Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Exposure Draft – Telecommunications Services Award 2015

4 August 2016

4 YEARLY REVIEW OF MODERN AWARDS

EXPOSURE DRAFT: TELECOMMUNICATIONS SERVICES AWARD 2015

1. This Reply Submission is made pursuant to the following Direction of Commissioner Roe, included in the Report to the Full Bench of 21 July 2016:

> 2. Item 7: The issue is whether "ordinary hourly rate" or "minimum hourly rate" should be used in Clause 6.4(b)(ii). It is not contested that the all purpose allowances apply to casual employees. What is in contest is whether, in calculating the wage, the casual loading is applied to the minimum rate plus all purpose allowances. It was agreed that this matter should be determined by the Full Bench on the basis of written submissions. CPSU requested the opportunity to respond further to the AiGroup submission. **Any party in opposition to the AiGroup proposal should make further submission by no later than 28 July 2016. The AiGroup, and any other party supporting their proposal, are provided with the opportunity to respond to any new matters raised by no later than 4 August 2016.** The matter will then be determined on the basis of the written submissions.

2. Ai Group's proposal, as referred to in the above Direction, is to amend Clause 6.4(b)(ii) of the Exposure Draft to replace the reference to the *"ordinary hourly rate"* with *"minimum hourly rate".*

3. Ai Group's proposal was set out in the following paragraphs 454 and 455 of our Group 3 Exposure Draft Submission of 14 April 2016:

> **Clause 6.4(b)(ii) – Casual loading**
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> 454. Clause 11.3(b) of the current award requires the payment of "1/38th of the minimum weekly wage prescribed by this award for the work which the employee performs, plus 25%". That is, the loading is to be calculated on the minimum wage prescribed by the award, absent the inclusion of any all purpose allowances.
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> 455. We refer also to our submissions above at section 2.5. Clause 6.4(b)(ii) should be amended by replacing the reference to the "ordinary hourly rate" with "minimum hourly rate".

4. Section 2.5 of Ai Group's submission of 14 April 2016, as referred to in paragraph 455 above, stated:

> **2.5 The application of penalties and loadings to the ordinary hourly rate**
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> 32. The Commission's decision of 13 July 2015[1] (July 2015 Decision) deals with the use of the term 'ordinary hourly rate', which has been defined as the hourly rate for the employee's classification as prescribed by a specific clause of the relevant award, plus any all purpose allowances. An issue arising from the use of this terminology is the calculation of various loadings and penalties. That is, whether the relevant penalty or loading is to be applied to the minimum rate or a rate that is inclusive of applicable all purpose allowances.
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> 33. The Commission observed that allowances defined as applying 'for all purposes' "have historically been treated as part of an employee's wages for the purpose of calculating penalties and loadings"[2] but noted that "some issues have arisen concerning the methodology used in the exposure drafts" in this regard.[3]
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> 34. The Commission stated that the exposure drafts, as at the time that the decision was issued, dealt with penalties and loadings in the following way:
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> > [44] In affected awards, penalties and loadings are expressed as a percentage of the ordinary hourly rate, for example "overtime is paid at 150% of the ordinary hourly rate" to make it clear that an all purpose allowance to which an employee is entitled must be added to the minimum rate before calculating the loaded rate, that is, there is a *compounding* effect.[4]
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> 35. The Full Bench went on to accurately summarise Ai Group's contentions as follows: (emphasis added)
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> > [45] Ai Group submit that the term 'ordinary hourly rate' could be "confusing" and is concerned that it could "extend existing entitlements". Ai Group submit that all purpose allowances should not necessarily be added to a minimum rate of pay before calculating any penalty or loading. In some cases due to the wording of the current award, Ai Group submit that the allowance should be added after the loading is applied to the minimum rate, that is there should be a cumulative rather than compounding effect.[5]
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> 36. The Commission declined to alter the exposure drafts such that they do not use the term 'ordinary hourly rate' or define the term 'all purposes'. In doing so, however, it had regard to our argument, that the specific terms of a clause must be given consideration in determining whether an all purpose allowance is to be added before or after a penalty or loading is applied: (emphasis added)

[1] [2015] FWCFB 4658.

[2] [2015] FWCFB 4658 at [40].

[3] [2015] FWCFB 4658 at [41].

[4] [2015] FWCFB 4658 at [44].

[5] [2015] FWCFB 4658 at [45].

> [47] … Any issues as to whether a particular payment is payable for all purposes, and, in particular, whether an allowance should be added to a minimum rate before calculating a penalty or loading, will be dealt with on an award-by-award basis. Ultimately the resolution of these issues will turn on the construction of the relevant award and the context in which it was made.[6]

37. The decision clearly contemplates the need to look to the specific drafting of a provision in order to determine the arithmetic exercise that must be undertaken to properly calculate an employee's entitlement. We took from the above passage that an opportunity would be afforded to interested parties to make submissions that go to how such a provision is to be applied on an award-by-award, clause-by-clause basis.

