

**Australian Industry Group Submission in Reply
to the Fair Work Commission**

15 October 2014

**4 Yearly Review of Modern Awards – Potential Inconsistencies between
Modern Awards and the National Employment Standards**



4 YEARLY REVIEW OF MODERN AWARDS

Potential Inconsistencies between Modern Awards and the National Employment Standards

1. Introduction

- 1.1 The Australian Industry Group (Ai Group) makes this submission in response to the Statement ([2014] FWCFB 5537) issued by a Full Bench of the Fair Work Commission (Commission) on 13 August 2014.
- 1.2 Various interested parties have filed submissions regarding potential inconsistencies between modern awards and the National Employment Standards (NES). Those submissions largely relate to matters raised by the Fair Work Ombudsman (FWO) in its correspondence of 4 April 2014.
- 1.3 This submission is in response to the submissions filed by other interested parties in respect of awards in which Ai Group has a significant interest.
- 1.4 Ai Group continues to rely on its submission filed on 26 September 2014.

2. Airline Operations – Ground Staff Award 2010

Annual leave accrual – clause 34.2 and 34.3

- 2.1 The Australian Manufacturing Workers' Union (AMWU) submits that clauses 34.2 and 34.3 of the *Airline Operations – Ground Staff Award 2010* may be inconsistent with the annual leave accrual and agreement provisions of the NES. It proposes that the provisions be deleted and replaced with clause 41.7 of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award).
- 2.2 Clauses 34.2 and 34.3 state:
 - “**34.2** The employer may allow annual leave to an employee before the right thereto has fully accrued, but where the leave is so taken a further period of annual leave will not commence until the expiration of the 12 months' service in respect of which annual leave was taken.

34.3 Where annual leave has been granted to an employee pursuant to this subclause before the right thereto has accrued, and the employee subsequently leaves or is discharged from the service of the employer before completing the 12 months' continuous service in respect of which leave was granted, the employer may deduct the cash equivalent of the unearned leave which amount will not include any sums paid for any of the holidays prescribed by clause 37—Public holidays.”

- 2.3 Ai Group submits that clause 34.2 is not inconsistent with the NES.
- 2.4 Clause 34.2 only deals with the taking of paid annual leave, not its accrual.
- 2.5 Section 88(1) of the *Fair Work Act 2009* (the Act) states that paid annual leave may be taken for a period agreed between an employee and his/her employer. By virtue of ss.55(2)(a) and 55(3) of the Act, s.88(1) has effect subject to terms expressly permitted to be included in an award by a provision of the NES.
- 2.6 Section 93(4) expressly permits the inclusion of an award term that deals with the taking of paid annual leave. Clause 34.2 is such a term.

3. Business Equipment Award 2010

Annual leave on termination – clause 31.8

- 3.1 The AMWU submits that clause 31.8 of the *Business Equipment Award 2010* is inconsistent with the NES. Clause 31.8 reads as follows:

“31.8 Termination

- (a) Where a full-time or part-time employee with one or more weeks' continuous service leaves the service of their employer for any reason other than serious and wilful misconduct, the employee will be entitled to payment for pro rata annual leave at the rate of 2.923 ordinary hours' pay for each 38 ordinary hours worked.
- (b) The terms of clause 31.3 will apply in circumstances where an employee has been granted annual leave in advance of the due date.”

- 3.2 The AMWU proposes that the clause be varied by deleting the words “with one or more weeks' continuous service”.

3.3 Ai Group submits that clause 31.8 is inconsistent with ss.87 and 90 of the Act and does not object to the clause being deleted in its entirety. Whilst the AMWU's proposal cures one of the inconsistencies arising from the provision, it does not address the following concerns:

- Clause 31.8(a) restricts the payment of annual leave on termination to employees who are terminated for any reason other than serious and wilful misconduct. The Act does not so confine the entitlement to payment of accrued annual leave on termination.
- Clause 31.8(a) entitles an employee to payment for pro rata annual leave at the rate specified, *for each 38 ordinary hours worked*. Under the NES, annual leave accrues progressively (s.87(2)) and all accrued annual leave is to be paid out on termination (s.90(2)).

3.4 Ai Group refers to page 2 of the table attached to its submissions dated 26 September 2014 in this regard.

4. Horticulture Award 2010

Annual leave and transfer of business – clause 25.9

4.1 The National Farmers' Federation (NFF) submits that clause 25.9 of the *Horticulture Award 2010* (Horticulture Award) is inconsistent with s.91(1) of the Act.

