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20 January 2017

Award Modernisation Team
Fair Work Commission
Level 10, Terrace Tower, 80 William Street
EAST SYDNEY NSW 2011
By email: *amod@fwc.gov.au*

Re: AM2014/271 – AWU submissions on the Exposure Draft for the *Hair and Beauty Industry Award 2010*

Background

1. These submissions of the Australian Workers' Union (AWU) are made pursuant to the Amended Directions of Justice Ross, President of the Fair Work Commission, issued on 21 December 2016 in AM2014/250 and others.

2. Parties are directed to file submissions on drafting and technical issues in the exposure drafts for Group 4D, 4E and 4F awards by 18 January 2017. The submissions that follow refer to the exposure draft for the *Hair and Beauty Industry Award* ('the Exposure Draft') as published on 3 November 2016.

Technical and drafting issues

3. **Clause 2 – definition of hair and beauty industry:** On a general level, it would be simpler to only include this definition in the coverage clause (clause 4) as per the approach in many other awards.

4. The use of punctuation in paragraph (a) and (b) should be reviewed because semi colons have been used in many instances whereby a comma appears more appropriate. For example, in paragraph (a), the punctuation commencing in the fourth line from the bottom should be amended to read: "or any process or treatment of the hair, head, or face carried on, using, or engaged in a hairdressing salon and includes the sharpening or setting of razors in a hairdressing salon".

5. In paragraph (b), the following words appear in brackets in clause 3 of the *Hair and Beauty Industry Award 2010* (the Award): "(but not limited to)", between "including" and "waxing chemical products". These words have a practical effect in expanding the scope of the coverage provision and should not be deleted.

6. **Clause 4.3 and 4.4:** The references to clause 4.1 should also refer to clause 4.2 given clause 4.2 also sets out the coverage of the award. This would be consistent with the current approach in the Award.

7. **Clause 7.2:** The reference to clause 13.2 should be amended to clause 13.2(b)(ii) because not all of clause 13.2 can be described as a facilitative provision.

8. **Clause 9:** This should read: "A full-time employee is engaged to work an average of 38 ordinary hours per week". Otherwise overtime hours could arguably be included in the 38 weekly hours.

9. **Clause 10.1(a):** For the same reasons as outlined for clause 9, this should be amended to read: "works less than 38 ordinary hours per week".

10. **Clause 10.2(e):** This should be amended to read: "that the minimum daily engagement is three consecutive hours" to ensure it doesn't undermine the condition in clause 10.5.

11. **Clause 10.10:** The current wording misleadingly indicates a part-time employee may not be entitled to payments for other NES conditions like notice of termination, redundancy pay, long service leave and community service leave. The clause should be amended to read:

    A part-time employee will be entitled to payments and benefits arising under the NES or this award on a proportionate basis.

Casual Employees

12. The current conditions for casual employees in the Award and the Exposure Draft are not consistent with the *Fair Work Act 2009* (FW Act). Section 147 of the FW Act states a modern award must include terms which provide for, or allow the determination of, the ordinary hours of work for each classification and each type of employment.

13. It does not currently appear possible to determine the ordinary hours of work for a casual employee. This problem arises because there are no ordinary hours specified in clause 11 of the Exposure Draft and clause 11.5(a) of the Exposure Draft excludes the operation of clause 13 for casual employees. This creates a situation whereby there does not appear to be any maximum weekly or daily ordinary hours for a casual employee and it is unclear whether hours worked outside of the span in clause 13.1(a) of the Exposure Draft are ordinary or overtime hours for a casual employee.

14. Clause 22.1(a) of the Exposure Draft may constitute an attempt to preclude the working of overtime by a casual employee. However, if the ordinary hours cannot be determined, neither can the overtime hours, and hence the exclusion serves no practical purpose.
15. The current problem is highlighted by the oxymoron in Schedule A.2.1 of the Exposure Draft which has a rates table that refers to casual employees receiving a rate of 150% for ordinary hours which are worked "Monday to Saturday outside ordinary hours".

