



25 November 2010

51 Walker Street,  
North Sydney NSW 2060  
Australia

The Hon JM Acton  
Senior Deputy President  
Fair Work Australia  
11 Exhibition Street  
Melbourne, Victoria, 3000

ABN 76 369 958 788

Tel: 02 9466 5566  
Fax: 02 9466 5599

Dear Senior Deputy President

**Re: *Matter No. AM2010/237 - Application by Australian Industry Group to vary the Manufacturing and Associated Industries and Occupations Award 2010 under section 160 of the Fair Work Act 2009***

We refer to yesterday's hearing of Ai Group's application to vary the Manufacturing Modern Award.

The purpose of this correspondence is to address the question which your Honour asked while Ai Group was presenting its oral submissions, regarding the difference between the wording in s.115(3) of the *Fair Work Act* (FW Act) and s.54(3) of the draft National Employment Standards (NES) released by the former Minister for Employment and Workplace on 16 June 2008.

Section 115(3) of the FW Act provides:

*"Substituted public holidays under modern awards and enterprise agreements*

- (3) *A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).*

Section 54(3) of the draft NES (16 June 2008) provided:

*"Substituted public holidays under modern awards*

- (3) *A modern award may substitute (or provide for the substitution of) a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2)."*

The Revised Award Modernisation Request of 16 June 2008, included the following provision:

- "33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions*

*dealing with these issues in a modern award. The NES allows, but does not require, modern awards to deal with, among other things:*

....

- *the substitution of public holidays;*

....”

In November 2008, the *Fair Work Bill 2008* was introduced into Parliament. Section 115(3) of the Bill is identical to the corresponding provision which is now contained within the FW Act.

The Explanatory Memorandum includes the following explanation of sub-clause 115(3) of the Bill:

*“458. Subclause 115(3) permits a modern award or enterprise agreement to include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday under subclauses 115(1) or (2). This means that a modern award or agreement cannot provide that a substitute day can be determined unilaterally by the employer.”* (Emphasis added)

On 18 December 2008, various amendments were made to the Award Modernisation Request, including changing paragraph 33 as follows:

*“33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:*

....

- *provide for the substitution of public holidays by agreement between an employer and employee;*

....”

It is apparent that the variation made to s.54(3) of the draft NES (16 June 2008), as reflected in the final version of the NES within the FW Act, was intended to prevent employers **unilaterally** determining that an alternative day will be substituted for a public holiday under the NES.

Ai Group submits that the different wording between s.54(3) of the draft NES and s.115(3) of the FW Act has no relevance to clause 44.2 of the Manufacturing Modern Award.

As set out in Ai Group’s written submission of 23 November 2010 (at paragraph 26 and in **Annexure C**), clause 44.2 of the Manufacturing Modern Award is not intended to have the effect of substituting any public holiday recognised under the NES to an alternative day, but rather to specify which days public holiday penalty rates are payable and which days weekend penalty rates are payable.

The term “observed as the public holiday” in s.44.2 is intended to mean “observed as the public holiday” for the purposes of applying the penalty rates in the award. In the correspondence in **Annexure D** to our submission, the FWO agrees that the wording which Ai Group has proposed for clause 44.2 (which retains the word “observed”) would not be inconsistent with the NES.

It is noteworthy that clause 44.2 in the Manufacturing Modern Award is entitled “*Public holidays which fall on a weekend*”, in contrast to the title of clause 7.5.1(d) of the Metals Award 1998 which was “*Substitution of certain public holidays which fall on a weekend*”. The change in title supports the view that the clause is not intended to have the effect of transferring a public holiday to another day but rather is a clause which is directed at how the public holiday is to be treated or observed for the purposes of award provisions (ie. penalty rates). Clause 44.3 uses the word “substitute” in its title but clause 44.2 does not.

