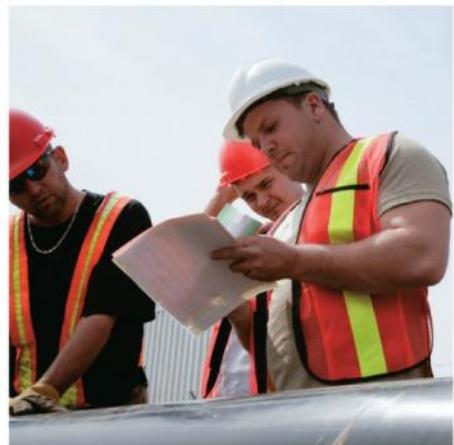




## Australian Industry Group Submission to the Fair Work Commission

26 September 2014

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



AUSTRALIAN INDUSTRY GROUP

## **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 (FWC) on 13 August 2014.
- 1.2 This submission primarily addresses correspondence from the Fair Work Ombudsman (FWO), dated 4 April 2014, in which it identified various alleged inconsistencies between the National Employment Standards (NES) and modern award terms.
- 1.3 The table attached to this submission sets out Ai Group's position with respect to matters raised by the FWO for various awards in which Ai Group has a significant interest.
- 1.4 In addition, Ai Group submits that an inconsistency arises between the NES and the terms of the *Timber Industry Award 2010* (Timber Award). Amendments to the relevant clause are proposed at section 3 below.

#### **2. Sections 55 and 56 of the *Fair Work Act 2009***

- 2.1 Subdivision A, Division 3 of Part 2-1 of the *Fair Work Act 2009* (the Act) deals with the interaction between the NES and a modern award or enterprise agreement.
- 2.2 Section 55 of the Act regulates the interaction between the NES and a modern award. It provides that:
  - A modern award must not exclude the NES or any provision of the NES (s.55(1));

- A modern award may include any term that the award is expressly permitted to include by a provision of Part 2-2 of the Act or by regulations made for the purposes of s.127 (s.55(2));
- The NES have effect subject to terms included in a modern award (s.55(3));
- A modern award may also include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or terms that supplement the NES, but only to the extent that the effect of those terms is not detrimental to an employee in any respect when compared to the NES (s.55(4));
- If a modern award includes terms permitted by s.55(4), to the extent that the terms give an employee an entitlement that is the same as an NES entitlement;
  - The award terms operate in parallel with the NES entitlement, but not so as to give the employee a double benefit; and
  - The provisions of the NES relating to the NES entitlement apply as a minimum standard to the award entitlement (s.55(6)).

- 2.3 Section 56 states that a term of a modern award (or enterprise agreement) has no effect to the extent that it contravenes s.55.
- 2.4 Ai Group has had regard to the operation and effect of ss.55-56 in determining its position on matters raised by the FWO.

### **3. Timber Industry Award 2010**

- 3.1 Ai Group proposes that clause 34.4 of the Timber Award be varied so that it complies with s.101(2) of the Act.
- 3.2 Clause 34.4 states:

#### **“34.4 Payment for excess accrued personal leave**

- (a)** Where an employee in the General Timber Stream or Wood and Timber Furniture Stream has more than 15 days of accumulated untaken personal leave, the employee may elect in writing that an equivalent payment will be made to the employee and the employer will pay such an employee for any accumulated untaken personal leave exceeding 15 days, up to a maximum payment as for 64 hours, in the case of an employee in the General Timber Stream, or a maximum payment as for 38 hours in the case of an employee in the Wood and Timber Furniture Stream. The employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that has been foregone.
  - (i)** In order to make an election to have an equivalent payment made an employee must have sufficient leave accrued to retain a minimum balance of 15 days' leave after the equivalent payment is made.
  - (ii)** The period of personal leave for which the employee has been paid will not be added to the period of untaken personal leave accrued to the employee.
  - (iii)** The employee may only make this request once in any twelve month period.
- (b)** In the Pulp and Paper stream, payment of excess accrued sick leave will be made to an employee, or a deceased employee's estate, in respect of accumulated entitlement upon:
  - (i)** retirement due to age or incapacity;
  - (ii)** termination of employment after ten years continuous service for other reasonable cause; or
  - (iii)** death whilst an employee of the business.”

- 3.3 Ai Group submits that clause 34.4 does not meet the requirements of the Act, as it does not stipulate that cashing out is subject to the employer's agreement, as required by s.101(2)(b). Instead, the clause appears to leave it to the employee's election.
- 3.4 Moreover, the subclause does not require that there be separate agreements in writing for each instance of cashing out, as required by the Act.
- 3.5 Ai Group proposes that subclause 34.4 of the Timber Award be amended so that it complies with s.101(2) of the Act. A new clause 34.4(a)(iv) should be inserted as follows:

"Each cashing out of a particular amount of paid personal/carer's leave must be by separate agreement in writing between the employer and the employee".

