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AM2019/17 and ors Tranche 1 Exposure Drafts: Submissions in Reply

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 20 September 2019.¹

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.²
3. The Full Bench further advised that the Exposure Drafts would be finalised in three tranches. Parties were directed to:
 - Respond to submissions made in response to the March submissions; and
 - File submissions in relation to the published exposure drafts in ‘Tranche 1’.
4. On 30 September 2019, the AMWU filed its submissions in reply to the March Exposure Drafts; and in response to the Tranche 1 exposure drafts in relation to the following Awards that the AMWU has an interest in:
 - Electrical Power Industry Award;
 - Mining Industry Award;

¹ 4 Yearly review of modern awards -award stage [2019] FWCFB 6562 [8]-[9].

² 4 yearly review of modern awards – finalisation of exposure drafts – newly constituted Full Bench [2019] FWCFB 6077 [1].

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- Oil Refining and Manufacturing Award;
 - Seafood Processing Award;
 - Surveying Award; and
 - Water Industry Award
5. The following parties also made submissions:
- a. The Australian Industry Group (**AiG**); and
 - b. Australian Business Industrial and the NSW Business Chamber (**ABI**);
6. The submissions of AiG and ABI traverse both general issues common to all exposure drafts and also issues that are specific to individual exposure drafts.
7. The AMWU makes the following submissions in reply to the submissions of AiG and ABI.

Submissions in reply to ABI

8. ABI submit:

“Our clients note that at paragraph [8] of the Decision, the Full Bench acknowledged that there were various common issue matters that were yet to be finally determined. This includes the ‘Overtime for casuals’ matter. A number of the updated Tranche 1 exposure drafts published on 2 September 2019 contain summary tables setting out the overtime rates for casual employees (in dollar terms). The calculation of some of these rates is currently in dispute as part of the ‘Overtime for Casuals’ matter. The tables in the relevant exposure drafts contain a disclaimer, stating that:

“A Full Bench has been constituted in AM2017/51 to deal with the issue of overtime for casuals. The rates in the tables below dealing with overtime for casuals will not become operative until a decision is made in that matter and only to the extent that they are consistent with the decision.”

ABI and NSWBC agree with the Commission that the summary tables should not be given effect until the relevant decision is handed down.

It is, however, not immediately clear whether the Commission intends to:

(a) publish the updated awards without these tables, inserting them at a later time after the relevant Full Bench hands down its decision; or

(b) publish the updated awards with the tables as currently set out in the exposure drafts, along with a disclaimer that the rates are not yet operational and are subject to a further decision of the Commission.

ABI and NSWBC submit that the first of these options is the most appropriate.

Our clients also submit that, if the relevant Full Bench has not yet handed down its decision, a similar process should be undertaken in relation to updated exposure drafts in the second and third.”³

9. In response to this submission, the AMWU notes the submission of ABI and advises that it is not opposed to the course of action proposed by ABI.
10. However, the AMWU notes that the reverse is also true, in that there are some exposure drafts in tranche 1 where there is no table of rates, or if there is, there are no casual overtime rates (as distinct from other rates for casuals, such as weekend and public holiday penalties).
11. The AMWU submits that where this is the case, parties should have the opportunity to request a table of rates to be inserted after AM2017/51 is determined. If (as proposed by ABI) the tables are only being inserted after AM2017/51 is determined, this should present little difficulty.

Submissions in reply to AiG: Submissions of General Application

12. The AMWU makes the following submissions in response to the submission filed by the AiG on 27 September 2019 in relation to those parts of the submission that have general application, or application across multiple exposure drafts.
13. The AiG submit in relation to the date of operation of the varied awards:

“The draft determinations issued by the Commission do not identify or propose a date upon which the determination would come into operation. Ai Group respectfully submits that it should be granted an opportunity to be heard before the Commission determines

³ *Submission of Australian Business Industrial and the NSW Business Chamber Limited Submissions: Tranche 1 Exposure Drafts* dated 27 September 2019 [7]-[13].

when the draft determinations will come into operation. We foreshadow that in our submission, the awards as varied should commence operation not less than three months after the final determination is issued”.⁴

14. The AMWU is not opposed to a three-month lead in time for the operation of the varied awards.

Reference to National Training Wage

15. AiG submit that:

“The references to “2010” may require updating”⁵

16. The AMWU agrees with this submission.

Note in Schedule of Rates

17. In relation to the “Note” that has been inserted in a number of the schedules dealing with hourly rates of pay in several exposure drafts, AiG submit:

“The ‘note’ has been deleted. The reason for this is unclear. We are not aware of any decision of the Commission to remove it. Unless such a decision has been made, we submit that it should be reinserted.”⁶

18. The AMWU supports the deletion of the Note.

Submissions in reply to AiG: Specific Exposure Drafts

19. The AMWU makes the following submissions in response to the submission filed by the AiG on 27 September 2019 in relation to those parts of the submission that are specific to particular Exposure Drafts.

AM2014/226 Electrical Power Industry Award

20. In relation to clause 20.1, AiG submit:

“Clause 20.1 and the subheading “penalty rates” should be deleted. It is unnecessary.”⁷

21. The AMWU assumes that AiG mean the words “20.1 penalty rates” should be deleted and not

⁴ *Submission of the Australian Industry Group – Tranche 1 Exposure Drafts* dated 20 September 2019 [3].

⁵ *Ibid* [57], [66], [69], [104].

⁶ *Ibid* [59], [67], [73], [108].

⁷ *Ibid* [58].

the substantive content of the clause.

