

FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

(AM2014/212)

Road Transport and Distribution Award 2010

Submission of the Transport Workers' Union of Australia

Introduction

1. These submissions are prepared by the Transport Workers' Union of Australia (**TWU**) in accordance with the Directions issued by President Ross dated 24 October 2019.
2. The TWU makes the following submissions having regard to the Exposure Draft of the Road Transport and Distribution Award 2010 (**the Award**) published by the Fair Work Commission on its website on 14 October 2019.

Clause 11.6 – Conversion of casual employment

3. The TWU refers to the Decision of the Plain Language Full Bench [2018] FWCFB 5602 and to the Decision of the Full Bench [2019] FWCFB 6894.
4. The TWU refers to the provisional view of the Full Bench expressed at [2019] FWCFB 6894 at paragraph [81] in respect of the drafting of the term and supports the inclusion that a further casual conversion clause be included in the Exposure Draft pending the resolution of issues associated with the drafting of the term.

Clause 14.4 – Ordinary hours of work – oil distribution employees

5. We refer to the amendment made to clause 14.4 that prescribes that the ordinary hours of work for oil distribution workers must not exceed 8 hours per day.
6. We also refer to those provisions at clause 14.6(a)(ii) which prescribe that the ordinary hours of work for those workers on public holidays is 7 hours per day.
7. We further refer to the provisions in 14.6(b) which also prescribe that the ordinary hours of work over 5 days each is 7 hours per day.
8. The TWU submits that the ordinary hours of work for oil distribution workers is 35 hours per week or 70 hours per fortnight (consistent with the provisions in clause 14.2). When divided by 5, this is the equivalent of 7 hours per day for an oil distribution worker engaged on a full-time basis.

9. The anomaly between the prescribed 8 hours per day and 7 hours per day between clauses 14.4, 14.6(a)(ii) and 14.6(b) of the RTD Award is likely to cause confusion in respect of the appropriate daily ordinary hours of work in the oil distribution sector.
10. Accordingly, we submit that clause 14.4 should be amended to reflect 7 hours per day consistent with those other relevant terms relating to those workers.

Clause 17.2 – Minimum wage rates – oil distribution workers

11. We refer to the clause and the note in respect of Schedule C set out below the table.
12. Upon review of the table in Schedule C, we note that the tables C.4.3 and C.4.4 in relation to casual oil distribution employees do not include overtime provisions for those casual oil distribution employees.
13. The TWU submits that the tables for casual oil distribution employees at C.4.3 and C.4.4 be amended to include overtime provisions for those workers as prescribed in clause 11.5 of the Exposure Draft.

Clause 23.1(d) – Work on a Sunday - casuals

14. We refer to clause 23.1(d) of the Exposure draft which prescribes that all work performed on a Sunday will stand alone.
15. We also refer to those tables found at C.4.1, C.4.2, C.4.3 and C.4.4 of the Exposure Draft.
16. The TWU submits that when the interaction between clause 23.1(d) and the above named tables is considered in conjunction with the provisions of clause 11.5, it becomes unclear if the Sunday rate of 225% of the ordinary rate applies to all hours worked by a casual or if that rate is reduced in circumstances where the casual employee exceeds 7.6 or 7 hours work on a Sunday (having regard to the appropriate table).
17. The TWU submits that the tables referred to in paragraph 14 ought be amended to ensure that it is clear that the rate is not reduced in circumstances where those workers exceed 7.6 or 7 ordinary hours of work because all time worked on a Sunday stands alone in accordance with clause 23.1 of the Exposure Draft.
18. A failure to make it clear that the relevant worker's rate is not reduced by reference to the tables would create an unintended anomaly in that those workers would effectively have their rates reduced from that of 225% of the ordinary hourly rate on a Sunday to 210% for each hour of overtime.

Clauses 24.4 and 24.9 – Annual leave loading

19. The TWU makes no further submission in respect of leave loading and awaits the Decision to be issued in that matter in accordance with the comments of the Full Bench in [2019] FWCFB 5409 at paragraphs [153] and [247].

