

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Plain Language Re-Drafting –
Clerks – Private Sector Award 2010
(AM2016/15)

20 September 2019

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GROUP

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AM2016/15 PLAIN LANGUAGE RE-DRAFTING
– CLERKS – PRIVATE SECTOR AWARD 2010

1. The Fair Work Commission (**Commission**) issued a statement (**Statement**) on 30 August 2019 concerning clauses 23 and 31 (Rest periods after working overtime) in the plain language exposure draft (**PLED**) of the *Clerks – Private Sector Award 2010* (**Clerks Award**) and correspondence received by the Commission from Mr Peter Farrell of Haelius Limited pertaining to these clauses. The Australian Industry Group (**Ai Group**) files this submission in response.
2. Mr Farrell has raised what is described as an ‘unintended consequence’ arising in the PLED concerning rest periods after overtime for shiftworkers.
3. Clause 27.3 of the Clerks Award is in the following terms:

27.3 Rest period after overtime

- (a) When overtime work is necessary it must wherever reasonably practicable, be so arranged that employees have at least 10 consecutive hours off duty between the work of successive days.
- (b) An employee (other than a casual employee) who works so much overtime between the termination of the employee’s ordinary work on one day and the commencement of the employee’s ordinary work on the next day that the employee has not had at least 10 consecutive hours off duty between those times must, subject to this clause, be released after completion of such overtime until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
- (c) If on the instructions of the employer such an employee resumes or continues work without having had such 10 consecutive hours off duty the employee must be paid at double the ordinary time rate of pay until the employee is released from duty for such period and the employee is then entitled to be absent until the employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.
- (d) Overtime worked in the circumstances specified in clause 27.4 must not be regarded as overtime for the purpose of this clause.
- (e) The provisions of this clause apply in the case of shiftworkers as if eight hours were substituted for 10 hours when overtime is worked:

- (i) for the purposes of changing shift rosters;
 - (ii) where a shiftworker does not report for duty and a day worker or a shiftworker is required to replace such shiftworker; or
 - (iii) where a shift is worked by arrangement between the employees themselves.
 - (f) When an employee has not substituted nor banked the rostered day off and therefore works overtime on the rostered day off, the rate of pay must be calculated in accordance with the provisions of clause 27.1.
4. The PLED of the Clerks Award clarifies the separate entitlements currently afforded to shiftworkers and day workers under the award by dealing with rest periods after working overtime for these categories of employees separately in clauses 31 and 23 respectively. The approach ensures that the instrument is simpler and easier to understand by grouping the conditions provided to shiftworkers separately in Part 6 of the PLED.
 5. Clause 31 of the PLED requires that, wherever reasonably practicable, employees must have at least eight hours off duty between hours worked on successive days by employees working shifts. This clause is only applicable where the circumstances outlined in the clause 31.2(a) – (c) are present. These are equivalent to those described at clause 27.3(e)(i) – (iii) of the Clerks Award.
 6. Clause 23 of the PLED, which provides an entitlement to 10 consecutive hours off duty between hours worked on successive days for day workers, does not apply to shiftworkers, as clarified by clause 23.1.
 7. Mr Farrell submits that the PLED has substantively altered the entitlement to hours off duty for employees performing shifts as currently contained in the Clerks Award. This assertion appears to be grounded on the basis that clause 27.3(e) constitutes an exception to a broader entitlement to 10 consecutive hours off duty that would otherwise apply to employees performing shifts as well as day workers.
 8. Ai Group disputes this assertion as it is clear that the current wording of the award only grants an entitlement to 10 consecutive hours off duty between hours worked on successive days to day workers. Shiftworkers are only entitled to a

break between work performed on successive days by virtue of clause 27.3(e) in the circumstances described in clause 27.3(e)(i) – (iii).

9. That the conditions contained in clause 27 (and therefore, clause 27.3) do not generally apply to shiftworkers is clear from the title of the clause: “Overtime rates and penalties (other than shiftworkers)”.

10. That the provisions of clause 27 were not intended generally to apply to shiftworkers is also made clear by the inclusion of express provisions where this is not the case. For example, clause 28.5 which separately provides overtime for shiftworkers states:

Clause 27.5—Time off instead of payment for overtime and clause 27.6—Make-up time, apply to shiftworkers as well as day workers.

11. If the conditions contained in clause 27, including 27.3, were to generally apply to shiftworkers, these words would be unnecessary and would have no work to do.

12. In our view:

- The PLED clarifies the separate entitlements afforded to day workers and shiftworkers in respect of rest periods after overtime already allowed for in the current Clerks Award. It does not change the legal effect of the award.
- A change to address the Mr. Farrell’s concerns would result in a substantive change to the legal effect of the Clerks Award.

13. It is to be noted that shiftworkers engaged under the Clerks Award, are protected from requests to more than 10 ordinary hours per day.¹ A further restriction on ordinary hours is imposed in the form of ordinary hours being composed of 6 shifts per week.² The *Fair Work Act 2009* (Cth) ensures that employees retain a right to refuse to work unreasonable ‘additional hours’, as defined in ss.62(1) and (2).

¹ *Clerks (Private Sector) Award 2010* cl. 28.3.

² *Clerks (Private Sector) Award 2010*, cl. 28.4(a).

14. Ai Group submits that the Commission should not amend the PLED in response to the issues described in Mr. Farrell's correspondence.