38. The submissions below, wherever relevant, deal with the appropriate construction of current award clauses that prescribe a penalty or loading in circumstances where we are of the view that the exposure draft ought to refer to the minimum hourly rate, rather than the ordinary hourly rate.

39. We do so on the basis that where a current award provision requires the application of a premium to a rate that does not include any all-purpose allowances, but the exposure draft deviates from this, the result is a substantive change that may have significant cost implications for an employer. We note that the Commission has repeatedly acknowledged that the redrafting process is not intended to create any substantive changes to the awards system.

40. In addition, we make the following observations regarding the definition of 'all purpose' that has been inserted in the revised exposure drafts, in accordance with the July 2015 Decision. It is in the following terms: (emphasis added)

> all purpose means the payment that will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on annual leave.

41. We are concerned that, even if the Commission accepts our submission in respect of any particular clause that the relevant loading or penalty is to be applied to the minimum hourly rate (rather than a rate that includes an all purpose allowance), there would remain an apparent tension between a clause that refers explicitly to the minimum hourly rate and the above definition. This is because the definition suggests that an all purpose allowance is to be *included* in the relevant rate of pay when calculating a loading or penalty.

42. If a clause that requires the payment of, for example, 150% of the minimum hourly rate, when read in conjunction with the definition of 'all purposes', is interpreted to require that the loading or penalty is to be calculated on a rate that includes all purpose allowances, it would clearly run contrary to the intention of referring expressly to the minimum hourly rate.

43. Whilst we appreciate that the Commission has not sought further submissions regarding the definition of 'all purposes', we think it appropriate to here raise the matter, as it may become apparent that there is a need to

[6] [2015] FWCFB 4658 at [47].

modify the definition, or accommodate for it when re-drafting the relevant provisions that prescribe the penalty or loading.

Calculation of the casual loading

44. The question of whether the casual loading should be applied to the minimum hourly rate or ordinary hourly rate has also been the source of some controversy in the context of the exposure drafts. The Commission previously expressed the provisional view that a general approach involving the application of casual loading to the minimum hourly rate should be adopted.

45. In its decision of September 2015[7], the Full Bench determined that the provisional view should not be adopted. It also indicated that:

> The general approach will remain as expressed in the exposure drafts, namely that the casual loading will be expressed as 25% of the ordinary hourly rate in the case of awards which contain any all purpose allowances, and will be expressed as 25% of the minimum hourly rate in awards which do not contain any such allowances.[8]

46. Ai Group does not understand the Full Bench's September decision to amount to a determination that the 'general approach' would necessarily be applicable in all awards.

47. In the proceedings associated with the September 2015 decision, both employer and union parties either argued for, or at least accepted, the need for some deviation from the application of a uniform approach to such matters: (emphasis added)

> [103] The primary submission of the AWU, the CFMEU and the AMWU was that the proposed general rule should not be adopted, so that issue 3 did not arise. The AWU submitted in the alternative that, if the proposed general rule was adopted, it should be on the basis that no employee suffered a reduction in remuneration as a result. The AMWU submitted that the *2008 decision* demonstrated that there may be departures from a general rule in relation to particular modern awards.
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> [104] ABI declined to make a submission in relation to issue 3 beyond noting that the *On-Site Award* and the *Cotton Ginning Award* were examples of modern awards which might require individual consideration. The Ai Group submitted that there should generally be a consistent position across all awards, but accepted that there could be a justification for a departure from that position in relation to particular awards, in which case the party contending for the departure should carry the onus of demonstrating the requisite justification.
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> [105] The MBA and the HIA both contended that adoption of the provisional decision in the *On-Site Award* would resolve the existing dispute concerning the interpretation of that award, but that if it was not considered appropriate to resolve the dispute in that way, the problem should be given specific consideration by the Commission as expeditiously as possible.[9]

[7] [2015] FWCFB 6656.

[8] [2015] FWCFB 6656 at [110].

[9] [2015] FWCFB 6656 at [103] – [105].

48. In relation to this point the Full Bench stated: (emphasis added)

> [106] The obligation in s.134(1) of the FW Act to ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions carries with it a requirement (in s.134(1)(g)) to take into account "the need to ensure a simple, easy to understand, stable and sustainable modern award system …". We accept that the adoption of a clear and consistent approach in relation to whether the casual loading should apply to all purpose allowances is desirable in the interests of simplicity and ease of understanding, although the particular circumstances of some awards may require special consideration. The question is whether the approach proposed by the provisional decision is the one which should be preferred in this respect.[10]

49. Ai Group has previously identified that numerous awards, as currently drafted, expressly require that the casual loading be calculated on the applicable minimum award rate of pay rather than compounding the benefits of any allowance, including 'all purpose' allowances.

50. To the extent that it is necessary, we point out that the inclusion of an all-purpose allowance in an award does not prevent the instrument from potentially providing that any applicable casual loading is to be calculated by reference to an amount not including any all-purpose allowance.

