Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Group 1 Awards

16 July 2018

4 YEARLY REVIEW OF MODERN AWARDS

GROUP 1 AWARDS

1. INTRODUCTION

1. On 28 June 2018, a Full Bench of the Fair Work Commission (**Commission**) issued a decision[1] that dealt with technical and drafting issues arising from numerous group 1 awards (**Decision**).

2. The Australian Industry Group (**Ai Group**) files this submission in accordance with the relevant directions at paragraphs [444] – [453] of the Decision.

2. ADDITIONAL WEEK'S LEAVE FOR SEVEN DAY SHIFTWORKERS – ALLEGED NES INCONSISTENCIES

3. Ai Group respectfully agrees with the provisional views expressed by the Commission at paragraphs [11] – [15] of the Decision and submits that in accordance with those views, the relevant provisions should be removed from the awards and exposure drafts identified.

3. CASUAL CONVERSION CLAUSE

4. On 19 January 2018, Ai Group filed a submission concerning technical and drafting issues arising from casual conversion provisions contained in 16 exposure drafts (**January Submission**). We there explained the context in which those submissions were being made, including the outcome of the casual employment common issues proceedings.

5. Of those 16 awards, the following awards fall within group 1:

   i. The *Asphalt Industry Award 2010*;

   ii. The *Cement and Lime Industry Award 2010*;

[1] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802.

iii. The *Concrete Products Award 2010*;

iv. The *Cotton Ginning Award 2010*;

v. The *Manufacturing and Associated Industries and Occupations Award 2010*;

vi. The *Premixed Concrete Industry Award 2010*;

vii. The *Quarrying Award 2010*; and

viii. The *Textile, Clothing, Footwear and Associated Industries Award 2010*.

6. The issues we have identified in relation to the casual conversion clauses in those eight awards are very similar and indeed in some cases the very same issue has been replicated in multiple awards.

7. Paragraph [19] of the Decision states as follows:

> **[19]** We note that the issue of casual conversion is currently before the Casual Employment Full Bench (AM2014/197). A number of issues relating to the casual conversion clause have been raised by the parties in relation to specific awards in Group 1. If the matter is not determined by the Casual Employment Full Bench parties have liberty to raise the issues prior to the conclusion of the Review.[2]

8. Notwithstanding the above comment, the Full Bench went on to deal with our January Submission in relation to the following awards:

i. The *Concrete Products Award 2010* (albeit not in full; some issues remain undetermined);[3] and

ii. The *Cotton Ginning Award 2010*.[4]

[2] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [19].

[3] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [125] – [138].

[4] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [156] – [166].

9. In relation to the following five awards, the Full Bench made reference to paragraph [19] of the Decision and did not determine the issues raised by the January Submission:

   i. The *Asphalt Industry Award 2010*;[5]

   ii. The *Cement and Lime Award 2010* and the *Quarrying Award 2010*;[6]

   iii. The *Premixed Concrete Award 2010*;[7] and

   iv. The *Textile, Clothing, Footwear and Associated Industries Award 2010*.[8]

10. The Decision does not deal with the *Manufacturing and Associated Industries and Occupations Award 2010*, save for the following paragraph:

> **[4]** The *June 2017 decision* resolved outstanding issues in the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award) with the exception of the changes arising from the decision to incorporate the manufacturing stream from the *Vehicle Manufacturing Repair, Services and Retail Award 2010* (the Vehicle Award) into the Manufacturing Award. The parties to the Manufacturing Award have reached an agreed position in relation to the incorporation of the vehicle manufacturing stream and an updated exposure draft was published on 17 April 2018.[9]

11. The relevant parties' discussions and the revised exposure draft for the *Manufacturing and Associated Industries and Occupations Award 2010* deal with the incorporation of elements of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010;* they did not relate to (and by extension, resolve) the matters raised by Ai Group in the January Submission regarding

[5] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [74].

[6] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [105].

[7] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [346]. We note that paragraph [346] states that "Items 3 and 4 are dealt with above at paragraph [17] of this decision". Items 3 and 4 in the summary of submissions published on 22 March 2018 (also referenced at paragraph [346] relate to casual conversion. Accordingly, we have proceeded on the basis that the reference to paragraph [17] in the passage cited above should instead be a reference to paragraph [19] of the Decision.

