Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Revised Exposure Draft – Outstanding Technical and Drafting Issues

Clerks – Private Sector Award 2010

(AM2014/219)

12 SEPTEMBER 2016

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AM2014/219 CLERKS – PRIVATE SECTOR AWARD 2010

1. On 17 August 2016, the Commission issued directions regarding a revised *Exposure Draft – Clerks – Private Sector Award 2016* (**Exposure Draft**). Those directions require interested parties to file written submissions on the 13 outstanding technical and drafting issues outlined in the revised summary of submissions, dated 4 August 2016.

2. The Australian Industry Group (**Ai Group**) files this submission in response to those directions.

Item 4: Clause 5.2 – Facilitative provisions

3. Clause 5.2 indicates that clause 18.2, which deals with the substitution of public holidays, enables substitution of public holidays by agreement between the employer and the majority of employees. However, clause 18.2 does not expressly provide for this. Instead, it merely refers to agreement between an "*employer and employees*." The wording in clause 5.2 is accordingly inaccurate.

4. Ai Group suggests that this could be addressed by amending cl 18.2 to enable substitution of public holidays, for the purposes of the award, by agreement between the employer and either the majority of employees or an individual employee. Such a clause would state:

> An employer and either the majority of employees or an individual employee may by agreement substitute another day for a public holiday.

5. This would address any potential uncertainty arising from the current provision's reference to an "employer and employees.

6. If this proposed course of action were adopted the third column of Clause 5.2 would need to be amended so that it specified that clause 18.2 provided for agreement between an employer and, "*an individual or majority of employees*".

Item 8: Clauses 8.1 and 14.1 – Shiftwork

7. The provisions of clause 14 do not apply to employees performing ordinary hours in accordance with clause 8.1. This would include circumstances where such hours may be worked after 7pm in accordance with either clause 8.1(c) or 8.2(b).

8. Clause 14 only applies to employees who have been employed on shifts, as contemplated by clause 14.4(a).

9. During the Modern Award Review 2012, Senior Deputy President Kaufman dealt with various applications to address the interaction between the day work and shiftwork clauses of the Award. In a decision of 14 November 2011, His Honour determined that the day work and shiftwork clauses apply to different types of employees, i.e. the day work clause applies to day workers and the shift work clause applies to shiftworkers. The following extract from the decision is relevant: (emphasis added):

> [143] ABI and the AiG seek to vary clause 28.1(a) to align the definition of 'afternoon shift' with the spread of ordinary hours for a day worker outlined in clause 25.1(b)…
>
> …
>
> [147] AFEI, Business SA and VECCI support the variation and agree that an inconsistency between the span of day work hours and the finishing time for an afternoon shift exists in the Award as it currently stands.
>
> [148] The ASU opposes the proposed variations to the definition of 'afternoon shift' and submits that the proposed variation confuses the separate and distinct definition of shift work and ordinary day work within the ordinary span of hours. It contends that definitions of shift work and ordinary hours for day workers should remain separate arrangements of work and should not be confused or conflated so as unsociable hours are increasingly treated like ordinary hours.
>
> [149] I am attracted towards the ASU submissions on this matter. In my view clauses 25 and 28 have different work to do as they operate in respect of different types of employees; day workers and shiftworkers respectively.[1]

[1] *Review of modern awards - Clerks-Private Sector Award 2010* [2012] FWA 9793, Kaufman SDP. See also Supplementary Decision of 23 November 2011 [2012] FWA 9968.

Item 9 & 10: Clause 8.1(a)(i) & 8.1(a)(ii) – Weekly hours of work – day workers

10. Ai Group has addressed this issue in paragraphs 28 to 21 and 198 of our 14 April 2016 submission.

11. Ai Group proposes that a modest amendment to 8.1(a)(ii) and 8.1(a)(ii) be made so that both provisions provide that the ordinary hours of work for day workers are "…*an average of up to 38 per week.*"

12. Our previous submissions have addressed the operation of s.147. Putting aside such considerations, we contend that the variation is also necessary in order to accurately reflect the circumstances of casual and part-time employees that perform less than an average of 38 ordinary hours per week. The ordinary hours of work for such employees are not always an average of 38 per week.

13. The combined effect of clauses 6.2(a), 6.2(b), 6.2(c) and 6.2(e) is that part-time employees work less than an average of 38 ordinary hours per week. Relevantly, clause 6.2(e) provides:

> (e) All time worked in excess of the hours as agreed under clause 6.2(b) or varied under clause 6.2(c) will be overtime and paid for at the rates prescribed in clause 12 – Overtime rates and penalties (other than shift workers).

14. The hours agreed under 6.2(b) will invariably amount to less than an average of 38 per week.

15. It is misleading and arguably wrong for clause 8.1 to provide that the ordinary hours of work for day workers are, "*an average of 38 per week…"* This is clearly not the case for part-time employees.

