Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –

Cleaning Services Award 2010

(AM2016/15)

17 November 2017

AiGROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING – C*LEANING SERVICES AWARD 2010*

1. The Australian Industry Group (**Ai Group**) makes this submission in accordance with the direction contained at paragraph [1] of the statement[1] issued by the Fair Work Commission (**Commission**) on 9 November 2017. It relates to certain technical and drafting issues arising from the *Exposure Draft – Cleaning Services Award 2010* (**Exposure Draft**) published on 8 September 2017, which was the subject of discussion during a conference listed before His Honour, Justice Ross on 8 November 2017 (**Conference**).

Items 3: Clause 9 of the Exposure Draft

2. As discussed at the Conference, we understand that discussion regarding the issues raised by various parties including Ai Group at item 3 have been deferred at this stage.[2]

Item 4: Clause 10 of the Exposure Draft

3. As noted at item 4, Ai Group considers that multiple issues arise from clause 10 of the Exposure Draft. Specifically, it deviates from clause 12.4 of the Exposure Draft in various substantive ways.

4. **Firstly,** the definition of part-time employee at clause 10.1 of the Exposure Draft is problematic. It is in the following terms (emphasis added):

> **10.1** An employee who is engaged to work for fewer than an average of 38 ordinary hours per week and whose hours of work are reasonably predictable <u>is a part-time employee</u>.

5. Under clause 10.1, an employee who is:

- engaged to work for fewer than an average of 38 ordinary hours per week; and

[1] [2017] FWC 5874.

[2] Transcript of proceedings on 8 November 2017 at PN56.

- those hours are reasonably predictable;

must be a part-time employee and is effectively deemed as such.

6. This deviates from the current clause 12.4(b), which defines a part-time employee as one who satisfies the criteria set out at clauses 12.4(b)(i) – (iii), but does not mandate that an employee who satisfies those criteria *must* be a casual employee. That is, a part-time employee must satisfy the relevant criteria but an employee who satisfies that criteria is not necessarily a part-time employee.

7. This substantive change is particularly relevant when considered in the context of the definition of a casual employee.

8. Under the *Cleaning Services Award 2010* (**Award**) and the Exposure Draft, a casual employee may only be engaged on certain bases (see clause 12.5 of the Award). Relevantly, a casual employee may be engaged "to replace a full-time or part-time employee who is rostered off or absent". Accordingly, a casual employee could be engaged for the purposes of replacing a part-time employee who is absent (e.g. on parental leave or due to illness/injury). That part-time employee would necessarily have had fixed hours that are "reasonably predictable", consistent with clauses 12.4(a) and (b) of the Award. If a casual employee is engaged to replace that employee and to works what would have been the part-time employee's hours of work, that casual employee will necessarily:

   - be "engaged to work for fewer than an average of 38 ordinary hours per week"; and

   - their hours of work will be "reasonably predictable" by virtue of the fact that they are replacing an employee who had "reasonably predictable" hours.

9. The definition of part-time employment at clause 10.1 of the Exposure Draft is such that the casual employee described above would be deemed a part-time employee and it is no longer clear that they could nonetheless be engaged on

a casual basis. On a strict reading of clause 10.1, it would appear that that would no longer be available to an employer.

10. Such a change is clearly a substantive one and should not be made. We suggest that the issue can most readily be overcome by simply replacing clause 10.1 of the Exposure Draft with clause 12.4(b) of the Award.

11. **Secondly,** clause 10.2 of the Exposure Draft recharacterises the *allowance* currently payable pursuant to clause 12.4(b)(iii) of the Award as a *loading*. This potentially has a substantive effect on the operation of the model flexibility clause, which allows for agreement between an employer and employee regarding the application of clauses concerning allowances. At the very least it would no longer be clear that an individual flexibility agreement could be implemented in relation to the "loading" payable pursuant to clause 12.4(b)(iii).

12. Accordingly, the word "loading" should be replaced with "allowance".

13. **Thirdly,** clause 10.4 of the Exposure Draft is in the following terms:

> **10.4** This award applies to a part-time employee in the same way that it applies to a full-time employee except as otherwise expressly provided by this award.

14. The Award does not contain a provision in these terms. It appears, however, that the proposed clause is intended to replace the current clause 12.4(e):

> **(e)** Subject to clause 12.4(b)(iii), a part-time employee receives, on a pro rata basis, equivalent pay and conditions to those of full-time employees who do the same kind of work.