[8] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [401]. We note that paragraph [401] states that "Items 10A and 11 are dealt with above at paragraph [17]". Items 10A and 11 in the summary of submissions published on 22 March 2018 (also referenced at paragraph [401] relate to casual conversion. Accordingly, we have proceeded on the basis that the reference to paragraph [17] in the passage cited above should instead be a reference to paragraph [19] of the Decision.

[9] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [4].

the casual conversion provisions. Accordingly, those matters remain outstanding.

12. Respectfully, in the interests of ensuring that the technical and drafting issues arising from the casual conversion provisions in the group 1 awards are dealt with in a consistent manner and in light of the commonality amongst those issues, the nature of the proceedings before the Casual Employment Full Bench and the outcome of those proceedings (outlined in the January Submission), in our submission all of the issues raised by Ai Group regarding the casual conversion provisions in group 1 awards can and should be dealt with by the Full Bench as presently constituted. The outstanding issues need not be deferred until the end of the review, as suggested at paragraph [19] of the Decision.

4. GAS INDUSTRY AWARD 2010

13. Ai Group strongly opposes the Commission's proposal at paragraph [182] of the Decision. It represents a significant substantive change to the award.

14. Clause 22 of the *Gas Industry Award 2010* is in the following terms:

> **22. Meal breaks**
>
> **22.1** A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.
>
> **22.2** Employees required to work for more than five hours without a suitable interval for a meal as provided for in clause 22.1 must, for all time worked in excess of the five hours before being allowed such interval, be paid at double time.
>
> **22.3** Employees required to continue or resume work during the meal break, must for the time of continuance or resumption until the full meal break is given, be paid at time and a half.

15. Clauses 22.2 and 22.3 stipulate the rate that is to be paid to an employee who is not given a meal break after more than five hours of work or is required to continue or resume work during a meal break. They wholly regulate the amount that is payable in such circumstances.

16. Clause 9.1 of the exposure draft of the *Gas Industry Award 2010* is the clause that is the subject of this submission. The Commission's proposed changes are marked below in red text:

> **9.1 Meal breaks**
>
> **(a)** A meal break of at least 30 minutes must be allowed to employees within five hours of the start of their shift.
>
> **(b)** Employees required to work for more than five hours without a meal break as provided for in clause 9.1(a) must, for all time worked in excess of the five hours before being allowed a meal break, be paid at 200% of the minimum hourly rate, plus penalties and relevant loadings.
>
> **(c)** Employees required to continue work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from the beginning of the scheduled meal break until the full meal break is given.
>
> **(d)** Employees required to resume work during the meal break must be paid at 150% of the minimum hourly rate, plus penalties and relevant loadings for all hours worked from resuming work until the full meal break is given.

17. The changes proposed by the Commission would have the effect of requiring the payment of weekend penalties, public holiday penalties and shift loadings in addition to the penalty prescribed by clause 22 of the award for working during a meal break.

18. The changes proposed would lead to a substantial increase to employment costs. For instance, an employee required to work for more than five ordinary hours on a Sunday would be entitled to 200% of their minimum hourly rate pursuant to clause 22.2 of the award. Under the Commission's proposal, the employee would instead be entitled to 400% of the minimum hourly rate.

19. The basis for the amendments proposed by the Commission are explained only by the following paragraph of the Decision: (our emphasis)

> **[181]** In this instance, we agree with the AWU that the effect of the use of the term 'minimum hourly rate' in the present circumstances would mean that an employee entitled to higher weekend or public holiday penalties would be entitled to a *lesser* amount under the circumstances contemplated by clause 9.1 of the Exposure Draft. The intention of the clause is to create a disincentive for employers to delay or

interrupt employees' meal breaks. In order to achieve this, the rates under clause 9.1 must be in excess of that which employees are otherwise entitled.[10]

20. The Decision does not identify any basis for the Commission's findings that:

a) The intention of the relevant provisions is to create a disincentive for employers to delay or interrupt an employee's meal break. The intention of the clause might equally be to simply provide employees in such circumstances with some compensation for working during a meal break. We are not aware of, nor has the Commission cited, any basis for the Commission's finding.

b) In order to achieve the clauses' alleged purpose, the rates payable in the relevant circumstances must be in excess of what employees are already entitled to. Further, this element of the Commission's reasoning does not acknowledge that in many circumstances, the current clauses do create an entitlement to a higher rate of pay. The proposed changes would simply result in a windfall gain for such employees and there is no evidence before the Commission that might establish the proposition that a further increase to the entitlement due to them will create a disincentive for employers to delay or interrupt their meal breaks.

