

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

Finalisation of Exposure Drafts  
- Tranche 2  
(AM2019/17)

**28 February 2020**

**Ai**  
GROUP

## 4 YEARLY REVIEW OF MODERN AWARDS TRANCHE 2 EXPOSURE DRAFTS

### 1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in response to paragraph [94] of the decision of the Fair Work Commission (**Commission**) dated 14 February 2020<sup>1</sup> (**February Decision**) and the determinations issued by the Commission on the same date in relation to the following ‘Tranche 2’ awards.
  - (a) *Asphalt Industry Award* (**Asphalt Award**);
  - (b) *Commercial Sales Award*;
  - (c) *Concrete Products Award*; and
  - (d) *Vehicle Manufacturing, Repair, Services and Retail Award* (**Vehicle Award**).

---

<sup>1</sup> 4 yearly review of modern awards [2020] FWCFB 690.

## **2. ASPHALT AWARD**

### **Clause 11.4(i): Casual loading**

2. The amendment identified at paragraph [33] of the February Decision to clause 11.4(a)(i) has not properly been made. The words “in clause 15” should be deleted. Clause 15 does not prescribe the ordinary hourly rate.

## **3. COMMERCIAL SALES AWARD**

### **Clause A.3.2: Summary of hourly rates – junior employees**

3. The amendment identified at footnote at 23 of the February Decision has not been made to the heading of A.3.2.

## **4. CONCRETE PRODUCTS AWARD**

### **Clause 4.4: Coverage**

4. The amendment identified at footnote 24 of the February Decision has not been made; that is, the reference to clause 4.1 has not been replaced with a reference to clause 4.2.
5. Ai Group does not consider that this issue necessarily requires rectification. The reference to clause 4.1 does not alter the meaning of the provision.

## **5. VEHICLE AWARD**

6. The submissions that follow relate to the Determination issued in respect of the Vehicles Award.

### **Clause 26 - Breaks**

7. Ai Group seeks to here raise a substantive problem with the wording of the Draft Determination that has only recently come to our attention. We acknowledge that we are identifying the matter late in this process but contend that it should be appropriately dealt with now, given the significance of the issue.
8. It appears that the combined effect of certain drafting changes implemented through the exposure draft is to render it arguable that the application of various obligations now contained in clause 26 of the Vehicles Award 2020 (which deals with various matters related to meal breaks and breaks between shifts) have been extended so as to now apply in the context of 'console operators' and fuel retailing establishments in a manner that appears to be unintended by both the parties and Commission. If such an interpretation was accepted it would constitute a problematic substantive change to employer obligations.
9. In short, this outcome appears to be a product of the following variations:
  - The restructuring of clauses 26.1 – 26.8 of the Vehicle Award as clause 26.1(a)-(f) and clause 26.2(a)-(b) in the Vehicles Award 2020;
  - The relocation of clause 28.6 – Rest Period before Commencing Work of the Vehicle Award (to which an appropriate exclusion for fuel retailing establishments applies) to clause 26.4 of the Vehicles Award 2020 which contains no exclusion for fuel retailing establishments;
  - The removal of the exemption for 'console operators' from the application of clause 26.

10. Ai Group is concerned that the above variations may have cause the following problems:

- Application of clause 26.2 – Working during or without a meal break to console operators;
- Application of clause 26.4 – Minimum breaks between shifts to casual employees and persons employed as driveway attendants, roadhouse attendants and console operators working in fuel retailing establishments; and
- Application of clauses 26.1, 26.2 and 26.4 to console operators whose hours are organised by an employer under clause 27.1(a)(ii).

11. Our reasoning in relation to this issue is set out below.

12. Clause 26.1 of the Vehicle Award includes an exemption for console operators from the provisions of clause 26 which includes:

- Prescribed duration of meal breaks (clause 26.2)
- Penalties applicable when an employee works through a meal break (cl 26.3)
- Provision for 6 hours without a meal break by agreement (clause 26.4)
- Separate provisions where an employee works through a meal break for the purpose of making good breakdowns of plant or to perform routine maintenance of plant (clause 26.5)
- Provision for the time of a meal break to be changed (clause 26.6)
- Provision for a morning and afternoon tea break (clause 26.7)

13. 'Special Provisions' affording separate entitlements to driveway attendants, console operators and roadhouse attendants relating to 'meal breaks' are included in clause 43.1 of the Vehicle Award which provides:

