either 17.5% of the minimum weekly wage or the relevant weekend penalty rates prescribed by clause 25.5; whichever is the higher, but not both.
 - (c) If an employee would have worked on shiftwork had they not been on leave, *'the loading'* payable to the employee in relation to the *'period of leave'* will equate to either 17.5% of the minimum weekly wage or *'the shift loading'*, including relevant weekend penalty rates; whichever is the greater but not both. We note again, as we have done in earlier submissions filed in this matter, that the Award does not prescribe shift loadings. The effect of clause 28.3(b)(ii) is therefore inherently unclear.
4. Clauses 28.3(b)(i) and (ii) both require that a comparison is drawn between two amounts. Using clause 28.3(b)(i) as an example, the comparison is to be made between *'17.5% or the relevant weekend penalty rates'*. The higher of those two amounts will constitute *'the loading'* that is payable *'during a period of leave'*.
 5. In our submission, the relevant calculations for the purposes of clause 28.3(b)(i) are to be made by reference to the entire period of leave taken in that instance. That is, if an employee is taking one week of annual leave, the two amounts relevant to the comparative exercise are:
 - (a) 17.5% of the minimum applicable portion of the weekly rate prescribed by the Award which receives in relation to taking leave; and
 - (b) The weekend penalties that would be payable to the employee during that week had the employee worked.
 6. The employee is entitled to the higher of the two amounts mentioned above, in relation to the leave.

7. Clause 22.3 of the Exposure Draft is in the following terms:

22.3 Annual leave loading

- (a) An employee is entitled to an additional payment for accrued annual leave, calculated on the minimum hourly rate specified in clause 15—Minimum rates for the classification in which they are employed.
- (b) The additional payment for the employee's ordinary hours of work when taking paid annual leave is as follows:

(i) Dayworkers

An employee who would have worked on day work only had they not been on leave must be paid the greater of either:

- the minimum hourly rate plus a loading of 17.5% of the minimum hourly rate; or
- the relevant weekend penalty rate specified in clause 21.10.

(ii) Shiftworkers

An employee who would have worked on shift work had they not been on leave must be paid the greater of either:

- the minimum hourly rate plus a loading of 17.5% of the minimum hourly rate; or
- the relevant penalty rate specified in clause 21.10, including relevant weekend penalty rates.

8. Clause 22.3 of the Exposure Draft deviates from the extant provision in various ways. Relevantly, for present purposes, clause 22.3 prescribes the amounts payable pursuant to it as hourly rates. In addition, using clause 22.3(b)(i) by way of example, the clause does not state that the amounts described by it at the first and second dot points are to be calculated by reference to the amounts that would be payable to the employee for the entire duration of the leave. Rather, the clauses appear to require an hour-by-hour comparison and calculation. Ai Group submits that this amounts to a substantive variation to the terms of the Award.

9. The Exposure Draft should be amended to make clear that the amounts referenced at clauses 22.3(b) are to be calculated by reference to the entire period of leave taken by an employee, consistent with the Award.

10. Ai Group also refers to paragraphs 75 – 79 of our submission dated 25 November 2020, which identify significant deficiencies in the way that clause 22.3 of the Exposure Draft has been framed (items 52 – 54 of the Commission’s summary of submissions). In response, the SDA submitted that the ‘the current wording at clause 28.3(b) of the Award is sufficiently clear’. It is not clear whether the union is suggesting that clause 22.3 of the Exposure Draft should be replaced with clause 28.3 of the Award.
11. Whilst such an amendment would alleviate some of our concerns, it would not, in our view, address all of the issues raised. We submit that clause 28.3 should instead be replaced with the following:

22.3 Annual leave loading

- (a) During a period of annual leave an employee will receive a loading on annual leave accrued, in accordance with clause 22.3.
 - (b) The loading will be the higher of the following two amounts, but not both:
 - (i) 17.5% of the minimum hourly rate prescribed by clause 15, multiplied by the number of ordinary hours of work that the employee would have been required to perform had the employee not taken leave.
 - (ii) The relevant weekend penalties that would have been payable to the employee for ordinary hours of work had the employee not taken leave.
 - (c) For the purposes of clause 22.3(b), the amounts described by clauses 22.3(b)(i) and 22.3(b)(ii) are to be calculated in relation to the entire period of leave taken by the employee.
 - (d) For the purposes of clause 22.3(b)(ii), the relevant weekend penalty is the applicable weekend penalty rate prescribed by clause 21.1, less the minimum hourly rate prescribed by clause 15.
12. Consistent with the submissions we have previously made about clause 28.3(b)(ii) of the Award, the above proposal does not include a provision that would apply to ‘*employees who would have worked on shiftwork had they not been on leave*’, because the Award (and therefore, the Exposure Draft), do not contemplate the performance of shiftwork.

13. We understand that interested parties have an opportunity to file submissions in response to this submission by 4pm on 15 March 2021. Ai Group may seek an opportunity to file a further submission in reply to any such submissions made, once we have had an opportunity to consider them.