Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

NES Inconsistencies – Draft Determinations regarding Categories 3 & 4

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NES INCONSISTENCIES – DRAFT DETERMINATIONS REGARDING CATEGORIES 3 AND 4

1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes this submission in relation to alleged inconsistencies between the National Employment Standards (NES) and modern awards. It is filed pursuant to the Fair Work Commission's (Commission) Statement[1] of 31 October 2014 and Decision[2] of 23 December 2014 (Decision).

2. In its Decision, the Commission found that various modern award clauses in categories 3 and 4 are inconsistent with the NES. On 22 January 2015, the Commission published draft determinations which propose to vary the relevant award clauses so as to address the inconsistency identified.

3. This submission addresses the aforementioned draft determinations. We deal with the determinations in the following categories:

    - Proposed variations that are not opposed by Ai Group; and
    - Proposed variations that are opposed by Ai Group.

4. We continue to rely on our submissions dated 26 September 2014 and 15 October 2014.

2. PROPOSED VARIATIONS THAT ARE NOT OPPOSED

5. The Commission's Decision determined that the award clauses listed below are inconsistent with various provisions of the NES.

[1] *4 Yearly Review of Modern Awards* [2014] FWCFB 7727.

[2] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412.

6. Ai Group does not oppose the variations proposed by the Commission with respect to each of these awards. The amendments contained in the draft determinations properly cure the inconsistencies identified:

- *Airport Employees Award 2010* – clause 32.6;
- *Business Equipment Award 2010* – clause 31.8(a);
- *Contract Call Centres Award 2010* – 20.5;
- *Labour Market Assistance Industry Award 2010* – clause 25.3;
- *Racing Industry Ground Maintenance Award 2010* – clause 10.3(d);
- *Silviculture Award 2010* – clause 10.4(c);
- *Sugar Industry Award 2010* – clause 16.5(f);
- *Timber Industry Award 2010* – clause 34.4(a); and
- *Waste Management Award 2010* – clause 32.2.

3. PROPOSED VARIATIONS THAT ARE OPPOSED

Accrual of annual leave for shiftworkers

7. The Commission's Decision deals with a common clause appearing in a significant number of awards, which specifies a methodology by which annual leave accrues for employees defined by the award as shiftworkers for the purposes of the NES.

8. For instance, clause 41.3 of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award) provides:

> "**(a)** For the purpose of the additional week of annual leave provided for in s.87(1)(b) of the Act, a **shiftworker** is a seven day shiftworker who is regularly rostered to work on Sundays and public holidays.
>
> **(b)** Where an employee with 12 months continuous service is engaged for part of the 12 month period as a seven day shiftworker, that employee must have their annual leave increased by half a day for each month the employee is continuously engaged as a seven day shiftworker."

9. The above clause is found in materially similar, if not identical, terms in each of the modern awards listed at paragraph [88] of the Commission's Decision. Whilst we refer specifically to the Manufacturing Award below, our submissions are also relevant to other awards identified by the Commission as containing a similar provision.

10. The Commission has ruled that the above provision is inconsistent with the NES in two respects (as underlined above):

    - It requires a minimum of 12 months' service before the additional entitlement applies; and
    - It provides that the additional entitlement accrues on a monthly and not a daily basis.

11. The draft determinations amend the clause by removing the requirement that an employee must have 12 months' continuous service in order to be eligible for the entitlement arising under this provision. Further, an additional subclause is proposed, which purports to provide the rate of accrual of annual leave for an employee who is engaged as a shiftworker for only part of a month.

12. The proposed and current clause generally provides a shiftworker, as defined, with a greater entitlement to annual leave than what is prescribed by the NES. Under the NES, an employee is entitled to five weeks of annual leave per year of service if the award defines the employee as a shiftworker for the purposes of the NES (s.87(1)(b)(i)). Under the proposed provision, however, an employee would be entitled to 6 days of annual leave in addition to the 4 weeks prescribed by the NES (s.87(1)(a)).

13. Notably, however, the clause does not operate in circumstances where an employee is engaged as a shiftworker for a complete period of 12 months. It operates only where an employee is engaged "for part of a 12 month period" as a shiftworker.

