



The Australian Industry Group
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25 November 2020

The Hon IJK Ross, President
Fair Work Commission
11 Exhibition Street
Melbourne Vic 3000

Dear Justice Ross,

AM2019/17 - 4 Yearly Review of Modern Awards – Food, Beverage and Tobacco Manufacturing Award 2020

We refer to the above matter, and to the submission filed by the Australian Manufacturing Workers Union (**AMWU**) on 23 November 2020 which proposed the following variation to cl. 23.1(f) of the Determination for the *Food, Beverage and Tobacco Manufacturing Award 2020* (**FBTM Award**) issued by the Fair Work Commission (**Commission**) on 10 November 2020.

(f) Where clause 23 refers to an overtime rate 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 ~~if the entitlement is applicable to a casual employee.~~

Ai Group opposes the AMWU's proposed amendment to the Determination.

In a [submission](#) filed on 23 December 2019 relating to the *Manufacturing and Associated Industries and Occupations Award* (**Manufacturing Award**) Ai Group proposed the wording that the AMWU is now seeking the deletion of in the FBTM Award. The wording was included in clause 11.2(d). Ai Group did not object to wording proposed by the AMWU for the clause provided that the impugned words were included. The AMWU's proposed wording was problematic in circumstances where a particular entitlement used the expression 'ordinary hourly rate' but the entitlement did not apply to a casual employee.

The issues that arise with regard to this matter are very similar in the Manufacturing Award and the FBTM Award.

In its 24 December 2019 Decision, the Full Bench of the Commission expressed a provisional view that the additional wording proposed by Ai Group for the Manufacturing Award was appropriate:¹

[255] In a further submission filed on 23 December 2019 Ai Group submits that the amendment to clause 11.2(d) proposed by the AMWU 'is problematic in circumstances where a particular entitlement uses the expression 'ordinary hourly rate' but the entitlement does not apply to a casual employee, eg clause 31.12(d) and (e) – the 10 hour break provision'. Ai Group does not object to the following modified wording for paragraph (d):

(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

¹ [2019] FWCFB 8569, [255] – [256].



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employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

[256] It is our *provisional* view that the modified wording proposed by Ai Group be adopted. Interested parties will have an opportunity to comment on this proposal when the revised exposure draft and draft variation determination are published in January 2020.

No objections were filed by the AMWU in response to the Full Bench's provisional view expressed above.

In the Decision published on 10 November 2020 with the Determination for the FBTM Award, the Commission invited submissions from relevant parties whilst noting that this process was not intended to be an opportunity to relitigate the issues which had already been determined.²

The wording that the AMWU is seeking to have deleted in clause 23.1(f) is important because not all provisions in the award are applicable to casuals. For example, clause 23.10 (Rest period after overtime) does not apply to casuals and provides for an entitlement expressed as a percentage of the 'ordinary hourly rate'. The AMWU's proposed variation could cause confusion.

Ai Group notes that similar wording in cl. 23.1(f) of the FBTM Award also appears in cl. 10.5 of the FBTM Award. This is consistent with cognate provisions appearing in clauses 11.2(d) and 32.1(f) of the Manufacturing Award.

Yours sincerely,

A handwritten signature in black ink that reads 'Hamish Harrington'.

Hamish Harrington
Workplace Relations Policy Adviser

² [2020] FWCFB 5954, [7].