4.2 Clause 25.9 states:

“25.9 Transfer of business

Where a business is transferred from one employer to another, the period of continuous service that an employee had with the old employer must be deemed to be service with the new employer and taken into account when calculating annual leave. However an employee is not entitled to leave or payment instead for any period in respect of which leave has been taken or paid for.”

4.3 Ai Group notes that this clause is also found in the following awards:

- *Airport Employees Award 2010* at clause 31.10 (albeit using a different form of words);
- *Food, Beverage and Tobacco Manufacturing Award 2010* at clause 34.10;
- *Manufacturing and Associated Industries and Occupations Award 2010* at clause 41.9;
- *Nursery Award 2010* at clause 27.7;
- *Seafood Processing Award 2010* at clause 27.10; and
- *Timber Industry Award 2010* at clause 33.9.

4.4 The NFF submits that clause 25.9 of the Horticulture Award denies an employer the right to not recognise an employee's service with the first employer for the purposes of annual leave.

4.5 Ai Group supports the submissions made by the NFF in this regard. The award clause excludes s.91(1) which is a provision of the NES. By virtue of s.55(1) and s.56 such a term has no effect. The clause should be deleted from the Horticulture Award and the awards listed above.

5. Pastoral Award 2010

Annual leave and transfer of business – clause 23.7(a)

The NFF submits that clause 23.7(a) of the *Pastoral Award 2010* is inconsistent with s.91(1) of the Act. Clause 23.7(a) is in the same terms as clause 25.9 of the Horticulture Award. Ai Group refers to its submissions above in this regard.

6. Textile, Clothing, Footwear and Associated Industries Award 2010

Accrual of annual leave and personal/carer's leave – clause 13.9

6.1 As noted in the submissions of Ai Group and the Textile, Clothing and Footwear Union of Australia, this clause is the subject of discussions between interested parties as part of the review of the *Textile, Clothing, Footwear and Associated Industries Award 2010* (AM2014/91).

6.2 The issue of any inconsistency between clause 13.9 and the NES should be dealt with as part of those proceedings.

7. Vehicle Manufacturing, Repair, Services and Retail Award 2010

Annual leave accrual for shiftworkers – clause 29.5(b)

7.1 Clause 29.5(b) has been identified by the FWO as being inconsistent with the NES. The clause states:

“(b) Where an employee with 12 months' continuous service is engaged for part of the 12 month period as a seven day shiftworker, the employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.”

7.2 Ai Group accepts that to the extent that the clause requires that an employee must have 12 months of continuous service to be entitled to the additional annual leave entitlement, this is inconsistent with s.87(1)(b) of the Act.

7.3 This clause commonly appeared in pre-reform federal awards at a time when neither the statutory regime nor the awards provided for progressive accrual of annual leave. Rather, an employee was entitled to four weeks of annual leave after 12 months of service. Seven day shiftworkers were typically entitled to an additional seven days of annual leave per year. The above clause provided a

method of calculating the entitlement for those employees who were not engaged as shiftworkers for the entire 12 month period.

- 7.4 The change to how annual leave accrues means that this clause is no longer necessary.
- 7.5 Under the Act, a shiftworker (as defined by the relevant modern award) is entitled to five weeks of paid annual leave. Section 87(2) provides that annual leave accrues progressively. Thus, a shiftworker accrues annual leave at a higher rate.
- 7.6 In effect, a seven day shiftworker may have their annual leave calculated by two different rates of accrual from month to month. As a result, it is virtually impossible to reach a generalised conclusion as to whether the clause is supplementary to the NES.
- 7.7 Further, where the clause does not reflect progressive accrual of annual leave based on the ordinary hours of work of a seven day shiftworker, the clause is inconsistent with s.87(2).
- 7.8 Ai Group submits that given the complexity that arises under the above clause and the different method by which annual leave now accrues, the clause should be deleted in each of the awards in which it appears.¹
- 7.9 Ai Group considers that the proposal put to the Commission by the AMWU – Vehicle Division regarding this clause does not adequately address the above submissions.

¹ See Schedule 1 to 4 April 2014 correspondence of FWO.

8. Waste Management Award 2010

Public holidays – clause 32.2

8.1 The AMWU submits that clause 32.2 of the *Waste Management Award 2010* is inconsistent with the NES and should be deleted. ABI also submits that the provision is inconsistent with the NES.

8.2 Ai Group does not object to the deletion of the provision.

9. Wine Industry Award 2010

Annual leave and transfer of business – clause 30.9

9.1 The NFF submits that clause 30.9 of the *Wine Industry Award 2010* is inconsistent with s.91(1) of the Act. Clause 30.9 is in the same terms as clause 25.9 of the Horticulture Award. Ai Group refers to its submissions above in this regard.