14. Ai Group opposes the amendments proposed. We contend that the current clauses should instead be deleted, to the extent that they deal with quantum or rate of annual leave accruals. Such matters are appropriately dealt with under the NES. All that should be retained from the current clauses is any element that defines a shiftworker for the purpose of s.87(1)(b).

15. We deal with the key reasons for this submission below.

The proposed clause expands the current entitlement without justification

16. In the context of the Manufacturing Award, clause 41.3(b) entitles a shiftworker with 12 months' continuous service to an additional half a day for each month that the employee is engaged as a seven day shiftworker. For the purposes of this section, we proceed on the assumption that this is a supplementary term to the NES.

17. The above words of limitation temper the impact of what is otherwise an entitlement that is more beneficial than that which arises under the Act.

18. Where an essential element of the relevant provision is found to be inconsistent with the NES, the appropriateness of retaining the balance of the provision notwithstanding the removal of the relevant element must be considered in totality and only retained if the altered entitlement is found to be *necessary* to achieve the modern awards objective. The mere removal of those elements of the clause that offend the NES is not appropriate. It alters the balance previously struck in setting such entitlements.

19. By deleting the relevant words underlined above, the proposed clause expands its application to an employee engaged as a shiftworker for a period of less than 12 months. In effect, it provides such employees with a windfall, as they would otherwise have accrued annual leave at a lower rate in accordance with the NES.

20. The removal of the exemption to clause 41.3(b) is detrimental to employers. It will increase costs. Rather than address the inconsistencies identified in the provision so as to align it with the NES, the proposed variation retains those elements that are of benefit to employees and then extends them to other employees in a manner that imposes a greater burden on employers.

21. Importantly, the draft determinations propose to implement a change that will inevitably increase costs without any substantive case for the variation being made out. It is unclear why this expansion of an existing entitlement would be *necessary* to achieve the modern awards objective.

The proposed provision is no longer relevant

22. The current clause 41.3(b) is a remnant from pre-modern awards, many of which contained a clause in similar terms. For instance, clause 7 of the *Metal, Engineering and Associated Industries Award 1998* (Metals Award) provided:

> **"7.1.1 Period of Leave**
>
> **7.1.1(a)(i)** A full time or part time employee under this award is entitled to a period of 28 consecutive days leave, including non-working days, (i.e 4 weeks) after each 12 months service (less the period of annual leave) with an employer.
>
> **(ii)** An employer may reach agreement with the majority of employees concerned to convert the entitlements in 7.1.1(a)(i) or 7.1.2 to an hourly entitlement (ie. 152 hours or 190 hours respectively for a full time employee) for administrative ease.
>
> **7.1.1(b)** The annual leave for full time and part time employees accrues at a rate of 2.923 hours for each 38 ordinary hours worked.
>
> **7.1.1(c)** Casual employees are not entitled to annual leave.
>
> **7.1.2 Additional Leave for Seven Day Shift Workers**
>
> In addition to leave provided for in 7.1.1, seven day shift workers, that is shift workers who are rostered to work regularly on Sundays and holidays, shall be allowed seven consecutive days leave including non-working days.
>
> Where an employee with 12 months continuous service is engaged for part of the 12 monthly period as a seven day shift worker, that employee is entitled to have the period of leave prescribed in subclause 7.1.1 increased by half a day for each month he or she is continuously engaged as a seven day shift worker."

23. It is uncontroversial that annual leave did not accrue progressively in the relevant sense under pre-modern awards, as it now does pursuant to s.87(2) of the Act. Rather, the entitlement to annual leave arose for all employees after each 12 months of service. Clause 7.1.2 of the Metals Award provided a method by which a shiftworker's entitlement to annual leave could be determined, if they were so engaged for a period of less than 12 months.

24. The determination as to whether a shiftworker should receive additional annual leave and, if so, the amount of such leave, occurred at the end of a period of 12 months. At that point, an employer would be able to ascertain whether the employee was engaged for all or part of the 12 month period as a shiftworker, and calculate the amount of annual leave to be credited to that employee accordingly.