**43.1 Hours of work**

- (a) For a person employed on a weekly, part-time or casual basis to principally perform duties of a driveway attendant, console operator or a roadhouse attendant as defined, the ordinary hours prescribed by clause 37.2 will be worked at the option of the employer in either of the following ways:
- (i) continuously, on a daily basis except for meal and morning or afternoon tea breaks at the discretion of the employer; or
  - (ii) continuously, on a daily basis, with 20 minutes during such hours each day or shift for crib, whilst maintaining customer service. The 20 minute crib break will be counted as time worked.
- (b) A driveway attendant or console operator who is working alone is entitled to close and secure the work site so as to attend the toilet.
- (c) Provided that in the case of a person employed on a part-time or casual basis principally to perform the duties of a driveway attendant, console operator or a roadhouse attendant clauses (a)(i) and 0 will not apply unless the time worked on any day has exceeded five hours.
14. The first exposure draft released for the Vehicles Award on 15 October 2014 altered the structure of the award in a number of ways including:
- Clauses 26.1-26.8 were partially reworded and renumbered as 11.1(a)-(e) and 11.2(a)-(c) [since renumbered in the most recent exposure draft as clauses 26.1 and 26.2 respectively].
  - The content of clause 28.6 – Rest breaks before commencing work was included in clause 11.4 under the title 'Minimum breaks between shifts' [since renumbered in the most recent exposure draft as clause 26.4). An exclusion currently applies to the application of clause 28 to console operators.
15. A subsequent variation introduced in the 27 June 2018 exposure draft removed the express exclusion from the application of the general breaks provision to console operators altogether.

16. Ai Group expresses concern that an inadvertent impact of these changes may leave open the following problematic interpretations:
- Clauses 26.2 and 26.4 of the Vehicles Award apply to console operators once the new Award is operational.
  - Clauses 26.1, 26.2 and 26.4 of the Vehicles Award will apply to console operators even when an employer chooses to organise their hours pursuant to clause 27.1(a)(ii)
17. Ai Group considers that such interpretations would not be consistent with either the intent of the Commission in applying structural changes to the Award in the first exposure draft released in October 2014 or the intent of the parties in subsequently seeking the removal of the exclusion applicable to console operators in the general breaks provision in the Vehicles Award.
18. On 25 May 2014, the Shop, Distributive and Allied Employees Association (**SDA**) filed submissions with the Commission proposing a variation to the abovementioned ‘Special Provisions’ applicable to console operators which would apply further restrictions on the discretion afforded to employers in relation to meal breaks.<sup>2</sup> The draft provided by the SDA sought to vary proposed clause 37.1 of the 2 April 2015 Exposure Draft (equivalent to clause 27.1 of the Vehicles Award 2020) by applying the parameters governing meal breaks in proposed clause 11.1 of the 2 April 2015 exposure draft (equivalent of clause 26.1 of the Vehicles Award 2020). Clause 11.1 did not provide for the application of penalty rates where an employee works through a meal break or for minimum breaks between shifts.
19. The issue which the SDA was seeking to address in proposing the alternative clause was to avoid an employer retaining excessive discretion as to whether to allow a meal break to employees covered by the ‘Special Provisions’ at all or in not providing a meal break of an appropriate duration. The concerns of the SDA were restricted to console operators whose hours were organised pursuant to

---

<sup>2</sup> AM2014/93, [Submission](#), Shop, Distributive and Allied Employees’ Association, (25 March 2015), [5].

clause 37.1(a)(i) rather than clause 37.1(a)(ii) [clauses 27.1(a)(i) and 27.1(a)(ii) in the Vehicles Award 2020 respectively]. Such is apparent from the following exchange which took place in a hearing held to deal with substantive issues relating to the Vehicles Award on 10 August 2015 (emphasis added):<sup>3</sup>

MS BURNLEY ... Now turning to variation 8 which the SDA filed a supplementary submission on 25 March, which we have had discussions with the employers and came up with a proposal that was agreed with certain organisations, which turns to clause 37.1 in the exposure draft, and this provision relates to how service station employees take their breaks. Currently the provision has the words there is two methods of how breaks are taken by service station employees, which is that they're either taken with meal and morning or afternoon tea breaks, or they are taken as a crib break of 20 minutes per day, so there's two ways in the service station area that rest breaks are provided to employees.

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: **So whereas the first option though that says at the discretion of the employer, does that mean the employer has a discretion as to whether the breaks are taken at all or not?**

MS BURNLEY: **That is our concern, your Honour, with why there's a double discretion, because the option in our proposal that we've done is that the option is said in the opening paragraph of (a) that the employer chooses which option that the employees are using, which is either meal and rest breaks, or crib breaks. That's a given that the employer sets that option.**

However, then there's another discretion, which is inadvertently we say was placed in there, which said that at the discretion of the employer - which then led us to the conclusion now - well the employer could then have the discretion not to provide a meal and rest break, because that's how the clause is worded - so in discussion with the employers what we came up with was some proposed wording - because the other problem with how the current clause is is that the rest of the meal breaks covering the RS and R employees is dealt with in clause 11, which specifically excludes roadhouse, driveway and console operators in the operation of that clause - so in doing that, clause 37.1 does not define the lengths of meal breaks, or what the length of a morning or afternoon tea break is, so there is no parameters around those provisions currently in the modern award, so you could have a 5 minute meal break and a 10 minute afternoon tea break, or you could have a 3 hour meal break, or a 6 hour paid rest break afternoon break if, you know, some people took either extreme positions.

**So what we've worked through is that, with regard to (i), you take out the discretion of the employer, so that means that if the employer opts for the option of the meal and the rest break provisions they have to do that in accordance with clause 11.1 meal and rest break, which then defines the parameters that it's a 15 minute morning or afternoon break, and a meal break which is between 30 and 60 minutes, which is all at the option of the employer to work out how that is rostered for the employee, or they do it as in (ii), which is that it is a crib break and which then, just to be extra clear, there is no application of clause 11.1 because crib breaks aren't dealt with in that provision for other RS and R employees.**

---

<sup>3</sup> AM2014/93, [Transcript](#), Hearing (10 August 2015), PN544 – PN549.