In our submission, when properly analysed, any suggestion that the Award Modernisation Full Bench included clause 44.2 in the award in error given the wording of the 17 June 2008 version of the Award Modernisation Request and draft NES is not sustainable, for the following reasons:

**1. The Modern Manufacturing Award and other priority awards were reviewed by the Full Bench in January 2010, for compliance with the NES, as contained within the FW Act**

The Modern Manufacturing Award was made on 19 December 2008, after the *Fair Work Bill* was introduced into Parliament

In its Statement of 23 January 2009 ([2009] AIRCFB 50) the Full Bench stated that the priority modern awards were made on the basis of the 16 June 2008 version of the Award Modernisation Request (see para [4]) but a process would be implemented to consider what variations needed to be made to the priority awards to ensure compliance with the 18 December 2008 version of the Award Modernisation Request and the terms of the FW Act (see para [12]).

In its Stage 2 Decision of 3 April 2009 ([2009] AIRCFB 345), the Full Bench announced that the variations which needed to be made to the priority awards to reflect the final provisions of the NES would be dealt with as residual variations in the final quarter of 2009 (see paras [26] and [27]).

In January 2010, all modern awards were reviewed by the Full Bench and residual variations made.

**2. The Stage 2 awards were made in April 2009 in compliance with the 18 December 2008 version of the Award Modernisation Request**

In its Stage 2 Decision, the Full Bench identifies that the Stage 2 awards have been made in compliance with the 18 December 2008 version of the Award Modernisation Request.

At the time of making the Stage 2 awards, the *Fair Work Bill* had passed through Parliament and the Act was due to come into operation on 1 July 2009.

The *Contract Call Centre Award 2010* (a Stage 2 award) includes an identical provision to clause 44.2 in the Manufacturing Modern Award.

**3. The Stage 3 exposure drafts were published in May 2009 in compliance with the Consolidated Award Modernisation Request in place at that time**

In its Statement of 22 May 2009 ([2009] AIRCFB 450), the Full Bench stated that the Stage 3 exposure drafts took into account the 18 December 2008 and 2 May 2009 variations to the Award Modernisation Request (see para [5]).

At the time of issuing the Stage 3 exposure drafts, the *Fair Work Bill* had passed through Parliament and the Act was due to come into operation on 1 July 2009.

The *Exposure Draft - Airline Operations – Ground Staff Award 2010* (a Stage 3 award) included an identical provision (clause 35.3) to clause 44.2 in the Manufacturing Modern Award.

**4. The Stage 3 modern awards were made on 4 September 2009 in compliance with the Consolidated Award Modernisation Request in place at that time**

In its Decision of 4 September 2009 ([2009] AIRCFB 826), the Full Bench stated that the Stage 3 modern awards took into account all variations to the Award Modernisation Request. With regard to the variation to the Request dated 26 August 2009, the Full Bench expressed the view that such variation had no direct relevance to the Stage 3 awards (see para [3]).

At the time of making the Stage 3 exposure drafts, the FW Act was in operation.

The *Airline Operations – Ground Staff Award 2010* (a Stage 3 award) includes an identical provision (clause 36.3) to clause 44.2 in the Manufacturing Modern Award.

The Award was also the subject of further extensive proceedings ([2010] FWAFB 965) relating to a revision to the Award Modernisation Request dated 9 November 2009.

**5. All modern awards were reviewed in the January 2010 for compliance with the FW Act and the Consolidated Version of the Award Modernisation Request**

As set out in the Full Bench's Statement of 21 December 2009 ([2009] AIRCFB 980), all modern awards were reviewed in January 2010 for compliance with statutory and other requirements, and residual variations were made.

**6. The Timber Industry Modern Award was varied in September 2010 to insert a similar clause to clause 44.2 in the Modern Manufacturing Award**

Refer to paragraphs 68 and 69 in Ai Group's written submission of 23 November 2010.

We trust that the explanation set out above satisfactorily answers your Honour's question.

Yours sincerely

A handwritten signature in black ink, appearing to read "S. Smith". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'S'.

**Stephen Smith**  
DIRECTOR – NATIONAL WORKPLACE RELATIONS