- 3.6 This issue was raised by Ai Group during proceedings relating to the review of the Timber Award before Deputy President Gooley (AM2014/92). The Deputy President's report to the Full Bench (PR552579) of 18 July 2014 at [16] – [22] and pages 24 – 26 deals with Ai Group's proposal.

## Potential Inconsistencies Raised by the FWO between Modern Awards and the National Employment Standards<sup>1</sup>

Issue	Award Clause	NES Provision	Comments
<b>Airline Operations-Ground Staff Award 2010 [MA000048]</b>			
Accrual of annual leave	<p><b>34.2</b> 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.</p>	<p><b>87 Entitlement to annual leave</b></p> <p><i>Accrual of leave</i></p> <p>(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p> <p><b>88 Taking paid annual leave</b></p> <p>(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.</p> <p>(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.</p>	<p><b>The FWO</b> submits that the clause is ambiguous as it implies a qualifying period of 12 months before an employee is entitled to access and accrue further annual leave. The clause also restricts when a period of annual leave can be agreed upon.</p> <p>Section 93 permits an award to include terms that deal with the taking of annual leave. The NES has effect subject to such terms (s.55(3)).</p> <p>Clause 34.2 is a term envisaged by s.93 and is therefore permissible. The clause does not go to the accrual of annual leave – only the taking of it.</p> <p><b>Ai Group view:</b> no variation necessary.</p>

<sup>1</sup> See correspondence from FWO, dated 4 April 2014.

Issue	Award Clause	NES Provision	Comments
<b>Business Equipment Award 2010 [MA000021]</b>			
Annual leave on termination	<p><b>31.8 Termination</b></p> <p>(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.</p>	<p><b>87 Entitlement to annual leave</b></p> <p>(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p> <p><b>90 Payment of annual leave</b></p> <p>(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.</p>	<p><b>The FWO</b> notes that the Act contains no requirement that:</p> <ul style="list-style-type: none"> <li>• An employee has at least one week of continuous service to have an entitlement under s.90(2); or</li> <li>• The employment is terminated for a reason other than serious misconduct.</li> </ul> <p>Additionally, annual leave accrues progressively. Thus, annual leave should not be paid out on termination on the basis of each 38 ordinary hours worked.</p> <p><b>Ai Group's view:</b> No objection to clause 31.8(a) being deleted as it appears to be inconsistent with the NES.</p>

Issue	Award Clause	NES Provision	Comments
<b>Contract Call Centres Award 2010 [MA000023]</b>			
Public holidays	<p><b>30.5 Absence on working day before or after a public holiday</b></p> <p>An employee absent on the working day before or the working day after a public holiday without reasonable excuse (proof of which will be on the employee), or without the consent of the employer, will not be entitled to payment for such holiday</p>	<p><b>114 Entitlement to be absent from employment on public holiday</b></p> <p><i>Employee entitled to be absent on public holiday</i></p> <p>(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.</p> <p><b>116 Payment for absence on public holiday</b></p> <p>If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.</p>	<p><b>The FWO</b> is of the view that clause 30.5 seeks to override the NES entitlement to payment for a public holiday.</p> <p><b>Ai Group's view:</b> No objection to clause 31.8(a) being deleted as it appears to be inconsistent with the NES.</p>

Issue	Award Clause	NES Provision	Comments
<b>Mobile Crane Hiring Award 2010 [MA000032]</b>			
Accrual of annual leave	<p><b>25.2(c) Leave allowed before due date</b></p> <p>(i) An employer may allow an employee to take annual leave prior to the employee's entitlement otherwise arising. In such circumstances, the qualifying period of further annual leave will not commence until the expiration of 12 months in respect of which the leave so allowed was taken.</p>	<p><b>87 Entitlement to annual leave</b></p> <p><i>Accrual of leave</i></p> <p>(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p> <p><b>88 Taking paid annual leave</b></p> <p>(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.</p> <p>(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.</p>	<p><b>The FWO</b> submits that the clause is ambiguous as it implies a qualifying period of 12 months before an employee is entitled to access and accrue annual leave. The clause also restricts when a period of annual leave can be agreed upon.</p> <p>Section 93 permits an award to include terms that deal with the taking of annual leave. The NES has effect subject to such terms (s.55(3)).</p> <p>Clause 25.2(c)(i) is term envisaged by s.93 and is therefore permissible. The clause does not go to the accrual of annual leave – only the taking of it.</p> <p><b>Ai Group's view:</b> no variation necessary.</p>