16. Upon review of the range of provisions relating to casual employees in the Exposure Draft, it appears likely the intent is:

    - Clause 13 is intended to regulate the ordinary hours of work for a casual employee;

- A casual employee's overtime rate is 150% except on Sundays when the rate is 200%. This intent is relatively clearly conveyed in clause 13.3 of the Award but the Exposure Draft has erroneously translated these provisions by confining the 150% rate to Saturdays in clause 23.1(b).

  It is also unclear why clause 13.4 of the Award currently purports to exclude the operation of clause 28 when clause 28.2 specifically has work to do for casual employees under clause 13.3; and

- Casual employees receive a penalty rate of 133% for work performed between 7am and 6pm on Saturday and a penalty rate of 200% for work performed between 10am and 5pm on Sunday. Work outside of these hours attracts the overtime rate of 150% or 200% on a Sunday.

17. If the Commission accepts the above reflects the intent of the Award/Exposure Draft, the following variations to the Exposure Draft would be required:

    - Clause 11.2: Amend to read: "For all ordinary hours worked between 7:00am and 9:00pm Monday to Friday, a casual employee will be paid…";

    - Delete clause 11.5(a) and 11.5(g);

    - Confine clause 22.2 to full-time and part-time employees;

    - Insert a new clause "22.3 Overtime rates - casual employees" which states: "For a casual employee, overtime hours worked in excess of the ordinary number of hours of work prescribed in clause 13.1 are to be paid at 150% of the minimum hourly rate or 200% of the minimum hourly rate on Sundays; and

    - Delete clause 23.1(b).

18. **Clause 11.5(b):** The reference should be confined to clause 14.1 because casual employees are not excluded from the rostering principles which appear in clause 30 of the Award.

Further technical and drafting issues

19. **Clause 13.1(a):** This clause should be amended to read: "Ordinary hours must not exceed an average of 38 per week over a 4 week roster period and may be worked within…" This would be consistent with the roster period in clause 14.2(a). The Award/Exposure Draft is currently deficient in terms of not clearly specifying an averaging period for ordinary hours. An averaging calculation cannot be undertaken if the relevant period is not identified. If this amendment is not made, it does not appear that section 147 of the FW Act would be satisfied.

20. **Clause 15.3(a):** This should read: "… must receive one rest break of 10 minutes ~~rest break~~ during the period of work".

21. **Clause 15.4:** This clause lacks the common award provision to the effect that an employee will not lose pay for ordinary hours falling within the 12 hour break.

22. **Clause 18.4(a):** Given this clause only applies to first-year apprentices, it appears reference is only needed to 80% of the Level 3 rate because the first year rate in clause 18.1, 18.2 or 18.3 is below 80%.

23. **Clause 20.3(a):** The current wording is confusing. The following would be clearer:

> *An employee required to work more than one hour of overtime after the employee's ordinary time of ending work without being given 24 hours' notice of the overtime will be either provided with a meal or paid a meal allowance of $17.85.*

24. **Clause 22.2:** In response to the question posed in the Exposure Draft, the answer is yes – all time worked outside the ordinary hours in clause 13.1 is necessarily overtime.

25. **Clause 22.4:** The Exposure Draft has not been updated to reflect the new TOIL term inserted on 14 December 2016.

26. **Clause 23.1:** In response to the question posed in the Exposure Draft, full-time and part-time employees receive the overtime rates in clause 22.2 when they work outside the Saturday ordinary hours.

27. **Clause 27.3(a):** This should read: "on the day elected by the employee".

28. **Clause 27.4:** The correct rate to be cited is 250% not 200%: clause 35.3 of the Award.

29. **Clause 35:** In addition to referencing clause 33, this clause should also reference the redundancy entitlements in clause 34 and clause 36.

30. **Schedule A:** The references to "other than shiftworkers" do not appear relevant for this Exposure Draft given there are no separate shift work rates.

31. **Schedule A:** A table with casual overtime rates should be inserted.

The Australian Workers' Union
20 January 2017