16. The variations will remove an inconsistency between award terms. They will also make the award simpler and easier to understand.

Item 35: Clause 13.4(b)(i) – Where the employee does not get a 10 hour rest

17. The change proposed by the exposure draft does not appear to be problematic.

Item 41: Clauses 14.4 and 14.7 – Special rates not cumulative

18. The reference to "special rates" captures all of the higher rates specified by the clause. The amendment that has been made to the exposure draft is appropriate.

Item 44: Clause 15.2 – Definition of shiftworker

19. The ASU is seeking a substantive variation to clause 29.2 of the Award, the effect of which would be to expand the entitlement to an additional week of leave for shiftworkers under the NES to those employees who might not currently be so entitled. The variation sought is opposed by Ai Group.

20. Given that this is not a 'technical and drafting' issue, we do not propose to here deal with it comprehensively. We suggest that a separate process be adopted in respect of substantive variations sought to the Award, including item 44.

Item 45: Clause 15.3 – Annual leave loading

21. The assessment is to be calculated by reference to the entire period of leave. There is no textual indication in the clause to suggest that the assessment is to be carried out on a separate daily basis, as contemplated by the FWO.

22. No amendment to the clause is required. The provision is similar to that contained in many awards.

23. If, contrary to our submissions, the Commission were to contemplate varying the provision it should only do so following careful consideration of the history of the provision. Ai Group has not undertaken a specific review of the history of this particular award provision. However, we note that historically annual leave has regulated in a much more restrictive manner than it is under the current legislative regime, which allows the taking of separate short periods of leave, such as individual days. In contrast, the *Annual Holidays Act* 1944 (NSW) placed restrictions on the periods of leave that could be taken, so that

it was generally accessed in blocks.[2] Given this context, and subject to the extent to which the current provision reflected the terms of predecessor instruments operating under such systems, it is unlikely that the annual leave loading provision was ever intended to require assessment of the relative entitlements calculated on a daily basis.

Item 49: Clause 13.4(c) – Rest period after working overtime

24. The heading to clause 13 of the Exposure Draft is in the following terms: Overtime rates and penalties (other than shiftworkers).

25. Clause 13.4(c), however, expressly applies to shiftworkers in certain prescribed circumstances. Its inclusion in a provision that is said to apply to employees other than shiftworkers is anomalous and should be addressed.

26. The deletion of the words "other than shiftworkers" from the aforementioned heading is self-evidently an inappropriate remedy, as it would have the effect of expanding the application of other provisions under clause 13 to shiftworkers where they do not currently apply.

27. Accordingly, we suggest that clause 13.4(c) be deleted and that a new clause 14.5(c) be inserted in the following terms:

> (c) The provisions of clause 13.4(b) apply in the case of shiftworkers as if eight hours were substituted for 10 hours when overtime is worked:
>
> (i) for the purposes of changing shift rosters;
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> (ii) where a shiftworker does not report for duty and a day worker or a shiftworker is required to replace such shiftworker;
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> (iii) where a shift is worked by arrangement between the employees themselves.

[2] See section 3.

Problems in Exposure Draft due to inconsistent terminology

28. Inconsistent terminology is used in the exposure draft that will lead to interpretation difficulties if not addressed:

    a. The heading for clause 14.4 refers to *"shift allowances"* but clause 14.4(c) contains penalty rates, not allowances. In Ai Group's view, an award provision which requires that shiftworkers be paid, say, 15% extra can legitimately be called a "*loading"* or an *"allowance"*, but it cannot legitimately be called a *"penalty rate"* or a *"shift rate".* Also, an award provision which stated that shiftworkers are to be paid, say, 115% of the ordinary time rate cannot legitimately be referred to as a *"loading"* or an "*allowance"*, but it can be referred to as a *"penalty rate"* or a *"shift rate".*

    b. Clause 14.7 refers to *"shift allowances"*. However, the award no longer contains any shift allowances. As explained above, clause 14.4 refers to shift allowances, but contains penalty rates, not allowances.

    c. Clause 15.3(b)(ii) refers to *"shift loading (including relevant weekend penalty rates"*. However, the award no longer contains and shift loadings. As explained above, clause 14.4 refers to shift allowances, but contains penalty rates, not loadings or allowances. The annual leave clause in an award cannot legitimately refer to the *"loadings"* or *"allowances"* in the shiftwork clause if the loadings / allowances (e.g. 15%) have been replaced with penalty rates of pay (e.g. 115%).

29. The above problems exist in most exposure drafts and are a consequence of the Commission deciding to replace shift allowances and loadings with rates of pay which include the quantum of the previous shift allowances and loadings but do not identify these amounts separately. A consistent approach to addressing this problem needs to be devised and all exposure drafts need to be reviewed to, wherever possible, reflect the consistent approach.