25. With the advent of the Fair Work regime, and the adoption of progressive accrual of annual leave, clause 41.3(b) can no longer be regarded as providing a relevant safety net. The rate of accrual is now prescribed by the statute, according to which a shiftworker accrues annual leave at a higher rate for those ordinary hours during which he/she is engaged as a shiftworker. The purpose previously served by such a clause is no longer necessary.

Ongoing inconsistency

26. The newly proposed clause 41.3(b) is itself potentially inconsistent with the NES. Under the NES annual leave accrues progressively based on an employee's ordinary hours of work. The proposed paragraph does not appear to reflect the operation of the NES. Instead it appears to operate on the basis of monthly accruals as opposed to progressive accruals. Accordingly, assuming the clause would not require that annual leave accruals be credited at the start of each month, the operation of (b) is, in a temporal sense, less beneficial to employees than the NES prior to the conclusion of each month. The insertion of paragraph (c) dealing with the circumstance of an employee who is only engaged as a shift worker for part of a month does not cure this. It deals with entitlements of different employees.

Appropriate remedy - accrual of annual leave should be left to the NES

27. We note that the rate of accrual of annual leave is generally not regulated by modern awards except for provisions similar to clause 41.3. Awards clauses pertaining to annual leave typically include a reference to the NES but go no further in addressing the rate of accrual.

28. Ai Group proposes that the clauses identified by the Commission should be deleted to the extent that they deal with the quantum or rate of annual leave accrual. The Commission should not seek to amend these clauses in a piecemeal manner that undermines the integrity of the clause. Instead it should simply determine that the accrual of annual leave is a matter that should be left to the NES.

The modern awards objective

29. The modern awards objective applies to the exercise of the Commission's modern award powers, which includes variations made to the awards as part of the 4 yearly review.[3] Thus, the variations proposed as part of these proceedings must result in each of the relevant awards containing terms *necessary* to achieve the modern awards objective (s.138). In our submission, the amendment proposed does not meet this requirement.

30. There is no evidence before the Commission directed at establishing a cogent reason why the variation proposed is necessary to ensure that the awards, together with the NES, provide a fair and relevant safety net, having regard to the various elements of the modern awards objective.

31. In fact, the following factors listed in s.134(1) establish that the amendments proposed are contrary to the modern awards objective and that our proposal to delete the current provision should be adopted:

[3] Section 134(2)(a) and *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [29].

- **Fair and relevant**

  As earlier discussed, the clause is no longer relevant, given the progressive accrual of annual leave under s.87(2) of the Act. It is appropriate that archaic provisions reflecting historical rates of accrual are updated to reflect the current legislative scheme.

  Moreover, any consideration of what constitutes a fair and relevant safety net must involve consideration of what is fair for employers. It would not be fair to employers to simply retain those elements of a former scheme that are beneficial to employers while at the same time removing previously applicable limitations.

- **The need to encourage collective bargaining (s.134(1)(b))**

  The deletion of clause 41.3(b) may encourage parties to engage in collective bargaining and develop a provision that deals specifically with the rate of accrual for shiftworkers. Such provisions can be tailored to provide a more beneficial entitlement to annual leave and a rate of accrual that can easily be implemented in a particular enterprise, having regard to the incidence of shiftwork and the payroll system utilised by the employer.

- **The likely impact on business, including productivity, employment costs and the regulatory burden (s.134(1)(f))**

  The expansion of the entitlement arising from the current clause 41.3(b) clearly imposes additional employments costs. Further, the proposed clauses create a significant regulatory burden due to the differing rates of accrual that may apply employees (as detailed below). The deletion of clause 41.3(b) would therefore have a favourable impact on business. It would reduce costs. The regulatory burden would also be reduced by providing greater uniformity of employee entitlements relating to annual leave at the safety net level. For example, there would be a reduced need to apply different standards to award covered versus award free employees.

