Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submissions

NES Inconsistencies Categories 3 & 4

Accrual of Annual Leave - Shiftworkers

12 MARCH 2015

4 YEARLY REVIEW OF MODERN AWARDS

NES INCONSISTENCIES CATEGORIES 3 & 4 – ACCRUAL OF ANNUAL LEAVE TO SHIFTWORKERS

1. The Australian Industry Group (Ai Group) makes this reply submission in response to specific issues raised by the Australian Manufacturing Workers' Union (AMWU) in their submissions of 5 March 2015. We file this submission pursuant to a direction from the Full Bench during proceedings before the Fair Work Commission (Commission) on 26 February 2015.[1]

2. At item 10 of the table contained in its submissions, the AMWU contest the factual accuracy of the Ai Group submission that the proposed provision would be more generous than the National Employment Standards (NES) because it provides for 6 days of annual leave in addition to the 4 weeks prescribed by s.87(1)(a) of the *Fair Work Act 2009* (the Act), as opposed to the more straightforward entitlement to 5 weeks provided under the NES. Ai Group accepts the AMWU's contention that, technically, an employee would never be able to accrue 6 days pursuant to paragraph (b) of the proposed clause, given the provision operates in circumstances where an employee works for part of a particular year. However the essential point is that the *rate* of accrual under the award is not consistent with the approach adopted under the NES and, in most cases, is more costly for employers.

3. If the matter is considered in more detail, it becomes apparent that the precise difference between the entitlement under the NES and the proposed award terms (or indeed the existing award terms) is difficult to determine. The proposed award terms refer to the entitlement as "half a days' pay". Under the NES, annual leave does not accrue by reference to "days", but instead, by reference to an individual employee's ordinary hours of work. There is accordingly a level of uncertainty or ambiguity around what the precise award entitlement would be, especially in circumstances where the number of ordinary

[1] Transcript of proceedings on 26 February 2015, PN709.

hours on a particular day may vary. Such uncertainty will be avoided if Ai Group's proposal to delete the inconsistent award terms relating to the accrual of annual leave is adopted, as the accrual of annual leave entitlements will consequently be in accordance with the NES.

4. At item 13 the AMWU describes the higher accrual prescribed by the award as being "slightly higher" (than the corresponding entitlement under the NES). Ai Group would agree with this characterisation. Although the benefit to an employee may only be slightly higher under the award when compared to the NES, the collective impact upon an employer engaging many "7 day shift workers" may of course be significant.

5. In weighing the competing and significant considerations arising under the modern awards objective, the Commission should be particularly mindful of both the need to ensure that the award system is simple and easy to understand and the regulatory burden imposed upon employers by the awards.[2] Such considerations weigh heavily against maintaining or extending the unnecessarily complex award derived rate of accrual for the relevant shift workers, even if the existing provisions are *slightly* more generous to employees.

6. In considering the current matter, it should not be assumed that employers must always bear the entirety of any costs flowing from the alignment of awards with the current legislative framework. Employees have gained much through the introduction of the NES. In the context of annual leave, this includes its progressive accrual and greater control over the taking of such leave. Ai Group's proposal strikes a reasonable balance in maintaining additional leave for shift workers while making the system simpler and easier to understand[3] as well as reducing the regulatory burden on business.[4]

[2] s.134(1).

[3] s.134(1)(g).

[4] s.134(1)(f).

7. In relation to item 13, the Union asserts that, "the slightly higher rate of accrual is additional compensation for shiftworkers managing the often delicate balance of their life ". However, the Union has not established any historical basis for this assertion, derived from cases giving rise to the higher accrual rate.

8. Moreover, the Union has not presented any evidence of the purported and likely overstated "significant upheaval" flowing from an employee transitioning to 7 day shiftwork. The Commission should not lose sight of the fact that it is considering a clause that applies to employees "regularly" rostered to work on Sundays or Public Holidays.

9. Awards cannot be assumed to be inherently unfair or as failing to provide a "fair and relevant safety net" if they provide for annual leave to be aligned to the legislative standard determined by Parliament and applicable to most employees in Australia. Rather, for an award to provide for a higher rate of accrual than the NES, such terms must be *necessary* to achieve the modern award objective if they are to be retained.[5] That is the test that must be applied in considering whether the amendment advocated by the unions should be made. As identified by the Full Bench in the Preliminary Jurisdictional Issues decision:

> *"To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective."*[6] (Emphasis added)

[5] s.138.

[6] [2014] FWCFB 1788 at 36

10. The parties advocating for the adoption of the draft determinations, or any alternate proposed terms, bear the onus of establishing that they are necessary, in the relevant sense. The draft determinations reflect the proposals initially advanced by the unions. The AMWU, like other unions, have failed to make out a case justifying their proposed variations. They have largely proceeded on the assumption that all that must be established in support of their proposals is that a departure from the approach foreshadowed in the draft determinations would result in some form of detriment to employees. That cannot be sufficient to determine the matter.

