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Fair Work Act 2009
FAIR WORK COMMISSION
s. 156 – 4 yearly review of modern awards – award stage

AM2019/17

AWU SUBMISSION ON FIRST TRANCHE EXPOSURE DRAFTS

BACKGROUND

1. On 2 September 2019, a Full Bench constituted to finalise exposure drafts arising from the 4-yearly review of modern awards process issued a procedural Statement¹.
2. Attachment B of the Statement identified 40 awards as falling within a ‘First Tranche of Exposure Drafts to be Finalised’. The Statement included directions for the filing of submissions concerning the First Tranche exposure drafts.
3. The Australian Workers’ Union’s (“**AWU**”) submissions concerning the First Tranche of exposure drafts are below.

Aluminium Industry Award

4. The AWU has not identified any issues with the changes proposed by the Australian Industry Group (“**AIG**”) in their submissions dated 20 September 2019.
5. Clause 17.5(a): There appears to be a formatting issue at the end of the sentence.
6. Clause 22.1(b): Consideration should be given to deleting the entire sub-clause or at least the bracketed example because the content is arguably inconsistent with the National Employment Standards (“**NES**”) based on the Full Bench decision in *RACV*² i.e. accruing the specified hours may not be sufficient to enable an employee to access their full NES entitlement.

¹ [2019] FWCFB 6077.

² *RACV Road Service Pty Ltd v Australian Municipal, Administrative, Clerical and Services Union* [2015] FWCFB 8554.

7. Clause 22.5(a): There is a full stop missing.
8. Clause 27.2: This should be amended to read: “Where an employee works on a public holiday they will be paid in accordance with clause 21.3 or 29.1(a)(iii)”. This change captures the rate of pay for ordinary hours and overtime worked on a public holiday.

Aquaculture Industry Award

9. Clause 20.1(a)(i): This should be amended to read: “outside the spread of ordinary hours on any day or shift as defined in clauses 13.2, 13.3 and 21”. The definitions of afternoon and night shift appear in clause 21 not clause 13.3.
10. Clause 20.8(b): The exposure draft refers to payment at the “minimum hourly rate” for twenty minutes where more than 1 ½ hours of overtime is to be worked after ordinary hours. Clause 21.3(b) of the current award refers to payment at “ordinary rates”. The term “ordinary rates” would include shift loadings and weekend penalty rates but the term “minimum hourly rate” does not. This means the exposure draft reduces the current condition and creates an anomalous outcome whereby an employee may fall onto a lower rate.
11. Clause 27.3: This should be amended to read: “Where an employee works on a public holiday or another day substituted in accordance with clause 27.2 they will be paid in accordance with clauses 20.6, 21.3 or 21.5(c).” The rate for ordinary time worked by day workers on a public holiday is contained in clause 21.5(c).

Cement, Lime and Quarrying Award

12. The AWU has not identified any issues with the changes proposed by the AIG in their submissions dated 20 September 2019 and by Australian Business Industrial and the NSW Business Chamber Ltd (“**ABL**”) in their submissions dated 27 September 2019.
13. Clause 27.2: This should be amended to read: “Where an employee works on a public holiday they will be paid at the rate of 250% of the ordinary hourly rate and a casual employee must be paid at 275% of the ordinary hourly rate.” This amendment clarifies the entitlement for day workers and for overtime given clause 21.6 of the exposure draft is arguably confined to ordinary time worked by shift workers.
14. Schedule C and D: The casual overtime rates are incorrect because the 25% casual loading has not been included. This issue is before the Casual

Overtime Full Bench. The AWU is opposed to casual overtime rates tables being published which do not include the 25% casual loading.

Cemetery Industry Award

15. Clause 10.2: This should be amended to read: “A casual employee must be paid per ~~ordinary~~ hour worked...” The word “ordinary” does not appear in clause 10.3(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.

16. Schedule B.2.2: It appears the “Ordinary hours” column can be deleted.

Cotton Ginning Award

17. The AWU does not agree with the concerns raised by AIG in their submissions dated 20 September 2019 about references to the industry coverage of the award. The AWU has not identified any other issues with the changes proposed by AIG or with the exposure draft.

Funeral Industry Award

18. Clause 11.2: This should be amended to read: “For each ~~ordinary~~ hour worked a casual employee must be paid...” The word “ordinary” does not appear in clause 10.5(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.

19. Schedule A.1.4: The overtime rate for afternoon shift is not 120% as stated in the first column. The correct rates appear in clause 20.6.