22. Assuming this is correct, the AMWU is not opposed to the AiG submission.

AM2014/79 Mining Industry Award

23. In relation to the definition in clause 2 of “casual ordinary hourly rate” AiG submit:

“We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the casual ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.”⁸

24. In relation to the definition of “ordinary hourly rate” in clause 2 AiG submit:

“We suggest that the definition be amended to make clear that where an employee is entitled to all-purpose allowances in addition to the industry allowance, they are to be included in the ordinary hourly rate in addition to the industry allowance. We are concerned that the current definition may be read to suggest that such allowances are to be so included in lieu of the industry allowance.”⁹

25. The AMWU does not necessarily agree with the contention that either the definition of the “casual ordinary hourly rate” or the “ordinary hourly rate” are capable of being misconstrued in the way that is foreshadowed by the AiG.

26. Further, whilst the AiG have proposed amendments to the definition, they have not put proposed a specific form of words.

27. If the Fair Work Commission agrees with the AiG that the definitions require amendment, the AMWU submits that the following form of words would be appropriate:

***casual ordinary hourly rate** means the hourly rate for a casual employee for the employee’s classification specified in clause 15—Minimum rates and classifications plus the casual loading and the industry allowance. Where an employee is entitled to an additional all-purpose allowance, this allowance also forms part of that employee’s*

⁸ Ibid [64].

⁹ Ibid [65].

ordinary hourly rate.

ordinary hourly rate means the hourly rate for an employee’s classification specified in clause 15—Minimum rates and classifications plus the industry allowance. Where an employee is entitled to an additional all-purpose allowance, this allowance also forms part of that employee’s ordinary hourly rate.

AM2014/80 Oil Refining and Manufacturing Award

28. In relation to clauses 18.1(a)(i) and 18.2(b)(i) which deal with annualised salaries, the AiG submit:

“The purpose (and effect) of the words “(other than clause 18.1)” is unclear. They should be deleted.”¹⁰

and

“The purpose (and effect) of the words “(other than clause 18.2)” is unclear. They should be deleted”¹¹

29. The AMWU agrees that the inclusion of the bracketed words is confusing and should be deleted.

30. In relation to clause 23.2 of the Exposure Draft, AiG submit as follows:

“We are concerned that clause 23.3 does not properly characterise the amounts payable under that clause. Specifically, the heading of the clause suggests that the clause requires the payment of a penalty. The clause, however, prescribes a rate that is payable for such time worked; the amount prescribed is not a penalty that is payable in addition to the base rate of pay.”¹²

31. The AMWU accepts the central premise of AiG’s contention but does not agree that any amendment to the clause or the heading is necessary.

32. The substantive content of clause 23.3 leaves the reader in no doubt as to what is required to be paid.

¹⁰ Ibid [70].

¹¹ Ibid [71].

¹² Ibid [72].

33. In relation to clause B.3 AiG submit:

“It is our understanding that there is a disagreement between the interested parties regarding the proper approach to calculating various rates contained at 4 Yearly Review of Modern Awards – Tranche 1 Exposure Drafts Australian Industry Group 19 B.3 of the exposure draft, including public holiday rates, shiftwork rates and weekend penalty rates.

It is Ai Group’s position that by virtue of clause 24.3(b) of the award, casual employees are not entitled to the casual loading where overtime rates, shiftwork penalties, weekend penalties or public holiday penalties are payable. We understand that this matter has been referred to the Full Bench dealing with AM2017/51 Overtime for Casuals (although we note that the issues we have raised are not confined to overtime work).

In our submission, the award should not be varied to include B.3 until the above matters are resolved.”¹³

34. The AMWU does not agree with the AiG construction of the award (above) and to that end agrees that there is a dispute between the parties as to the proper construction of the award. The AMWU further agrees that the matter is being dealt with as part of the AM2017/51 Overtime for Casuals proceedings. The AMWU is not opposed to the table of rates being inserted once that matter is finalised as identified at [9]-[11] of this submission.

35. However, the AMWU also notes, that as identified at [10] of this submission, the reverse is also true; that is there are no casual overtime rates in B.3. Depending on the outcome of the proceedings in AM2017/51 parties should be entitled to request that such rates be included in the tables in B.3.

36. In relation to clause C.2.1 the AiG also submit:

“Consistent with clause 19.3(a), the reference to “per meal” should be replaced with “per occasion”. The allowance is not payable for every meal consumed by an employee. It is payable on each occasion that the employee is entitled to a rest break during overtime work.”¹⁴

37. The AMWU agrees with this submission, and notes that it identified the same issue in [9]-[12]

¹³ Ibid [74]-[76].

¹⁴ Ibid [77].

of its submission. The AMWU had suggested the table be amended to provide “per rest break” rather than “per occasion” but considers that “per occasion” has the same effect.

AM2014/289 Water Industry Award

38. In relation to clause 4.5, AiG Submit:

“Clause 4.5 of the exposure draft should be amended by deleting the number “4.2” in the second line. This appears to be a typographical error.”¹⁵

39. The AMWU agrees with this submission and notes that it raised the same matter in [21]-[24] of its submission.

40. AiG submit in relation to the annualised salaries clause at 17.4:

“The reference to “clause 17.4” should be to “clause 17”.¹⁶

41. The AMWU agrees with this submission.

42. In relation to clause 21.5 AiG submits:

“The reference to “clause 18.5” should be replaced with “clause 21.5”¹⁷

43. The AMWU agrees with this submission.

44. In relation to clause C.1.1, AiG submit:

“The reference to clause 18.3(c)(iv) should be replaced with 18.3(c)(v).”¹⁸

45. The AMWU agrees with this submission.

End

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¹⁵ Ibid [102].

¹⁶ Ibid [105].

¹⁷ Ibid [107].

¹⁸ Ibid [109].