

From: Gabriel Miller <gabriel.miller@amwu.org.au>
Sent: Monday, 23 November 2020 10:48 AM
To: Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>
Cc: AMOD <AMOD@fwc.gov.au>
Subject: AM2019/17 Finalisation of Exposure Drafts

Dear Associate to Justice Ross,

I refer to the above matter.

The AMWU seeks leave to file the **attached** submission in relation to the Determination that was published in respect of the Food, Beverage and Tobacco Manufacturing Award.

Regrettably the responsible officer (myself) was on personal/carer's leave on Friday 20 November 2020 which is why the attached submission was not filed in accordance with the deadline referred to at [7] of the Decision of the Full Bench ([2020] FWCFB 5954).

The AMWU apologises for the late filing.

Yours sincerely,

Gabriel Miller

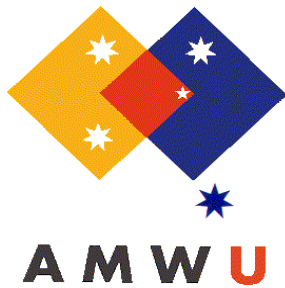
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AM2019/17 Finalisation of Exposure Drafts

Introduction

1. These are the submissions of the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU).
2. These submissions are filed in relation to the *Food, Beverage and Tobacco Manufacturing Award (Food Award)* in response to the Decision¹ published on 10 November 2020 and the determination that was published for the *Food, Beverage and Tobacco Manufacturing Award* also published on 10 November 2020.

Background

3. On 29 January 2020 the exposure draft for the Food Award was re-published.
4. On 5 March 2020 the AMWU filed its submissions in response to the re-published exposure draft and filed further submissions in reply to submissions of other industrial parties on 7 April 2020.
5. These submissions, and the submissions of the other parties were ultimately resolved during two conferences held before Deputy President Clancy held on 25 May 2020 and 10 June 2020. The changes to the exposure draft that were agreed are outlined in the Report to the Full Bench published by Deputy President Clancy on 11 June 2020.²
6. On 15 June 2020 the Full Bench issued a Statement³ confirming it was their provisional view that the amendments of the exposure draft in accordance with the changes outlined

¹ *4 yearly review of modern awards – Graphic Arts, Printing and Publishing Award 2010 and Food, Beverage and Tobacco Manufacturing Award 2010* [2020] FWCFB 5954.

² AM2019/17 Report to Full Bench 11 June 2020.

³ [2020] FWCFB 3094.

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in the Report were necessary to achieve the modern awards objective.⁴

7. On 18 August 2020 the Overtime for Casuals Full Bench issued a decision outlining various changes to many awards recorded simultaneously with a suite of draft determinations. The awards proposed to be varied by the Full Bench including the Graphic Arts Award and Food Award.
8. On 14 September 2020 the AMWU filed submissions which broadly supported the changes outlined in the draft determinations, but pointed out that as there were already significant award variations pending due to the changes outlined by the *Finalisation of Exposure Drafts* Full Bench, the changes proposed in the draft determinations would likely be shortly superseded.⁵
9. On 6 October 2020 the Full Bench issued a Decision confirming that the changes outlined in the report would be adopted, but that final determinations would not be issued until the finalisation of the AM2017/51 Casual for Overtime proceedings and that the determinations so issued would be incorporated into the final determinations.⁶
10. On 10 November 2020 the Full Bench issued a further Decision confirming the new determinations for the Food Award and Graphic Arts Awards. The determinations were published simultaneously with the decision. The Full Bench advised parties have until 20 November 2020 to file an objection to any of the amendments to the Food Award.⁷

AMWU Comments in Relation to the Food Award Determination

11. The AMWU does not object to the determination published in respect of the Food Award as such, however it makes the following comments in respect of clause 23.1 of the new award (as expressed in the determination).
12. Clause 23.1(f) of the proposed new award (as varied) states:

“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

⁴ Ibid [2].

⁵ [AM2017/51 AMWU Submissions of AMWU 14 September 2020](#).

⁶ *4-Yearly Review of Modern Awards* [2020] FWCFB 5307 [105].

⁷ *4 yearly review of modern awards – Graphic Arts, Printing and Publishing Award 2010 and Food, Beverage and Tobacco Manufacturing Award 2010* [2020] FWCFB 5954 [7].

*applicable to a casual employee.*⁸

13. The words ‘*if the entitlement is applicable to a casual employee*’ in this subclause arguably introduces an ambiguity into the award regarding the entitlement of casuals to overtime. The use of the words ‘*if the entitlement is applicable to a casual employee*’ suggest that it may be uncertain whether overtime is applicable to casuals. However, this is an inherently contradictory statement as it appears in a clause which deals exclusively with overtime.
14. In any event the various proceedings throughout the 4-Yearly Review of Modern Awards, particularly AM2017/51 Overtime for Casuals, AM2014/268 Food Beverage and Tobacco Manufacturing Award, and AM2019/17 Finalisation of Exposure Drafts have determined conclusively that casual employees have the same entitlement to overtime as other employees, and the AMWU understands that this is not controversial among the main industrial parties with an interest in this award.
15. For the above reasons, the AMWU respectfully requests that the Full Bench consider varying clause 23.1(f) in the determination as follows (changes to the determination as currently drafted are marked up using strike through and underline):

(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.~~

16. The AMWU notes the observation of the Full Bench that:

“this process is intended to provide an opportunity to correct any errors; it is not an opportunity to relitigate the issues which have already been determined.”⁹

17. In the AMWU’s respectful submission the proposed amendment above can be characterised as an error rather than re-litigating an already determined matter, in that (as observed above) it has already been determined that casuals are entitled to overtime and because (in the AMWU’s view) it is not clear that clause 23.1(f) reflects this position.

⁸ [Determination – Food, Beverage and Tobacco Manufacturing Award](#) 2020 clause 23.1.

⁹ 4 yearly review of modern awards – *Graphic Arts, Printing and Publishing Award 2010 and Food, Beverage and Tobacco Manufacturing Award 2010* [2020] FWCFB 5954 [7].

Conclusion

18. The AMWU thanks the Commission for its consideration of the matter raised in respect of the Food Award.

END

AMWU National Research Centre

23 November 2020