15. It is self-evident that the proposed clause contains a very different proposition to the current clause 10.4. It requires that any given clause of the Exposure Draft is to apply "in the same way" that it applies to a full-time employee, unless expressly stated otherwise. We here propose to outline the material difficulties that we consider arise from the clause:

- Award clauses that contain blanket propositions such as the proposed clause 12.4(e), can be inherently problematic. Absent an exhaustive and careful consideration as to whether each and every provision of the Award (including the schedules to the Exposure Draft) apply "in the same

way" to full-time and part-time employees, clause 12.4(e) should not be included as it may have the effect of creating an unintended and substantive change.

- A provision of this nature does not, in our view, render the instrument any simpler or easier to understand. If the application of a particular provision to part-time employees is considered ambiguous, this may be considered in isolation, having regard to the specific terms of the clause, and the Commission may consider it appropriate to vary the provision accordingly. However, the insertion of a generalised provision without any apparent regard for the substantive effect that this may have for the application of each provision of the instrument is, with respect, inappropriate.

- Clause 10.4 effectively inverts the requirement imposed by the current clause 12.4(e) and in this way, potentially alters the legal effect of the Award. For example, clauses 17.4 and 17.5 of the Award create an entitlement to a weekly first aid allowance and a weekly leading hand allowance respectively. Read with clause 12.4(e), we consider that a part-time employee is entitled to those allowances on a pro-rata basis. That is, an employee who works full-time hours is entitled the entire quantum of the allowance. However, a part-time employee who works, for instance, 16 hours is entitled to 50% of the allowance.

  Neither clause 10.4 nor any other provision of the Exposure Draft would have that effect. That is to say, under the Exposure Draft, it appears that a part-time employee would be entitled to the allowances in full, because pursuant to clause 10.4, the Exposure Draft applies to a part-time employee in the same way that it applies to a full-time employee. Self-evidently, this is a substantive change to the entitlement, which would have the effect of increasing the entitlement of a part-time employee to the aforementioned allowances.

16. Accordingly, clause 10.4 of the Exposure Draft should be deleted and clause 12.4(b)(iii) of the Award should be reinstated.

17. **Fourthly,** the Award does not contain a provision equivalent to clause 10.5 of the Exposure Draft.

18. We do not understand the purpose or effect of the proposed clause. Payments in respect of the entitlements identified are made pursuant to the NES and/or the Award. Whilst it is not clear what is meant by the requirement to pay an employee in respect of those entitlements "on a proportionate basis", the provision inaccurately reflects the NES and the Award in any event.

19. Take for instance annual leave. Pursuant to s.87(1), an employee is entitled to four weeks of paid annual leave for each year of service. That is, for a complete year of service, an employee is entitled to four weeks of annual leave. The specific amount of leave to accrue to an employee is contingent upon their ordinary hours of work. The effect of s.87(2) is to entitle a part-time employee to a proportionate amount of leave. That is, a part-time employee will accrue, over the course of the year, an amount of annual leave that is less than 152 hours in accordance with their ordinary hours of work. Whilst this provision provides for accrual of the entitlement to annual leave on a proportionate basis, it does not purport to deal with payment for that entitlement.

20. Payment for annual leave is dealt with at s.90 of the Act. It states that if an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period. That is, a part-time employee who takes annual leave over a period of 7.6 ordinary hours which the employee would have otherwise worked is paid for 7.6 ordinary hours at their base rate of pay. Similarly, a part-time employee who takes annual leave over a period of 20 ordinary hours which the employee would have otherwise worked is paid for 20 ordinary hours at their base rate of pay. The notion of a "proportionate basis" does not arise.

21. The payment due for personal/carer's leave and compassionate leave is to be calculated on a similar basis, pursuant to ss.97 and 106 of the Act respectively.

22. Accordingly, clause 10.5 of the Exposure Draft is potentially confusing and misleading. It purports to introduce a consideration of pro-rata payments where

such a notion is neither necessary nor relevant, having regard to the NES or the Award. Furthermore, it is not *necessary* in the sense contemplated by s.138 of the *Fair Work Act 2009*, because it purports to regulate matters that are already dealt with by the NES. In our view clause 10.5 of the Exposure Draft should be deleted.