11. At item 14, the AMWU asserts, in effect, that Ai Group has not established a reason for removing a longstanding entitlement. The Commission has determined that the provisions are inconsistent with the NES. In response, the AMWU are seeking to opportunistically expand the current entitlement by cherry picking the elements of the award provision that are beneficial to employees, while simply striking out the elements that potentially limit its application. They are seeking to potentially change the substantive nature of a longstanding provision without mounting any real argument for why an increase in entitlements is *necessary*. In contrast, Ai Group is seeking to align the provisions of the awards with the NES. We have mounted significant merit based arguments in support of our proposal.

12. Given that Ai Group is proposing the deletion of certain terms, there is no requirement that we establish that any new terms are necessary to meet the modern awards objective. Although the Commission will need to be satisfied that the Award, as varied, would meet the modern awards objective and we of course accept the requirement to make an appropriate merit based argument in support of the proposed variations. The modern awards objective will be met by aligning the rate of annual leave accrual for relevant shift workers with the NES. The awards, "together with the NES", will provide a fair and relevant safety net.

13. In determining whether a departure from the current terms is warranted it is also relevant for the Commission to take into consideration the reality that the particular issues that are the subject of the current proceedings do not appear to have been contested in the Part 10A Award Modernisation Process and consequently have not been the subject of detailed consideration by the Commission.

14. We agree with the AMWU's submission that it is uncontroversial that awards can supplement the NES. However, the mere fact that an award can supplement the NES does not mean that it should. Regardless, the 4 Yearly Review represents a timely opportunity to modernise such provisions and, importantly, ensure that the annual leave provisions reflect a "relevant" minimum safety net in the sense that they reflect the current statutory framework rather than an archaic hangover from awards developed under a different legislative context.

15. The Commission has already determined that the relevant award clauses are inconsistent with the NES.[7] The proposal advanced by the AMWU maintains a level of inconsistency between the award derived entitlement and that provided by the NES. In contrast, the Ai Group proposal aligns the entitlements of relevant shiftworkers under the applicable awards with the NES and consequently the entitlements of the majority of employees.

16. In relation to item 18, the AMWU appears to assert, in effect, that the element of the relevant clauses that require a minimum of 12 months' service has not had effect since 31 December 2009, pursuant to the operation of s.56 of the Act. Such a contention is not correct.

17. This element of the clauses does not *contravene* any element of s.55, in the manner contemplated by s.56, although we acknowledge the Commission's decision that it is *inconsistent* with a provision of the NES.

[7] [2014] FWCFB 9412 at [88].

18. Subsection 55(1) is the only element of s.55 that imposes a requirement that a term of an award could *contravene*. The remaining subsections are permissive, in that they identify terms that may be included in an award or they deal with the interaction between award or agreement terms and the NES.

19. Subsection 55(1) provides that:

> *"a modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards."*

20. The relevant award clauses do not *exclude* the NES, as contemplated by section 56.

21. The interaction between the award derived entitlement and the NES is governed by s.55(6), which provides:

> *"To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the award or agreement entitlement) that is the same as an entitlement (the NES entitlement) of the employee under the National Employment Standards:*
>
> *(a) Those terms operate in parallel with the employee's NES entitlements, but not so as to give a double benefit; and*
>
> *(b) The provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.*
>
> *Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply as a minimum standard, to 4 weeks of leave."*

22. The relevant effect of s.55(6) is that:

- The award derived entitlement does not operate to provide a double benefit, but that element of the quantum of leave that may be higher than the NES derived entitlement.

- The provisions of the NES relating to the accrual of paid annual leave by relevant shift workers only applies, at most, to 5 weeks of the leave. Indeed the award clauses are analogous to the specific example included in section 55(6).

23. Section 56 does not prevent an award from including terms limiting the circumstances in which employees are entitled to a more beneficial award derived entitlement than is permitted by s.55(4). It appears to be common ground between the parties that the terms supplement the NES.

24. The AMWU refers to the level of consent surrounding the inclusion of the contentious clauses in the awards, particularly the *Manufacturing and Associated Industries and Occupations Award 2010*, as a reason to refrain from deleting the contentious award provisions. Ai Group submits that it is disingenuous to appeal to such "agreements" when at the same time seeking to opportunistically recast the provision in substantively different terms. The agreed provisions must be viewed as a whole and it should not necessarily be retained if the amendment is required to address an inconsistency with the NES.

25. Ai Group acknowledges the significance that consent positions between major industrial associations have and contends that the Commission should be cautious about disrupting such arrangements. However, the Commission cannot be regarded as simply providing a rubber stamp to the agreed positions of the parties. The Commission can and must vary an award where, in the context of the Review, considerations arising from the framework of the Act, including the modern awards objective, dictate that another outcome is appropriate. Moreover, given the context of the current proceedings it is trite to observe that the nature of the interaction between all modern award terms and

the NES was not fully considered or appreciated during the Part 10A Award Modernisation Process.

