Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –

Clerks – Private Sector Award 2010

(AM2016/15)

24 September 2018

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING

– CLERKS – PRIVATE SECTOR AWARD 2010

1. The Australian Industry Group (**Ai Group**) makes this submission in response to a decision[1] issued by the Fair Work Commission (**Commission**) on 6 September 2018 (**Decision**) regarding the plain language redrafting of the *Clerks – Private Sector Award 2010* (**Award**).

2. Our submission addresses matters about which the Commission invited further submissions in the Decision, as well as certain other issues arising from the 'revised plain language exposure draft' published on 14 September 2018 (**Exposure Draft**).

3. The clause numbers referenced in this submission relate to the Exposure Draft and as a result, may differ from those referenced in the Decision.

4. We note that the Decision does not contemplate the filing of submissions about the Exposure Draft more generally. Accordingly, we have not undertaken a broader review of the Exposure Draft for the purposes of this submission.

Clause 2 of the Exposure Draft – Definition of 'minimum hourly rate' (item 155)

5. Ai Group has considered the 'proposed solution' outlined at paragraph [13] of the Decision and implemented in the Exposure Draft.

6. The changes proposed are not opposed by Ai Group. They appear to address the issues previously raised by Ai Group in this regard.

[1] *4 yearly review of modern awards – Plain Language re-drafting – Clerks – Private Sector Award* [2018] FWCFB 5553.

Clause 19.2 of the Exposure Draft – First aid allowance (relates to item 21)

7. At paragraph [52] of the Decision, the Full Bench invited interested parties to make submissions about the application of the first aid allowance to part-time employees in light of its decision to delete clause 10.2 of the Exposure Draft.

8. Having regard to the current clause 11.2, we consider that part-time employees are entitled to a proportion of the first aid allowance prescribed by clause 19.6 of the Award, calculated on a pro-rata basis. The amount due is referrable to the number of ordinary hours required to be worked by the part-time employee in a week, as a proportion of 38 ordinary hours.

9. Clause 21.2 of the Exposure Draft should be amended to reflect this.

Clauses 21.3(c) and 24.4(c) of the Exposure Draft – Penalty rate and overtime rate for work performed on Sundays (new item)

10. At paragraph [117] of the Decision, the Commission said as follows regarding the minimum payment to which employees are entitled if they work ordinary hours and/or overtime on a Sunday: (emphasis added)

> **[117]** The minimum engagement for both ordinary hours and overtime worked on a Sunday in clauses 23.3(c) and 24.4(c) of the revised PLED reflect clause 27.2(c) of the current award. We are satisfied that clauses 23.3(c) and 24.4(c) reflect the provisions of the current award. However, we consider that the retention in both provisions of the condition that the employee is "available to work 4 hours" is likely to have little practical work to do and may lead to disputation concerning the circumstances in which an employee may be said to be "available". We also consider that the drafting of clause 24.4(c) could be satisfied. Accordingly, we have reached the *provisional* view that clauses 23.3(c) and 24.4(c) should be amended to read as follows:
>
> …[2]

11. Clause 21.3(c) and 22.4(c) of the Exposure Draft have been amended to remove the requirement that the employee must be "available to work for 4 hours" in order to be entitled to a minimum of four hours' pay on the basis that that limitation is "likely to have little practical work to do and may lead to

[2] *4 yearly review of modern awards – Plain Language re-drafting – Clerks – Private Sector Award* [2018] FWCFB 5553 at [117].

disputation concerning the circumstances in which an employee may be said to be "available""[3].

12. Ai Group addressed the relevant clauses in its submissions of 28 February 2017: (emphasis added)

Clause 21 – Penalty rates (employees not engaged on shifts)

316. Clauses 27.2(b) and 27.2(c) of the Award deal with all time worked on a Sunday:

(b) All work done on a Sunday must be paid for at the rate of double time.

(c) An employee required to work on a Sunday is entitled to not less than four hours' pay at penalty rates provided the employee is available for work for four hours.

317. Where an employee performs ordinary hours of work or overtime on a Sunday, the employee is to be paid at the rate of double time. Whilst the spread of ordinary hours prescribed by the Award does not extend to Sunday, an employee may be required to work ordinary hours on Sunday by virtue of the exemption provided by clause 25.1(b) of the Award: (emphasis added)

(b) The ordinary hours of work may be worked from 7.00 am to 7.00 pm Monday to Friday and from 7.00 am to 12.30 pm Saturday. Provided that where an employee works in association with other classes of employees who work ordinary hours outside the spread prescribed by this clause, the hours during which ordinary hours may be worked are as prescribed by the modern award applying to the majority of the employees in the workplace.

318. Clause 21 of the Exposure Draft, which sets out the penalty rates payable for the performance of ordinary hours at certain times, does not include a provision that deals with work on a Sunday. The Exposure Draft appears to have the effect of removing an employee entitlement where such work is performed.