   For example, an employee working ordinary hours on a Saturday is to be paid 150% of the minimum hourly rate. If that employee is required to work for more than five hours without a meal break, clause 22.2 of the award entitles the employee to 200% of the minimum hourly rate. Under the Commission's proposed changes, the employee would instead be entitled to 350% of the minimum hourly rate.

21. The Commission's Decision states that absent the proposed changes, "an employee entitled to the higher weekend or public holiday penalties would be entitled to a *lesser* amount under the circumstances contemplated by clause

[10] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [181].

9.1 of the Exposure Draft"[11]. This proposition should not be overstated. It is likely to arise only in very limited circumstances such as:

a) Where an employee is working on a public holiday; and

b) Where the employee is working on a Sunday and clauses 9.1(c) or (d) apply.

22. A consideration of the relevant factors listed at section 134(1) of the Act does not lend support to the proposed variations.

a) There is no evidence of the extent to which employees covered by the *Gas Industry Award 2010* are in fact low paid or that the proposed clauses will better the **relative living standards and needs of the low paid**.

b) There is no evidence or cogent reason why the proposed clauses could be expected to **encourage enterprise bargaining**.

c) There is no evidence or cogent reason why the proposed clauses could be expected to **promote social inclusion through increased workforce participation**.

d) If the Commission's assumption that the proposed changes will create a disincentive to require employees to work during a meal break was borne out, such an outcome would be inconsistent with the **need to promote flexible modern work practices and the efficient and effective performance of work**.

e) The proposed changes do not further the need to **provide additional remuneration for employees working overtime' unsocial, irregular or unpredictable hours; on weekends or public holidays; or shifts**. Employees under the *Gas Industry Award 2010* are already in receipt of higher rates of pay for work performed during such time and further, the relevant provisions do not only apply where work is performed in one or

[11] *4 yearly review of modern awards – Award stage – Group 1* [2018] FWCFB 3802 at [181].

more of the aforementioned circumstances. In any event, even if the Commission found that section 134(1)(da) supports making the proposed changes, this must be weighed against the remaining factors listed at section 134(1), which overwhelmingly do lend support to the proposed changes.

f) The principle of **equal remuneration for work of equal or comparable value** is not relevant.

g) The proposed changes would have a negative **impact on business**, including on employment costs (explained above) and productivity if it has the effect of disincentivising employers from requiring employees to work during a meal break where necessary for operational reasons.

h) The need to ensure a **simple and easy to understand modern awards system** is a neutral consideration. The need to ensure a **stable modern awards system** is contrary to making the proposed variations in the absence of any evidence or a compelling case before the Commission that establishes that the proposed clauses are necessary to ensure that the *Gas Industry Award 2010* achieves the modern awards objective.

i) The likely **impact on employment growth, inflation and the national economy** is likely to be neutral.

23. The changes proposed are not necessary to ensure that the *Gas Industry Award 2010* achieves the modern awards objective. Ai Group remains of the view that clause 9.1 of the exposure draft should be amended by simply inserting the words “minimum hourly rate” after each percentage penalty rate prescribed by it.

24. If the Commission declines to accept Ai Group’s primary position, it is our submission that any variations made to clause 9.1 of the Exposure Draft should extend no further than to *maintain* an employee’s rate of pay where an employee is working on a weekend or public holiday and therefore entitled to a higher rate of pay for time worked on that day. That is, the higher rate of pay

would be payable in the circumstances described in clauses 9.1(b) – (d) in lieu of the penalty rate prescribed by those clauses.

5. POULTRY PROCESSING AWARD 2010

25. This submission is made in relation to paragraph [345] of the Decision.

26. The Commission has determined that clause 8.2(b) of the exposure draft will be amended such that it requires that "Any change to rosters or hours of work is subject to the consultative provisions in clause 22.2".

27. The proposed provision is plainly erroneous and creates an inconsistency between clause 8.2(b) and clause 22.2. Clause 22.2 applies only where an employer is proposing to change an employee's regular roster or ordinary hours of work. The additional sentence proposed is clearly cast in far broader terms.

28. In our submission, any change made to clause 8.2(b) of the exposure draft resulting from the Decision should accurately reflect the scope of the clause 22.2.