26. At paragraphs 19 to 21 the AMWU rejects Ai Group's contention that the proposed determination extends the entitlement or adds additional costs. The AMWU's argument cannot be correct. The current relevant award clause provides an entitlement that is more beneficial than the NES in circumstances where an employee has 12 months' continuous service with their employer. That limitation is not contained within the current clause. Accordingly, the draft determinations extend the current entitlements.

27. For clarity, Ai Group accepts that the contentious text of the current awards does not generally expressly require that an employee actually work as a seven day shiftworker for twelve months in order to obtain the additional entitlement for having worked part of the year as a shiftworker. Rather it requires that the employee generally have one year of continuous employment or service.

Response to the AMWU Submission regarding the Dry Cleaning and Laundry Industry Award 2010

28. At the footnote 4 of the AMWU's submissions, they contend, in effect, that it is not a condition of every award that the employee be a seven day shiftworker in the relevant sense in order to receive the additional benefit. They point to the wording of the *Dry Cleaning and Laundry Industry Award 2010* as an example of an award under which an employee simply needs to be a shiftworker in order to receive the benefit.

29. The TCFUA has indicated general support for the AMWU's submission.[8]

30. Ai Group disagrees with the unions' interpretation of this clause. The relevant provisions of the clause state:

[8] TCFUA correspondence dated 6 March 2015.

"25.3 Shiftworkers—laundry workplaces

(a) For the purposes of the extra week of leave prescribed by the NES, a shiftworker is an employee who is rostered to regularly work on Sundays and public holidays.

(b) Where an employee with one year's continuous employment is engaged for part of the yearly period as a shiftworker, the employee will be entitled to have the period of annual leave increased by half a day for each month employed as a shiftworker."

31. The reference to "shiftworker" in paragraph (b) should be read in the context of the immediately preceding paragraph (a) which provides a definition of the term. The term "shiftworker", as used in paragraph (b) should be regarded as having the same meaning as it does in paragraph (a). Nonetheless we acknowledge that the drafting is not ideal and could be regarded as uncertain or ambiguous.[9] At the very least, it is not simple and easy to understand. If Ai Group's proposal to simply delete this provision is not adopted, it should be reworded to avoid the problematic interpretation advanced by the AMWU.

32. If our contentions regarding the wording of the Dry Cleaning Award are not accepted then the nature of any potential inconsistency between the award terms and the NES is different to that arising in most awards. This award would provide an additional benefit to 'shiftworkers' in addition to the four weeks provided by the NES, rather than a discrete entitlement for "7 day shiftworkers". There can be no justification for expanding such a broader entitlement through the current proceedings, as proposed by the draft determination. The interaction between the current award term and the NES would be dealt with under s.55(6). Accordingly a different determination dealing only with the relevant type of shiftworkers would need to be drafted and it would be appropriate for the parties to be given a further opportunity to comment on such a provision.

[9] As contemplated under s.160 of the Act.

Response to Paragraphs 8 to 11 of the AMWU Submissions

33. At paragraphs 8 to 11 of the AMWU's submissions they purport to explain why the new subclauses (b) and (c) are necessary to ensure that the awards achieve the modern award objective.

34. In reality the union merely articulates the work that they believe the clauses do. The submissions simply fail to address the relevance of the modern awards objective. The AMWU submissions are typical of the failure of unions in the current proceeding to establish that, if the draft determinations were adopted, the relevant awards would only include terms that are *necessary* to meet the modern awards objective, as contemplated in the Preliminary Jurisdictional Issues Decision.[10] It would be inconsistent with the approach to the Review foreshadowed in that decision for the Commission to issue the determinations in the terms advocated for by the AMWU and other unions.

Conclusion

35. There is no logical reason why employees who work for part of a year as a 'seven day shiftworker' should accrue leave at a higher rate than employees who work for an entire year as a '7 day shiftworker'. The current approach is anomalous and unnecessarily complex. The awards should simply be aligned with the operation of the NES.

36. At paragraph 12 the AMWU seeks, through a further proposed amendment, to rectify the deficiency in the wording generally contained in paragraph (b) of the draft determination comprising the implied requirement that the additional leave accrues on a monthly basis. The effect of the newly proposed reference to "pro-rata basis" is confusing and uncertain. Rather than adopting this approach the Commission should ensure that annual entitlements accrue based on an employee's ordinary hours of work, as contemplated under the NES. This can be achieved by deleting the award clauses dealing with the rate of accrual for the relevant type of shiftworkers. There has been no persuasive reason advanced for adopting or maintaining a different approach.

[10] [2014] FWCFB 1788