Issue	Award Clause	NES Provision	Comments
<b>Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017]</b>			
Accrual of annual leave and personal/carer's leave	<p><b>13. Part-time employment</b></p> <p><b>13.9</b> When calculating an employee's pro rata entitlement to annual leave and personal/carer's leave, they must be paid in proportion to the average number of hours worked in the previous 12 months. If there is not a 12 month period of employment then the calculation will be based on the average number of hours worked each week for the actual period of employment.</p>	<p><b>Section 87 Entitlement to annual leave</b></p> <p>(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p> <p><b>96 Entitlement to paid personal/carer's leave</b></p> <p>(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p>	<p><b>FWO</b> notes that annual leave and personal/carer's leave accrue on ordinary hours worked, not an average of hours worked. It is concerned that in some circumstances, the award clause may be disadvantageous to employees (e.g. where their hour of work have reduced).</p> <p>To the extent that clause 13.1 is detrimental to an employee, it cannot be included in a modern award, by virtue of s.55(4).</p> <p>The clause could be read to include overtime as it is not limited to an average of the <i>ordinary</i> hours worked.</p> <p><b>This matter has been discussed by the parties as part of the review of this award before Lee C. The parties positions are:</b></p> <ul style="list-style-type: none"> <li>TCFUA: to the extent that the clause is inconsistent with the NES, it should be varied such that the greater of the two accruals will apply.</li> <li>AIG and ABI: The clause is unnecessary given the operation of the NES and should be deleted.</li> </ul> <p>The parties are continuing discussions regarding the review of this award.</p>

Issue	Award Clause	NES Provision	Comments
<b>Waste Management Award 2010 [MA000043]</b>			
Public holidays	<p><b>32.2</b> An employee other than a casual who, without the consent of their employer or without reasonable cause, is absent from work on the day before or the day after a public holiday is not entitled to any payment for such public holiday.</p>	<p><b>114 Entitlement to be absent from employment on public holiday</b></p> <p><i>Employee entitled to be absent on public holiday</i></p> <p>(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.</p> <p><b>116 Payment for absence on public holiday</b></p> <p>If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.</p>	<p><b>The FWO</b> is of the view that clause 32.2 seeks to override the NES entitlement to payment for a public holiday.</p> <p><b>Ai Group's view:</b> No objection to clause 31.8(a) being deleted as it appears to be inconsistent with the NES.</p>

Issue	Award Clause	NES Provision	Comments
<b>Multiple Awards – see Schedule 1 to FWO correspondence</b>			
Accrual of annual leave	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 shiftworker.	<p><b>Section 87 Entitlement to annual leave</b></p> <p>(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.</p>	<p><b>The FWO</b> is of the view that the clause is contrary to s.87(2) and that it is ambiguous as to whether the shiftworker must have 12 months continuous service before accessing the additional week of annual leave.</p> <p>To the extent that the clause might be considered ancillary or incidental to the operation of the NES entitlement of shiftworkers to annual leave, it must not be detrimental to an employee when compared to the NES (s.55(4)).</p> <p><b>Ai Group's view:</b> In certain circumstances, the operation of this award clause could be detrimental to the employee as compared to the progressive accrual of annual leave according to the employee's ordinary hours of work. If that is the case, the clause should be deleted.</p>

Issue	Award Clause	NES Provision	Comments
<b>Multiple Awards – see Schedule 2 to FWO correspondence</b>			
Annual leave on termination	Annual leave loading is not payable upon termination.	<p><b>90 Payment of annual leave</b></p> <p>(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.</p>	<p><b>The FWO</b> is of the view that such a clause is contrary to s.90(2).</p> <p>This issue is being considered by the FWC as part of the annual leave common claims (AM2014/47).</p> <p>Ai Group's view is that this clause is not inconsistent with the NES as set out in its submissions in the above proceedings.</p>
Annual leave on termination	Annual leave loading is payable if the employee is terminated for a reason other than misconduct.	<p><b>90 Payment of annual leave</b></p> <p>(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.</p>	<p><b>The FWO</b> is of the view that such a clause is contrary to s.90(2).</p> <p>Of the four awards identified by the FWO in this category, three of them are included in the ACTU's annual leave claim and will be dealt with by the FWC as part of the annual leave case (AM2014/47):</p> <ul style="list-style-type: none"> <li>• Security Services Industry Award</li> <li>• Timber Industry Award</li> <li>• Live Performance Award</li> </ul> <p>The Electrical, Electronic and Communications Contracting Award has also been identified by the FWO in this category.</p> <p>Ai Group's view is that this clause is not inconsistent with the NES as set out in its submissions in the above proceedings.</p>

Issue	Award Clause	NES Provision	Comments
Annual leave on termination	Annual leave loading applies only where a period of leave is taken.	<p><b>90 Payment of annual leave</b></p> <p>(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.</p>	<p><b>The FWO</b> is of the view that such a clause is contrary to s.90(2).</p> <p>To be considered by the FWC as part of the annual leave common claims (AM2014/47).</p> <p>Ai Group's view is that this clause is not inconsistent with the NES as set out in its submissions in the above proceedings.</p>