319. Accordingly, a new clause 21.3 should be inserted in the following terms:

21.3 Sunday

(a) An employer must pay an employee at the rate of 200% of the minimum hourly rate for ordinary hours worked on a Sunday.

(b) An employee required to work ordinary hours on a Sunday is entitled to at least 4 hours pay at 200% of the minimum hourly rate, provided the employee is available for work for 4 hours.

320. Clause 21.3 of the Exposure Draft should be renumbered as clause 21.4.

[3] *4 yearly review of modern awards – Plain Language re-drafting – Clerks – Private Sector Award* [2018] FWCFB 5553 at [117].

…

Clause 22.4(c) – Payment for working overtime

364. Clause 27.2(c) of the Award provides for a minimum payment where an employee works on a Sunday in the following terms: (emphasis added)

> **(c)** An employee required to work on a Sunday is entitled to not less than four hours' pay at penalty rates provided the employee is available for work for four hours.

365. Importantly, the requirement to pay an employee for a minimum of four hours applies only if the employee is available to work for four hours. If, for instance, an employer requests an employee to perform 4 hours of work however the employee indicates that the employee is only available to perform three hours of work and the employee is accordingly so rostered, the employer is not required to make four hours of payment.

366. Clause 22.4(c) of the Exposure Draft deviates from this, as it does not contain the aforementioned qualifier. It states:

> **(c)** An employer must pay an employee who is required to work overtime on a Sunday for a minimum of 4 hours.

367. In the circumstances described above, the employee would be entitled to a minimum four hour payment under the above clause. Quite clearly the legal effect of the clause is different to the Award provision.

368. Accordingly, clause 22.4(c) of the Exposure Draft should be amended as follows:

> **(c)** An employer must pay an employee who is required to work overtime on a Sunday for a minimum of 4 hours, provided the employee is available to work for 4 hours.

13. The changes proposed by Ai Group were incorporated into subsequent iterations of the exposure draft, save and until the Decision and the Exposure Draft published after it was handed down.

14. Ai Group reiterates and continues to rely on the above submissions that it has previously made. The legal effect of the relevant current provisions will be altered if the requirement that the employee must be available for work for four hours in order to be entitled to a four hour minimum payment is deleted from clauses 21.3(c) and 22.4(c). In the context of these proceedings, which are directed at re-writing the Award in 'plain language' without changing the substantive meaning of current award terms, we submit that it is not appropriate

for provisions to be amended in a way that enhances employee entitlements where this is not supported by submissions, evidence or other material.

Clauses 23.3 and 23.4 of the Exposure Draft – Rest Period after Working Overtime (Employees other than Shiftworkers) (items 96 and 98 – 101)

15. At paragraph [129] of the Decision, the Commission proposed amendments to clauses 23.3 and 23.4 of the Exposure Draft in light of submissions previously made by Ai Group and other interested parties.

16. Ai Group opposes the changes made for the reasons that follow.

17. *Firstly,* they introduce the notion of "rostered hours" which is problematic because, the Award does not contemplate the preparation of rosters for employees covered by it. That is, the Award does not, as such, require that employees be *rostered*.

18. Furthermore, the notion of 'rostering' in respect of clerical employees covered by this Award is also, in our experience, inconsistent with the practical operation of the Award. For instance, full-time employees covered by the Award are commonly told their usual starting and finishing times upon commencement of employment (as a term of their contract of employment or otherwise). Those hours thereafter form the employee's ordinary hours of work. There is no 'roster' that is prepared or provided in such circumstances.

19. Accordingly, the notion of "rostering" in clause 23 is potentially confusing and at odds with the practical operation of the Award.

20. *Secondly,* the amendments do away with the notion that the clause applies where an employee performs overtime between two periods of ordinary hours worked on two consecutive days. The clause does not apply where, for instance, an employee performed work on a particular day that wholly constitutes overtime and on the following day, the employee is required to perform ordinary hours of work. So much is clear from the underlined text in the current clause 27.3(b):

(b) An employee (other than a casual employee) who works so much overtime between the termination of the employee's ordinary work on one day and the commencement of the employee's ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this clause, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

21. By removing express reference to this notion, the practical application of subclauses (a) and (b) is unclear and confusing.

22. To address these concerns, we submit that clauses 23.3 should be amended as follows:

23.3 Despite clause 23.2 but subject to clause 23.4, where an employee, due to overtime worked, would be required to start working their ordinary ~~rostered~~ hours without having had 10 consecutive hours off duty since the cessation of the employee's ordinary hours of work on the previous day:

(a) the employer must release the employee from duty after finishing the overtime until the employee has had 10 consecutive hours off duty; and

(b) the employee must not suffer any loss of pay for any ordinary ~~rostered~~ hours that the employee would otherwise have been required to work by the employer but that the employee did not work as a result of being released from duty in accordance with paragraph (a).

