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AM2019/17 and Ors Tranche 2 Exposure Drafts

Introduction

1. The “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (**AMWU**) makes the following submissions in accordance with varied directions made by the Full Bench on 21 November 2019 pursuant to a request for an extension by the National Farmers Federation and Ai Group.¹

Background

2. On 2 September 2019 a Decision was issued, advising that a new Full Bench had been constituted to oversee the finalisation of the exposure drafts and consequent variation of each modern award. The Full Bench further advised that the Exposure Drafts would be finalised in three tranches.
3. On 10 October 2019 a Decision was issued inviting submissions on the re-published exposure drafts in ‘tranche 2’.²
4. Accordingly, the AMWU makes the following submissions.

Submissions in Relation to Tranche 2 Exposure Drafts

5. The AMWU has an interest in the following awards in Tranche 2:-
 - a) Airline Operations – Ground Staff Award 2010
 - b) Manufacturing and Associated Industries and Occupations Award 2010
 - c) Poultry Processing Award 2010
 - d) Rail Industry Award 2010

¹ [Correspondence from FWC to all parties 21 November 2019.](#)

² 4-yearly Review of Modern Awards [2019] FWCFCB 6861.

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e) Waste Management Award

AM2014/254 Airline Operations – Ground Staff Award 2010

Tables in Schedule B – Overtime for Shiftworkers

6. The tables in schedule B that deal with overtime for shiftworkers (B.2.4; B.3.4; B.4.4 and B.5.4) incorrectly state that the rate non-continuous shiftworkers are entitled to be remunerated at for working overtime on a Sunday is time and a half.
7. The correct rate is double time, which is unambiguous considering clause 32.1(a)(ii). This sub-clause was only recently inserted as a way of resolving the substantive issues dealt with in the Ground Staff Award by the Full Bench in AM2018/15.³
8. The AMWU assumes that the recency of this decision and order is the reason that the change has not been reflected in this exposure draft.
9. The AMWU proposes that the matter be resolved by amending the tables in B.2.4; B.3.4; B.4.4 and B.5.4 as follows:

Day Workers			Shiftworkers (except continuous shiftworkers)			Continuous shiftworkers
Monday to Saturday		Sunday	Monday to Sunday Saturday		<u>Sunday</u>	Monday to Sunday
First 2 Hours	After 2 hours	All hours	First 2 hours	After 2 hours	<u>All hours</u>	All overtime hours
% of ordinary hourly rate						
150%	200%	200%	150%	200%	<u>200%</u>	200%

10. The AMWU notes that the FWC has already acknowledged this issue and proposed to resolve it.⁴ The AMWU is not particularly concerned with whether the exposure draft is amended by

³ [4 Yearly Review of Modern Awards – Airline Operations Ground Staff Award 2010 \[2019\] FWCFB 5619 \[111\]; PR712352.](#)

⁴ [Correspondence between FWC and the Transport Workers Union.](#)

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the Full Bench in AM2018/15 or by this Full Bench but reiterates that it is imperative to correct the tables prior to the final determination variation taking effect.

Tables in Schedule B – Overtime for Casuals

11. The tables in schedule B that deal with casual rates (see B.6; B.7; B.8 and B.9) do not include overtime rates for casuals.
12. It is acknowledged that this issue may be resolved by the Full Bench in *AM2017/51 Overtime for Casuals*, however the AMWU notes for the record that it has submitted as early as 2016 that a table of overtime rates for casuals should be inserted into the relevant schedule B tables that summarise the rates for casuals.⁵ It was determined that tables would only be inserted into exposure drafts pending a decision on the matter by the Casual and Part time employment full Bench. The matter was subsequently referred to a newly constituted Full Bench in AM2017/51.
13. Since then, the parties have reached consensus regarding the entitlement of overtime for casuals under the terms of this award, and the way the casual loading interacts with the overtime penalty. Accordingly, the AMWU submits that a table of rates should be inserted reflecting this position. The AiG oppose tables being inserted into this award for reasons which are as yet unclear.⁶
14. The AMWU acknowledges that this issue may be dealt with by the Full Bench in AM2017/51, but in the event that the issue is not dealt with, the AMWU submits it should be dealt with by this full bench, especially considering the length of time the AMWU has been agitating this issue as part of the award stage proceedings.

AM2014/75 Manufacturing and Associated Industries and Occupations Award

Clause 4.8 Description of Industry

15. Clause 4.8 of the Exposure Draft provides:

“the industries and parts of industries in clause 4.8(a)(xii) in respect of:

- *employers and employees who were covered by section 2—Vehicle Manufacturing Employees, Section 3—Drafting, Planning and Technical Employees,*

⁵ [Transcript of proceedings 6 December 2016 PN192](#)

⁶ [Correspondence from Australian Business Lawyers and Advisors to the Fair Work Commission dated 4 November 2019.](#)

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and Section 4—Supervisory Employees of the Vehicle Manufacturing, Repair, Services and Retail Award 2010 on XX Month 20XX; and

- *employers established after XX Month 2018 that are principally engaged in one or more of the industries or parts of industries in clause 3.8(a)(xii) but excluding employers and employees covered by the Vehicle Repair, Services and Retail Award 20XX”*

16. The AMWU suggests that “employers established after XX Month 2018” be changed to XX Month 20XX pending the finalisation of this exposure draft.

Clause 11 – Casual Employees

17. The AMWU has some concerns with the way clause 11.2 is expressed and organised in the context of the way references to the calculation of penalties and loadings in other parts of the exposure draft have been changed from “time and half” and “double time” to references to percentages of the ordinary hourly rate.

