Fair Work Commission

Section 156 – Fair Work Act 2009 (the Act)

4 Yearly Review of Modern Awards

(AM2014/1 and Ors)

Alleged Inconsistencies with NES

Further Submission In Reply NES matters

Australian Manufacturing Workers Union

(AMWU)

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ACCRUAL OF ANNUAL LEAVE FOR SHIFTWORKERS

1. Pursuant to the Commission's directions in transcript[1] the AMWU makes this further submission in reply to the AIG's submission paragraphs 7 through to 32 dated 19 February 2015.

2. The AIG have two main arguments. Firstly, that the beneficial provisions found at Clause 41.3(b) of the Manufacturing and Associated Industries and Occupations Award (the Manufacturing Award) supplementary to s.87(1)(b) of the NES should be deleted. Secondly, the AIG argue that the draft determination broadens the scope of the existing entitlement.

3. The AMWU's response to these arguments is located in the table below.. Regarding the AIG's second complaint as to extension of the entitlement at sub-clause 41.3(b) of the Manufacturing Award, a review of transcript identifies some confusion relating to the intent of the amendments proposed to remove the inconsistency with the NES.

4. The following submission seeks to clarify the intent and proposes amendments based on the clarification, to the draft determination issued by the Commission[2].

5. The AMWU made the following submission recorded in transcript of 26 February, 2015[3]t :

PN575 We would point out that the AMWU's clause on which the FWC's draft determination appears to be based, did not include the word "continuously" and that the FWC has inserted that requirement which does make the subclause operate in a more effective way. Subsection (c) applies to those people identified in subclause (b) who are those who are continuously engaged on seven-day shift work**.** (emphasis added)

[1] PN 708 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/260215_AM20141andOrs.pdf

[2] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/MA000010-manufacturing-NES-draft.pdf

[3] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/260215_AM20141andOrs.pdf

6. That is, proposed sub-clause (c) of the draft determination applies only to employees meeting the conditions at sub-clause (b) and clarifies that the accrual rate provided at sub-paragraph b) applies throughout a month on a pro-rata basis.

7. The conditions necessary to attract the more beneficial accrual entitlement at sub-clause (b) of the draft determination are:

A) The employee be a seven day shift worker[4];

B) Who is regularly rostered to work on Sundays and public holidays; and

C) Is engaged for only part of a 12 month period as a continuous seven day shiftworker.

Why are clauses (b) and (c) necessary to meet the modern award objective?

8. Under Clause 36.3(c) and 36.4(b) of the Manufacturing Award shift workers can work on a roster, including a 7 day roster, operating over 28 days or operating over a period of up to 12 months. Seven day shift workers may commence but not finish their 12 month projected roster. Sub-clause (b) has work to do in this instance. Sub-clause (b) also has work to do where a day worker transfers from day work to 7 day shift work. These examples are illustrative not exhaustive.

9. Clause (c) would have effect, for example, where the conditions of sub-clause (b) are satisfied and where the employee:

A) Commenced their engagement in the middle of the month

B) Commenced their engagement at the beginning of a month ;

C) Was transferred from a particular work arrangement to a 7 day shift arrangement during any part of a month

D) Was terminated prior to the completion of a month; and

[4] The requirement for "seven day shiftwork" is not a condition of every award. For example Clause 25.3 of the Dry Cleaning Award applies the additional benefit to "shift workers"

Accessed leave prior to a complete month passing from any of the examples provided above.

10. The entitlement at sub-clause (c) is not an additional entitlement. It is a clarification required to reflect progressive accumulation of the accrual rate specified in (b). The clause is necessary as evidenced by paragraph 26 of the AIG's submission where they misconceive the accrual rate of a half day per month being applied on a monthly rather than progressive basis.

11. The AIG state:

> 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.

Proposed amendments to the draft determination

12. The amendments proposed we submit clarify intent and should resolve concerns regarding the alleged extension of the entitlement..

1. By deleting the following text in clause 41.3(b):

> "(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."

and inserting the following:

> "(b) In addition to the leave prescribed at s.87(1)(a)of the Act, w~~W~~here an employee is engaged for part of a 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.

(c) The leave prescribed in (b) above accrues throughout the month on a pro-rata basis. ~~**An employee engaged for only part of a month as a seven day shiftworker will accrue leave for the part month proportionate to the leave prescribed in clause 41.3(b).”**~~

Reply to AIG submission of 19 February, 2014

13. The AMWU’s response to the AI Group submission is contained in the table on the following page. The paragraph numbers are referenced to those in the AI group submission.

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
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.	The purpose of sub –clause (c) of the proposed draft determination is to clarify that the accrual rate of half a day per month accrues progressively throughout the 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	This submission is factually incorrect. The purpose of the provision is to not disadvantage employees who work only part of the year as a 7 day shiftworker. The accrual rate only applies where less than a year is worked. A 7 day shift worker receiving an entitlement under clause (b) would never be

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
	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)).	able to accrue 6 days. Six days additional leave applies the accrual rate to a 12 month period where the application at b) is restricted to employees who work less than 12 months.
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.	The slighter higher accrual rate is additional compensation for shiftworkers managing the often delicate balance of their life, and that of their family, disrupted through changes to working patterns. There is significant upheaval for example for A day worker moved to 7 day shift work in a family situation where one partner is already required to work on the weekend.
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).	AI Group have not established why this long standing employee entitlement should be removed from the safety net. It is uncontroversial that Awards can supplement the NES.

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
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.	The "above words" reflect the outmoded form of leave accrual. The provision still has work to do in the current regime of progressive accrual.
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.	The 'essential element" has had no effect since 31.12.2009 (s.56). Its deletion leaves the current award entitlement intact, an entitlement already considered to be consistent with s.134 and s.138 of the Act. AI Group do not establish why the award safety net should be diminished. Retaining the entitlement reflects part of the exhaustive "balancing" undertaken by the parties when first negotiating the terms of a modern manufacturing award. The provision was an agreed provision in every draft

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
		award proposed by the parties to the Commission prior to the making of the modern award. Deletion would be abrogation of the responsibility inherent in consent arrangements.
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.	The philosophy and intent of the clause was, and remains, that 7 day shift workers engaged for part of a year in that capacity accrue leave at the higher rate for that period on 7 day shift work. No extension is created by removal of the NES inconsistent phrase.
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.	There is absolutely no additional cost at clause b) or c). There is a potential "bringing forward" of the cost where an employee chooses to access leave prior to the completion of 12 months service.
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	The AMWU does not agree that clause c) of the draft determinations expand the existing entitlement as argued by AI Group. The amendments proposed however clarify the operation of the clause.

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
	would be necessary to achieve the modern awards objective.	
The proposed provision is no longer relevant		
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.	This is not correct. Under the old schema, an employee engaged as a 7 day shift worker could have, after 4 months for example, been transferred to shift work for the remainder of the 12 months. An employer would know at the 4 month mark that the higher accrual rate applied for that 4 month period.
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	The provision remains relevant under the current statute as the rate of accrual at s.87 accrues in relation to each "year of service". Employees and

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
	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.	employers know when an employee's service commences and whether a period of 7 day shift work occurred during that period.
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.	As stated above, the AI Group's submission is evidence of why sub clause c) is required to clarify that service accrues progressively throughout a month at the accrual rate of half a day per month.

NO.	AIG SUBMISSION: 19 FEBRUARY 2015	AMWU REPLY
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.	The Commission has determined that "**[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective"[2014] FWCFB 1788
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		

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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.	The AMWU and its component sections have previously addressed AI Group's modern award objectives objections.