23. Clause 23.4 should be amended in a similar vein:

23.4 If, at the direction of the employer, an employee continues work or resumes working ordinary ~~rostered~~ hours without having at least 10 consecutive hours off duty in accordance with clause 23.3 all of the following apply:

(a) the employee must pay the employee 200% of the minimum hourly rate until such time as the employee is released from duty; and

(b) the employer must release the employee from duty until the employee has had 10 consecutive hours off duty; and

(c) the employee must not suffer any loss of pay for any ordinary ~~rostered~~ hours that the employee would otherwise have been required to work by the employer but that the employee did not work as a result of being released from duty in accordance with paragraph (b).

'Shiftwork' Issues (various clauses and items)

24. Ai Group has considered the decision made by the Commission concerning items 105 and 106. Specifically, the Commission declined to amend clause 25.1 of the Exposure Draft in the manner proposed by Ai Group.[4]

25. Ai Group remains concerned about the drafting of clause 25.1 of the Exposure Draft. As we have previously submitted, it is commonplace for employees covered by the Award to perform 'daywork' and 'shiftwork' from time to time. The Award does not prohibit such an arrangement. We have set out the basis for this interpretation of the Award in earlier written submissions and orally in proceedings before Vice President Hatcher. We refer in particular to our submission dated 20 February 2018 at paragraphs 50 – 53.

26. The Full Bench stated in the Decision that "if an employee is working on one of the defined shifts [in clause 25.1 of the Exposure Draft], the employee is not working day work by definition". In a temporal sense, this must of course be so. That is, at a particular point in time, an employee cannot simultaneously be performing daywork and on a shift defined at clause 25.1 of the Exposure Draft).

27. However, over time, an employee may perform both daywork and shiftwork. Under the Award, when an employee performs shiftwork, the provisions pertaining to shiftwork apply to them and when the employee performs daywork, the provisions pertaining to daywork apply to them. Provisions concerning shiftwork do not apply to an employee whilst performing daywork.

28. We are concerned that as presently drafted, the Exposure Draft deviates from the current Award substantively.

29. Clause 2 defines a 'shiftworker' as an employee to whom Part 6 applies. By virtue of clause 25.1, Part 6 applies to an employee "who [is] required to work their ordinary hours on any of" the shifts defined at subclauses (a) – (c). There is no temporal limitation contained in clause 25.1. It is cast such that Part 6

[4] *4 yearly review of modern awards – Plain Language re-drafting – Clerks – Private Sector Award* [2018] FWCFB 5553 at [38] – [140].

potentially applies to an employee who is, at any time during their employment, required to work their ordinary hours on any of the defined shifts.

30. Accordingly, under the Exposure Draft, a 'shiftworker' is an employee "who is required to work their ordinary hours on any of" the shifts defined at subclauses (a) – (c) at any stage during the course of their employment.

31. This is problematic because, by way of example;

- Take a full-time employee is required to work their ordinary hours on an afternoon shift as defined by clause 25.1(a) over a period of three months.

- By virtue of clause 25.1, Part 6 applies to the employee during the performance of such work and the employee satisfies the definition of 'shiftworker' under clause 2.

- After that three month period, the employee is directed to perform ordinary hours that do not satisfy any of the shift definitions at clause 25.1(a) – (c), however they fall within the parameters set for the performance of ordinary hours by dayworkers under clause 13.

- Clause 13 is headed "Ordinary hours of work (employees other than shiftworkers)". Clause 13.1 states that "clause 13 applies to employees other than shiftworkers".

- If the definition of 'shiftworker' is read in the manner we have outlined above, clause 13 ostensibly does not apply to the employee, even if they are <u>not</u> performing hours of work in accordance with any of the shift definitions at clause 25.1. The same can be said of, for instance:

    - Clause 14 (rostered days off);

    - Clause 15 (breaks); and

    - Part 5 (penalty rates and overtime).

32. Such an outcome clearly deviates from the current Award. Further, if Part 6 continues to apply to an employee in the circumstances described above, the employee would be entitled to, for instance, paid rest breaks under clause 27.3 of the Exposure Draft. That is an entitlement that would not otherwise be afforded to an employee performing 'daywork'.

33. Respectfully, it is not clear whether the Commission's Decision considers circumstances in which an employee performs both daywork and shiftwork from time to time. Ai Group submits that further consideration should be given to this issue, having regard to our submissions.

34. We make this submission noting the significance of this issue. We are aware that many employers covered by the Award require employees to perform both daywork and shiftwork from time to time, and we consider that if left unaddressed, the application of the Exposure Draft to such circumstances is unclear; and potentially extremely problematic and disruptive to existing practices.

35. We remain of the view that the amendment we proposed in our submission of 20 February 2018 at paragraph 53 would address the issue, without requiring substantial amendments to the Exposure Draft. That is, clause 25.1 should simply be amended as follows:

> Part 6 applies to employees <u>when</u> ~~who are~~ required to work their ordinary hours on any of the following shifts: …

36. Ai Group remains of the view that the resolution of the items identified at paragraphs [142] – [143] are directly related to the outcome of the issue articulated above. Ai Group may seek an opportunity to make further submissions about them.