

**Australian Industry Group Submission to the  
Fair Work Commission**

**3 February 2014**

**4 Yearly Review of Modern Awards (AM2014/1)**



## **4 YEARLY REVIEW OF MODERN AWARDS (AM2014/1)**

### **1. Introduction**

1.1 The Australian Industry Group (Ai Group) makes this submission in response to the Statement ([2013] FWC 10195) issued by Justice Ross, the President of the Fair Work Commission (FWC), on 24 December 2013 and the associated Issues Paper issued by the FWC on 24 January 2014.

### **2. Draft Propositions**

***Proposition 1: That the 4 Yearly Review is broader in scope than the Transitional Review of modern awards completed in 2013***

2.1 Ai Group agrees with the above proposition, as identified in paragraph [8] of the Issues Paper.

2.2 However, we submit that the FWC should set a program for the filing of initial submissions and reply submissions on the scope of the 4 Yearly Review and other preliminary jurisdictional issues. This should be followed by a short (say, one day) hearing.

***Proposition 2: That the modern awards objective in section 134 of the Fair Work Act is relevant to the 4 Yearly Review***

2.3 Ai Group agrees with the above proposition.

2.4 However, we submit that the inclusion of paragraph (1)(da) in the modern awards objective has no practical relevance, given that it simply reflects the approach which the FWC and its predecessors have always taken to the issues identified in the paragraph. That is:

- Awards commonly include penalty rates for working overtime, shiftwork, weekend work, etc;
- Where appropriate, awards include annualised salary provisions to provide flexibility with regard to the payment of remuneration;

- Where appropriate, awards do not include specific penalty rates given the nature of the work or occupations covered by the awards but rather provide alternative remuneration structures, e.g. the *Professional Employees Award 2010*;
- Awards contain a flexibility term which enables penalty rates to be the subject of an Individual Flexibility Arrangement (IFA), subject to the employee being Better Off Overall.

***Proposition 3: That the provisions of Division 3 of Part 2-3 of the Fair Work Act are relevant to the 4 Yearly Review and any variation to a modern award arising from the Review must comply with this Division***

2.5 Ai Group agrees with the above proposition, as identified in paragraph [14] of the Issues Paper.

***Proposition 4: That the provisions of Division 5 (Exercising Modern Award Powers Outside the 4 Yearly Reviews and Annual Wage Reviews) of the Fair Work Act are not relevant to the 4 Yearly Review***

2.6 Ai Group agrees that the above provisions are not directly relevant. However, similar to the Modern Awards Review 2012, the FWC would have the option to use its powers to vary awards under Division 5 to address any relevant issues which are identified during the 4 Yearly Review. This issue is dealt with in the context of the Modern Awards Review 2012 at paragraph [41] of the Tribunal's decision on the *Preliminary Issue* ([2012] FWAFB 5600):

*“[41] In the event that the Review of a modern award identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in the award, and there is some doubt as to whether the matter falls within the scope of subitem 6(2)(b), then the Tribunal may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties should be provided with an opportunity to comment on any such proposed variation.”*

### 3. Initial stage and identification of common claims

3.1 Ai Group supports the approach of parties identifying claims they wish to pursue which affect multiple or all awards ahead of the Conference on 5 February.

3.2 The common claims that Ai Group intends to pursue are listed below.

#### **Ai Group's List of Common Claims**

##### 1. **Annual leave:**

- a. Award provisions which enable an employee and an employer to agree upon annual leave flexibility, including:
  - i. Cashing out of annual leave as provided for in section 93 of the *Fair Work Act*;
  - ii. Purchased leave (e.g. twice the leave for half the pay);
  - iii. The granting of annual leave in advance.
- b. Provisions which enable employers to deal with excessive leave accruals. (Some modern awards do not contain these provisions).
- c. Close down provisions. (Some modern awards do not contain these provisions).

2. **Model flexibility clause:** Amendments to the model flexibility clause to increase flexibility for employers and employees.

3. **Part-time employment:** Inclusion of sufficiently flexible part-time provisions in all modern awards. (Currently some awards do not contain part-time provisions. Some other awards contain provisions which are unduly inflexible).

4. **Transitional provisions:** Removal of the transitional provisions in modern awards after the relevant sunset date has been reached, e.g. transitional provisions dealing with wages, more generous redundancy provisions, accident pay and district allowances.
  5. **Substitution of public holidays by agreement between the employer and the employee:** (Some modern awards do not contain these provisions).
  6. **Time off in lieu of overtime and make up time:** Some modern awards do not contain these provisions).
- 3.3 The above list does not include various issues identified by Ai Group which relate to a single modern award or a few modern awards. Ai Group envisages that parties would be required to identify award-specific claims at the start of the relevant Award Stage.

#### **4. Award groupings**

- 4.1 Ai Group has not identified any difficulties with the proposed grouping of modern awards, as set out in Attachment A of the Issues Paper.



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