- **The need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g))**

  The rate of accrual of annual leave for an employee engaged as a shiftworker may vary, under the Commission's proposal, as follows:

  - Where an employee is engaged as a shiftworker for a complete month, but not for every month in a 12 month period, the employee is entitled to an additional half a day for each such month;

  - Where an employee is engaged for part of a month as a shiftworker, the employee is entitled to an additional amount of leave that is proportionate to the leave that accrues under the proposed clause 41.3(b); and

  - Where an employee is not engaged as a shiftworker for any part of the month, the employee's annual leave accrues at the same rate as that of an employee who does not meet the definition of a shiftworker. Pursuant to the NES, such an employee is entitled to 4 weeks of annual leave for each year of service (s.87(1)(a)).

  The complexity arising from this is self-evident. The application of the clause does not lend itself to ensuring that the award is simple or easy to understand. This further highlights the need to delete the relevant provisions.

  The alignment of the rules relating to the accumulation of annual leave by relevant award covered shiftworkers with those applicable under the legislation will result in a greater level of uniformity of conditions under the workplace relations system and as such can only assist in making the award system simpler and easier to understand.

The contention that aligning annual leave accruals to the NES is consistent with s.134(1)(g) is reinforced by the Commission's decision that annotated awards will be prepared by the Commission, which refer readers of the award to the relevant provisions of the NES.[4]

- **The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))**

  To the extent that considerations arising from ss.134(1)(b), (d) and (f) adversely impact on employment growth, inflation and the national economy, the amendment proposed is contrary to s.134(1)(h). To the extent that Ai Group's alternate proposal reduces costs and regulatory burden on business it will be consistent with this consideration.

Conclusion

32. For all of the reasons stated above, the provisions identified by the Commission at paragraph [88] of its decision should be deleted.

Air Pilots Award 2010

33. The current cause 27.8(a) of the *Air Pilots Award 2010* has been found to be inconsistent with the NES on the basis that it places impermissible conditions upon the circumstances in which a period of personal/carer's leave accessed during annual leave will be taken not to be personal/carer's leave. Such impermissible conditions provide, in effect, that an employee is required to become "seriously ill" while on annual leave and the period of personal/carer's leave is required to be of at least seven days' duration.

34. The proposed amendment removes the requirement that a pilot must become *seriously* ill in order to obtain the benefit of the clause and instead provides that the entitlement will arise when an employee is merely ill. The seven day requirement is also simply removed.

[4] *4 Yearly Review of Modern Awards* [2014] FWCFB 9412 at [35].

35. In relation to personal illness, s.92 of the Act provides that an employee may take paid personal/carer's leave if the leave is taken *"…*because the employee is not fit for work because of a personal illness…". Section 89 provides, in effect, that a person is taken not to be on paid annual leave provided for by the NES where they access certain other types of leave or absence prescribed by the legislation. This includes personal/carer's leave. Section 107 deals with notice and evidence requirements associated with employees accessing leave. Subsection 107(1) provides that the notice that an employee must give their employer of the taking of leave;

> (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
>
> (b) must advise the employer of the period, or expected period, of the leave.

36. Subsection 107(5) provides that;

> (5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

37. If the award is to be amended based on an inconsistency it is appropriate that it is properly aligned to the NES.

38. The term "serious illness" is potentially narrower than the term "illness". However, a mere reference to an employee being "ill", as found in the proposed clause, is possibly narrower than the circumstances in which an employee may be entitled to personal/carer's leave under the NES. That is, a reference to "illness" is not confined to capturing circumstances where an employee is *not fit for work* because of a personal illness as contemplated by the NES. Consequently the amendment would arguably create a new award derived entitlement that is more generous than both the NES and the current award term. We assume such an outcome is not intended. No case has been mounted so as to justify such a substantive change.

39. The requirement that an employee be not taken to be on paid annual leave pursuant to under the NES while on personal/carer's leave and the circumstances in which an employee on annual leave is able to access personal/carer's leave is not a matter that need be dealt with in awards. This is already provided for under the NES. Further, awards can only include terms to the extent that they are necessary to achieve the modern awards objective. As such it is arguable that any inconsistency could be addressed through the deletion of the relevant clauses. However, it is appropriate that the award continue to identify relevant evidence requirements for employees seeking to access personal/carer's leave.