23. **Fifthly,** the current clause 12.4(a) requires that “the employer and the part-time employee will agree in writing on a regular pattern of work”, specifying certain details regarding the employee’s hours and days of work. The clause contemplates the employer and employee reaching a consensus together regarding each of the relevant matters.

24. The legal effect of clause 10.6 of the Exposure Draft differs from this. It requires as follows: (emphasis added)

> **10.6** At the time of engaging a part-time employee, the employer must agree in writing with the employee to all of the following:
>
> **(a)** the number of hours to be worked each day; and
>
> **(b)** the days of the week in which the employee will work; and
>
> **(c)** the times at which the employee will start and finish work each day.

25. The above provision appears to require that an employer *must* agree with the employee. That is, it mandates that an employer is to agree with an employee regarding the relevant matters. The practical effect of the proposed clause would be to enable an employee to dictate the days and times at which they are to work and an employer would be required to consent. The change in the legal effect of the clause is self-evident.

26. Accordingly, clause 10.6 should be amended as follows:

> **10.6** At the time of engaging a part-time employee, the employer and employee must agree in writing ~~with the employee to~~ on all of the following: …

Item 5: Clause 10.2 of the Exposure Draft

27. Ai Group does not oppose the variation proposed by United Voice.

Item 6: Clause 10.4 of the Exposure Draft

28. We agree with the submissions made by ABI and the NSW Business Chamber. We refer to the third point we have made in relation to item 4 above.

Item 7: Clause 10.5 of the Exposure Draft

29. We agree with the submissions made by ABI and the NSW Business Chamber. We refer to the fourth point we have made in relation to item 4 above.

Item 8: Clause 11 of the Exposure Draft

30. Ai Group seeks to reserve its position in relation to clause 11.1 of the Exposure Draft at this time. We consider that its terms are closely associated with the concerns we have earlier raised regarding clause 10.1 of the Exposure Draft (item 4, first point).

Item 9: Clause 11.3 of the Exposure Draft

31. The words "for each ordinary hour" do not appear in the current clause 12.5(a). That is, the entitlement to the casual loading is not limited to ordinary hours of work and appears to arise during overtime. Their inclusion in clause 11.3 of the Exposure Draft creates an inconsistency between it and Table 5 (page 20 of the Exposure Draft). Accordingly, those words should be removed.

Items 36 and 37: Clause 25.4 of the Exposure Draft

32. As identified by Ai Group during the Conference, multiple issues arise from clause 25.4 of the Exposure Draft. Specifically, it deviates from clause 29.6 of the Award in various substantive ways.

33. **Firstly**, the circumstances in which the clause applies has been fundamentally altered.

- Clause 29.6 of the Award applies where "the <u>client</u> of an employer … intends temporarily to close or reduce to a nucleus the establishment or a section thereof for the purposes of allowing annual leave <u>to that client employer's employees</u>" (emphasis added).

- Clause 25.4(a) of the Exposure Draft makes no reference to the employer's client. It is instead drafted such that the following provisions would apply where the employer intends to close down its operations.

34. This is a substantive change to the application of the shutdown clause.

35. **Secondly,** the provision in the Exposure Draft does not deal with circumstances in which an employee commences their employment with the employer after the employer has provided notice of a temporary close down period to its pre-existing employees. That is, the underlined words in the current clause 29.6(a) reproduced below (or words to that effect) do not appear in the Exposure Draft:

> **(a)** The employer may give in writing to such employees one month's notice (or in the case of an employee engaged after the giving of such notice, on engagement) of their intention to apply the provisions of this clause.

36. Accordingly, clause 25.4(b) the Exposure Draft does not make clear how much notice is to be given to an affected employee who commences their employment after notice has otherwise been given. In this way, the Exposure Draft is not simple and easy to understand.

37. To the extent that the absence of underlined words above lead to a suggestion that an employee who commenced their employment after notice has been given cannot be required to take annual leave during a temporary close down, this would quite clearly amount to a substantive change.

38. **Thirdly,** the clause in the Exposure Draft does not contain any ability for an employer to require an employee to take unpaid leave as contemplated by the current clauses 29.6(b)(ii) and 29.6(b)(iii). This is a significant substantive change.

39. **Fourthly,** we accept United Voice's contention that the current clauses 29.6(d) and 29.6(e) do not appear in the Exposure Draft.

40. Ai Group submits that clause 25.4 of the Exposure Draft should be amended to address the above issues.