So that is the proposal that we have worked through to overcome issues which are in the current provision, which is the double discretion that the employer could have, or might have, and the second fact - well two more facts - that there is no guidance as to the length of the meal break or the rest breaks, so we think that's a deficiency in the modern award which needs to be overcome, **so it doesn't mean that it's open slather for the employees to elect what they're doing or how they're doing it or why they're doing it; it is just making sure that employees will be entitled to an appropriate meal and rest break if that is the option that they're given by their employer - which is set by their employer, or they continue to take the 20 minute crib break, which is the majority of the industry works on crib breaks in this industry.**

20. There is no indication in the above transcript that the intent of the SDA's variation was to:
- Apply the provision governing minimum breaks between shifts to console operators;
  - To expose employers of console operators to penalties where an employer requests an employee to work through a meal break
  - To apply the general provision regarding 'breaks' to console operators whose hours are worked continuously, on a daily basis, with 20 minutes during such hours each day or shift for crib, whilst maintaining customer service.
21. It is clear from the above extract that the intent of the SDA in seeking a variation to the provisions governing meal breaks for console operators was to ensure that parameters would apply restricting an employer's otherwise wide discretion to determine if a meal break was to be given at all and to ensure that breaks of appropriate duration were provided. It is also apparent from the above exchange that the SDA's concerns only applied with respect to the broad discretion applicable under clause 37.1(a)(1) of the 2 April 2015 exposure draft [43.1(a) of the Vehicle Award and clause 27.1(a)(i) of the Vehicles Award 2020].

22. As the SDA's proposed clause referred back to the more prescriptive provisions in clause 11.1 of the 2 April 2015 exposure draft, in the course of the 10 August 2015 Hearing, Senior Deputy President O'Callaghan raised the potential inconsistency that would be brought about due to the exclusion of console operators from this clause:<sup>4</sup>

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Ms Burnley, can I just raise another basic question? The proposal that you've got here says at 37.1(a)(i) that one of the options is to work in accordance with 11.1 of the award. Now, 11.1 of the award says right at the outset that it doesn't apply to persons engaged as console operators. So how does the everyday person in the street ever hope to read a provision that refers it to another provision that says it doesn't apply to it?

MS BURNLEY: Yes, it's the complication of this award of having too many sections within the one award.

SENIOR DEPUTY PRESIDENT O'CALLAGHAN: Yes.

MS BURNLEY: I would suggest, just on my feet, your Honour, that maybe that that exclusion at clause 11 would have to say where the exclusion to exclude driveway, roadhouse and console operators, we will have to put an exception, "except as provided in 37.1(a)(i)."

I don't see there's any other way - the only other way would be to actually just replicate the meal and rest break provision into clause 37.1(a) and include the proper meal and rest break provisions in there as well as in the other section, but in award modernisation it was deemed to only have it all in one section and not repeated throughout the various sections.

So there's two ways; one is to put an alert to the exception that there is an exception to the exception or to repeat the stuff in section 37.1(a), which does make the award again longer. There's two ways around that issues.

23. A joint report filed subsequently to this hearing on behalf of the AMWU, AWU, SDA, Ai Group, ABI, AFEI, MTA (NSW), MTA(SA) and the VACC on 29 September 2015 stated that it was 'always intended that the exclusion in clause 11.1(a) of the 2 April 2015 Exposure Draft would be removed in respect of console operators so as to give effect to the proposed variation.'<sup>5</sup>
24. The deletion of 'console operators' from the exclusion to the general 'breaks' clause was made in the 27 June 2018 iteration of the exposure draft.

---

<sup>4</sup> AM2014/93, [Transcript](#), Hearing (10 August 2015), PN582 – PN587.

<sup>5</sup> AM2014/93, [Joint Report](#), (29 September 2015), [41].

25. Ai Group considers it arguable that the 'Special Provisions' governing meal breaks applicable to driveway attendants, console operators and roadhouse attendants would preclude the application of clauses 26.2 and 26.4 of the Vehicles Award to such employees. Ai Group also considers that clause 26 of the Vehicles Award 2020 is not applicable to employees whose hours are organised pursuant to clause 27.1(a)(ii). However, in order to put the matter beyond doubt and in the interests of clarity, Ai Group considers the following variation to be appropriate:
26. Breaks
- 26.1 Meal and rest breaks
- (a) Except where otherwise provided in this Award, clause 26 ~~Clause 26.4~~ will not apply to a person principally employed to perform vehicle sales related duties, console operators or to employees on continuous shiftwork.
26. Further, to avoid the inadvertent application of clause 26.4 – Minimum breaks between shifts to casual employees and to persons employed as driveway attendants, roadhouse attendants and console operators working in fuel retailing establishments, Ai Group proposes that this provision be relocated to clause 24.12 – Overtime so that the relevant exclusions contained in clause 24.1 will apply.