40. At the very least, the proposed amendment should be altered so that an employee must have a personal illness which would result in them not being fit for work. A potentially appropriate alternate form of words would be as follows:

> "Where a pilot becomes so ill during annual leave that they would not be fit for work, the duration of such illness may be counted as personal/carer's leave to the extent that the pilot has credited personal/carer's leave. Providing that…"

Aircraft Cabin Crew Award 2010

41. The proposed variation to the *Aircraft Cabin Crew Award 2010* is directed at removing the requirement for an employee to be ill for more than one day before the award permits such leave to be personal/carer's leave and to have annual leave credit adjusted accordingly.

42. The removal of the limitation extends the award derived entitlement. If this is to occur it is appropriate that the phrase "*fall ill*" be amended to reflect the requirement that the employee needs to be "*not fit for work*" because of the illness:

> "An employee who:
>
> (a) <u>While on annual leave falls so ill that they are not fit for work</u>;

(b) advises the employer as soon as practicable of such illness; and

(c) produces medical evidence of the illness…"

Alpine Resorts Award 2010

43. The Commission's Decision found that clause 11.5 of the *Alpine Resorts Award 2010* is inconsistent with s.87(1) of the Act.

44. Ai Group does not oppose the proposed deletion of clause 11.5. We note however, that the following consequential amendments should also be made to the award:

- A new standard rate will need to be identified within the award. It is presently the minimum hourly rate for a Resort Worker Level 2 (seasonal) in clause 16. The rate there prescribed includes the 8.33% loading which would no longer be justifiable if clause 11.5 is deleted.
- The "seasonal hourly rate" column should be deleted from clause 16.2.
- The "snowsports instructor seasonal hourly rate" column should be deleted from clause 16.3.

45. We note that the *Alpine Resorts Award 2010* is to be dealt with as part of the second group in the Award Stage of the 4 Yearly Review and that the *Exposure Draft – Alpine Resorts Award 2014* was published prior to the Commission's Decision. The Exposure Draft should also be amended to reflect the Commission's Decision and the above proposals.

46. Ai Group submits that the insertion of the proposed new provision in lieu of the current clause 11.5 is unnecessary. But for clause 11.5, the award does not purport to exclude seasonal employees from an entitlement to annual leave. Clause 26 (Annual Leave) explicitly refers to the NES, which, as found by the Commission, entitles seasonal employees under this award to annual leave. Further, the insertion of a clause that refers specifically to annual leave in the absence of provisions that deal with other forms of leave, may give rise to

confusion as to whether other provisions of the NES apply to seasonal employees.

47. On this basis, the award should be varied by simply deleting clause 11.5.

Horse and Greyhound Training Award 2010

48. The Commission ruled that clause 10.2(d) of the *Horse and Greyhound Training Award 2010* is inconsistent with s.117 as it prescribes periods of notice to be given upon termination to probationary employees that are shorter than those mandated by the NES.

49. Ai Group opposes the proposed clause 10.2(d)(i), the effect of which is to require employers to give notice in accordance with the NES, however probationary employees need only give notice in accordance with this clause. We note that but for this provision, probationary employees would be required to give the same period of notice upon resignation that an employer would be required to give under the NES, by virtue of clause 11.2 of the award.

50. The clause clearly operates on the premise that an employer and probationary employee must give an equivalent period of notice when either party seeks to bring the employment relationship to an end.

51. The variation proposed simply deletes that element of the current clause that has been identified as inconsistent with the NES. There is no apparent rationale for preserving an employee's right to resign upon the giving of a shorter period of notice, when considered in light of s.138 and the modern awards objective.

52. Ai Group submits that clause 10.2(d) should be deleted in its entirety.

53. Should the Commission determine that the draft determination is to be adopted, we make the following additional observations:

    - The interaction between the proposed clause 10.2(d)(i) and clause 11.4 should be considered. We propose that clause 10.2(d)(i) commence with the words: "Notwithstanding clause 11.4 …".

- The proposed clause 10.2(d)(ii) should not be included. The provision creates an award obligation to give one week of notice, where one is not presently contained in the award. If the intention of the amendment is to ensure that the clause is consistent with the NES, it need not provide for a period of notice to be given. The NES, including the exemptions contained in s.123, will apply.