18. Specifically, the AMWU’s concern is that because the Exposure Draft:

- Introduces a new defined concept of “casual ordinary hourly rate”;⁷ and
- Provides that overtime and other penalties are to be calculated as a percentage of the “ordinary hourly rate”;⁸

may have the effect of causing employers to mistakenly interpret the new award as meaning that the relevant overtime and other penalties are calculated on the “ordinary hourly rate” and not the “casual ordinary hourly rate”.

19. The AMWU does not cavil with the concept of having separate definitions of “ordinary hourly rate” and “casual ordinary hourly rate”, indeed having separate definitions for both ordinary hourly rate and casual ordinary hourly rate is necessary as concepts have specific and distinct work to do for casuals, as follows:

- It is necessary to define “ordinary hourly rate” exclusive of the casual loading in order to clarify that the casual loading is calculated *on* the ordinary hourly rate.⁹

⁷ See clause 11.2(c) and clause 2 definitions of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 20XX* republished 14 October 2019.

⁸ See clauses 31.2; 31.3; 31.4; 31.5; 31.6; 31.7; 32.1; 32.2; of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 20XX* republished 14 October 2019.

⁹ *4-yearly Review of Modern Awards* [2015] FWCFB 6656 [110].

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- b. It is necessary to define casual ordinary hourly rate, because that is what the casual employee is entitled to be paid for working ordinary time.

20. The confusion arises because of the way overtime and penalty rates are expressed. For example, clause 31.1 states:

(a) Weekend work

Where agreement is reached in accordance with clause 17.2(c):

- (i) The rate to be paid to a day worker for ordinary time worked between midnight on Friday and midnight on Saturday will be **150% of the ordinary hourly rate.***
- (ii) (ii) The rate to be paid to a day worker for ordinary time worked between midnight on Saturday and midnight on Sunday will be **200% of the ordinary hourly rate.***

21. As it can be seen from the above example there is no distinction in the relevant clause as to how the calculation is conducted between casual and non-casual employees. For the discerning employer, any confusion about the calculation of penalty rates for employers will ultimately be clarified by clause C.3.1 which provides:

“The casual ordinary hourly rate applies for all purposes and is used to calculate penalties and overtime”¹⁰

however, the AMWU contends that there is merit in making the award simpler and easier to understand by clarifying the distinct way of calculating penalties for casual and non-casual employees in the body of the award.

22. In preparing this submission the AMWU notes that it has raised this issue previously in its submission of 13 December 2015¹¹, however it appears that submission was never dealt with by the relevant Full Bench in AM2014/75. In that submission, the AMWU proposed that all relevant references to the calculation of penalties or loadings throughout the exposure draft be changed from X% of the ordinary hourly rate to X% of the ordinary hourly rate/casual ordinary hourly rate.¹²

¹⁰ *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 20XX* republished 14 October 2019 Clause C.3.1.

¹¹ [Submission of the Australian Manufacturing Workers’ Union \(AMWU\) dated 13 December 2015.](#)

¹² *Ibid* [6].

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23. The AMWU concedes that this approach may be cumbersome, and considers that the same affect could be achieved with a more minimalist approach, by amending clause 11.2 as follows (proposed changes marked up using strike through and underline):

11.2 Casual loading

(a) For working ordinary time, a casual employee must be paid:

(i) the ordinary hourly rate for the work being performed; plus

(ii) a loading of 25% of the ordinary hourly rate.

(b) The casual loading constitutes part of the casual employee's all purpose rate.

(c) The resulting rate is the casual ordinary hourly rate.

(d) Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate.

(e) ~~(d)~~ The 25% casual loading in this clause 11.2 does not apply to vehicle manufacturing employees in the technical field covered by clause 4.8(a)(ix). The casual loading for these employees is prescribed in clause 46 in Part 9— Vehicle manufacturing employees of this award.

24. The AMWU contends that amending the exposure draft in the way proposed will ensure that the new award is simple and easy to understand. The AMWU further considers that the proposed changes should not be controversial considering the Group 1 Full Bench has already confirmed that in respect of the Manufacturing Award, penalties compound on the casual loading¹³ and the relevant employer groups have confirmed they agree that that the casual loading compounds in the Manufacturing Award as part of the *AM2017/51 Overtime for Casuals* proceedings.¹⁴

Clause 33

25. The title accompanying “clause 33.12” has been deleted. The AMWU assumes that this is intentional, considering “annual close down” is instead provided for in at clause 33.7.

26. If this is the case however, the AMWU submits that the clause number “33.12” should also be deleted, which will require an overall renumbering of clause 33.

¹³ *4-yearly Review of Modern Awards* [2015] FWCFB 7236 [88].

¹⁴ [Correspondence from Australian Business Lawyers and Advisors to Fair Work Commission dated 10 October 2019.](#)

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Schedule C – C.1.1 Table of Rates

27. The newly inserted reference to “Full-time and part time employees other than afternoon and night shift workers”) appears somewhat superfluous considering the existing heading five rows above “employees other than a afternoon and night shift employees”.

28. In the very next row, there is no percentage figure in the second column (which corresponds to “Overtime on a public holiday”). The AMWU proposes that “250%” be inserted into the column, which is consistent with the cross reference.¹⁵

AM2014/82 Poultry Processing Award 2010

29. The AMWU has not identified any issues and has no comments to make in relation to the published exposure draft.

AM2014/87 Rail Industry Award

30. The AMWU has not identified any issues and has no comments to make in relation to the published exposure draft.

AM2014/216 Waste Management Award

31. The AMWU has not identified any issues and has no comments to make in relation to the published exposure draft.

END

AMWU National Research Centre

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¹⁵ See clause 31.7(a) of the *Exposure Draft – Manufacturing and Associated Industries and Occupations Award 20XX* republished 14 October 2019.

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