51. To require that the casual loading be applied to a rate that includes one or more all-purpose allowances in an exposure draft where that is not the approach under the current award would be a substantive change and would increase employer costs. Ai Group opposes such redrafting of the relevant award provisions on this basis.

52. Such redrafting would unjustifiably compound the benefits of either the relevant allowance or loading. There is no basis in the text of any of the relevant awards for concluding that this reflects the purpose for which either the casual loading or relevant allowances in the award is paid. Such issues were, to an extent, acknowledged by the Full Bench:

> [109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[11]

53. Ai Group agrees that the Full Bench's concern is an important matter that must be addressed. In circumstances where an award did not previously require the compounding of such entitlements it is difficult to understand how

[10] [2015] FWCFB 6656 at [106].

[11] [2015] FWCFB 6656 at [109].

the Full Bench can be satisfied that such a term is now necessary to meet the modern awards objective, as required by s.138.

54. Ultimately, these issues may need to be addressed differently in the context of particular awards. However, one potentially appropriate approach to addressing this matter would be to maintain the practice in a particular award of specifically defining or articulating the way in which the casual loading is to be calculated in a manner that expressly deals with, and precludes, any compounding of the relevant all-purpose allowance and to slightly modify the definition of 'all purpose' adopted in the context of that instrument.

55. This is necessary as there will, as already identified, be a tension between the proposed 'all purpose' definition and the clause specifying what a casual employee is to be paid if there is not to be a compounding effect. In the interests of ensuring the award is simple and easy to understand this should be expressly dealt with. There may be a different means of addressing this within different awards. However, one way would be to modify the proposed definition of 'all purpose' so that, in relevant awards, it states:

> Allowances paid for all purposes are included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties, loadings (except for the casual loading provided for in clause x) or payment while they are on annual leave…

56. Importantly, the definition of "all-purpose allowance" is a new provision in awards. Accordingly, any difficulty reconciling the wording of the new definition with a current entitlement should not be considered a reason for varying the current award entitlements.

5. The only party which has filed a submission in opposition to Ai Group's proposed amendment to amend Clause 6.4(b)(ii) of the Exposure Draft is the CPSU. In a submission of 28 July 2016, the CPSU essentially raises two arguments:

- Firstly, that as a matter of construction, the current award provides for the casual loading to be paid upon the wages including allowances; and
- Secondly, that Ai Group has misconstrued paragraph [109] of the September 2015 Decision.

6. The CPSU's construction of the relevant provisions is incorrect.

7. Clause 11.3(b) in the current award states (emphasis added):

> **"(b)** A casual employee is one engaged and paid as such, and for working ordinary time will be paid per hour 1/38th of the weekly wage prescribed by this award for the work which the employee performs, plus 25%."

8. In the current award, the weekly wages are prescribed in clause 14. Allowances are prescribed in a different clause (clause 17), including all-purpose allowances.

9. In the context of this award, the plain and ordinary meaning of the phrase *"weekly wage prescribed by this award"* is the relevant wage set out in clause 14. There is no ambiguity or uncertainty.

10. Ai Group's proposed amendment to the Exposure Draft is consistent with the plain and ordinary meaning of the existing award provisions.

11. The CPSU alleges that Ai Group has misconstrued paragraph [109] of the Commission's September 2015 Decision. This paragraph states:

> [109] The concern which underlay the provisional decision was whether it was appropriate for certain allowances currently expressed as all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading. Ultimately however we have concluded that to deal with this concern in the manner proposed by the provisional decision is too broad-brush an approach and involves conducting the analysis from the wrong starting point. We consider that the preferable approach is to permit reconsideration, on an award-by-award basis during the course of the 4-yearly review, as to whether any existing allowance should retain its "all purpose" designation or should be payable on some different basis.[12]

12. Similar to the phrase *"weekly wage prescribed by this award",* paragraph [109] in the Full Bench's decision is plain in its meaning. There is no ambiguity or uncertainty regarding the Full Bench intentions.

13. Consistent with paragraph [109], it is appropriate for the terms of each particular award to be considered to ascertain whether it is *"appropriate for…all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading".*

14. The current provisions of the Exposure Draft would increase costs for employers as highlighted by the following example for a Telecommunications Technical Employee who is a team leader in charge of 5 employees:

[12] [2015] FWCFB 6656 at [109].

Current award

Weekly wage prescribed in clause 14:	$783.30
Casual pay for 38 hours ($783.30 x 1.25):	$979.13
Leading hand allowance in clause 17 ($783.30 x 0.439)	$34.39
Weekly remuneration for casual team leader ($979.13 + $34.39)	$1,013.52

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Weekly wage prescribed in clause 14:	$783.30
Casual ordinary pay for 38 hours [($783.30 + $34.39) x 1.25]:	$1,022.12

15. Given the increased costs that would be imposed on employers and given the plain and ordinary meaning of the existing award provisions, in this award it is not *"appropriate for…all-purpose allowances to be paid at an increased level for casual employees by reason of the application of the casual loading".*

16. Accordingly, the Exposure Draft should be amended in line with Ai Group's proposal.