20. Schedule A.1.5: It is unclear why a 100% ‘Day shift’ column has been included in an overtime rates table.

Hydrocarbons Industry (Upstream) Award

21. Clause 11.4: This should be amended to read: “For each ~~ordinary~~ hour worked, a casual employee must be paid no less than...” The word “ordinary” does not appear in clause 10.4(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.

22. Clause 22.1(b) and (c): Reference should be added to ‘clause 13-Ordinary hours of work’ because the span of ordinary hours for all employees appears in this clause.

Mining Industry Award

23. The AWU has not identified any issues with the changes proposed by the AIG in their submissions dated 20 September 2019.

Nursery Award

24. Clause 13.2: To ensure compliance with s 147 of the FW Act, a new sub-clause should be inserted stating:

The ordinary hours of work for casual employees are the lesser of:

(i) *an average of 38 per week but not exceeding 152 hours in 28 days; or*

(ii) *the hours required to be worked by the employer.*

Oil Refining and Manufacturing Award

25. Clause 11.3(a): This should be amended to read: “For each ~~ordinary~~ hour worked, a casual employee must be paid...” The word “ordinary” does not appear in clause 10.3(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.

26. Clause 23.2 and 23.7(b): This content is repeated.

Premixed Concrete Award

27. The AWU has not identified any issues with the changes proposed by the AIG in their submissions dated 20 September 2019.

28. Clause 11.2(a): This should be amended to read: “For each ~~ordinary~~ hour worked, a casual employee must be paid...” The word “ordinary” does not appear in clause 10.5(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.

29. Clause 20.2: A row for overtime on public holidays should be inserted with 250% and 275% for casual employees and clause 20.2 should then be cross-referenced in clause 27.2. Otherwise, the exposure draft only prescribes a penalty rate for ordinary hours on public holidays in clause 21.1. Clause 27.3 of the current award prescribes a double time and a half rate for all work on public holidays.

30. These overtime rates can also be added into Schedule A.1.5 and A.2.3.

Salt Industry Award

31. The AWU does not agree with AIG's submissions dated 20 September 2019 concerning shiftwork penalties and casual hourly rates, but has not identified any issues with its other proposed changes.

32. Clause 11.3(a): This should be amended to read: "For each ordinary hour worked, a casual employee must be paid..." The word "ordinary" does not appear in clause 10.3(b) of the current award. The casual loading is paid for all purposes so there should be no dispute about it being paid on overtime.

33. Clause 21.1: These provisions are misleading because they indicate overtime is only payable when an employee works in excess of their maximum weekly ordinary hours. However, overtime is also payable for hours outside those specified in clause 13-Ordinary hours of work. Reference to "or outside the ordinary hours specified in clause 13-Ordinary hours of work" should be added into clause 21.1(a),(b) and (c).

34. Schedule B.1.1: It isn't clear whether a day worker can work ordinary hours on a public holiday under this award. The 200% rate appears directed at shiftworkers.

Seafood Processing Award

35. Clause 11.2(a): This should be amended to read: "For each ordinary hour worked, a casual employee must be paid..." The casual loading is paid for all purposes so there should be no dispute about it being paid on overtime.

36. Clause 20.6 and 20.7(f): The reference to "clause 0" should be clause 20.5.

37. Schedule A.2.4 and A.2.5: The reference to "% of minimum hourly rate" should be "% of casual ordinary hourly rate".

Silviculture Award

38. Clause 13.2: The reference to clause 8.3 should be 13.3.

39. Clause 15.1: The inclusion of an “Ordinary weekly rate” column appears inconsistent with other exposure drafts.
40. Clause 20.12(a): It appears the public holiday rate of 250% of the ordinary hourly rate should be inserted here or the references are circular.

Wool Storage, Sampling and Testing Award

41. Clause 11.3(a): This should be amended to read: “For each ordinary hour worked, a casual employee must be paid...” The word “ordinary” does not appear in clause 10.3(b) of the current award. The wording in the exposure draft may constitute a significant substantive change. The issue is before the Casual Overtime Full Bench and the wording from the current award should be maintained until the issue is resolved in those proceedings.
42. Schedule B.1: The rates tables do not appear correct. The tables indicate day workers can work ordinary hours on the weekend and shiftworkers cannot – whereas the opposite is correct. The weekend and public holiday penalty rates should be moved from the day work table to the shiftwork tables for permanent and casual employees.



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9 OCTOBER 2019