Schedule C.2 – Full-time and part-time employees – ordinary and penalty rates

20. We refer to the request for comment on the proposal that an adjustment to the percentages in the table is necessary having regard to clause 23.2(a) and further whether a footnote should be inserted in respect for payment of work on a public holiday in accordance with clause 23.2(b).
21. The TWU submits that the percentages in clause 23.2(a) and the footnote should be reflected in tables C.2.1, C.2.3 and C.2.5.
22. The provisions at clause 23.2(a) and(b) when read together clearly state that the employee must be paid a minimum of the additional percentages of the appropriate hourly rate *in addition* to any amount payable in respect of the weekly wage.
23. We have prepared at **Attachment 1** calculations identifying the difference in the manner in which the rates would be reflected in circumstances where the percentages and footnote have been included as well as where they have not. The difference would be a significant reduction in the take home pay of the employee for work on a public holiday where the ambiguity remains.
24. We submit that should the relevant amendments to the percentages and footnote not be made, this would cause a reduction in a full-time employee's wage entitlement where that employee works less than full-time hours on a public holiday because clause 23.2(a) contemplates working less than full-time hours (minimum of 4) on a public holiday.

Schedule C.3 – Full-time and part-time employees – overtime

25. We refer to the request for comment on the proposal that an adjustment to the percentages in the tables C.3.1, C.3.3 and C.3.5 is necessary to accurately reflect the appropriate percentages for work on a public holiday in accordance with clause 23.2(b).
26. The TWU submits that the tables ought be amended to reflect the appropriate penalties applicable for public holiday work in accordance with clause 23.2(a) and that a further footnote ought also be included to reflect the provisions of clause 23.2(b).
27. Consistent with the TWU's submissions in respect of Schedule C2 found at paragraphs 20-24 above, a failure to include the relevant shift percentages and footnote cause a reduction in a full-time employees' wage entitlement where that employee works less than full-time hours on a public holiday because clause 23.2(a) contemplates working less than full-time hours (minimum of 4) on a public holiday consistent with the calculations at attachment 1 to this submission.

Schedule C – Tables C.4.1, C.4.2, C.4.3, C.4.4, C.4.5 and C.4.6

28. The above listed tables do not currently include provisions for the payment of overtime

to casuals on Saturdays and Sundays.

29. The TWU submits that the tables ought be amended to include provisions for the payment of overtime to casuals with the appropriate rates payable to casual workers' when engaged in overtime on a Saturday and/or a Sunday identified.
30. As set out briefly at paragraph 18 of this submission, the current provisions cause workers engaged in overtime on either a Saturday or Sunday to effectively receive less than the ordinary hourly rate for other employees engaged in ordinary hours for the completion of work on a Saturday or a Sunday in accordance with clause 23.1 of the Exposure draft. An example of the monetary difference caused by the different applicable percentages between weekend work and overtime worked on the weekend in the current Exposure Draft is set out at **Attachment 2** to this submission.
31. Should this remain the case, the current terms of the Exposure Draft fail to meet the modern award objectives set out in section 134(1)(da)(i) and (iii) of the *Fair Work Act 2009* (Cth).
32. The TWU submits that the tables should be amended consistent with the calculations set out at **Attachment 3** of this submissions to avoid a circumstance where employees engaged to work overtime are paid less than the minimum prescribed rates for weekend work in the Award.

Clause 12.2 – Minimum wage rates

33. We refer to the email correspondence of NatRoad to the Fair Work Commission (**the Commission**) dated 23 September 2019 and to their 18 November 2019 submissions in respect of the correct weekly divisor for oil distribution workers engaged under the Award.
34. First, we wish to emphasise that in NatRoad's email correspondence to the Commission dated 23 September 2019, it has been suggested that the matter of the appropriate divisor for oil distribution workers under the Award was not properly advanced by the TWU and the TWU has made no submissions on the matter.
35. The TWU agrees that this was not a matter advanced by the Union in its submission dated 25 November 2014 in relation to the Award. The matter was, however, advanced by the Fair Work Ombudsman (**FWO**) in its submission on the Award dated 24 November 2014. The relevant reference can be found at item 22 on page 7 of the FWO's submissions of that date.
36. This was not a matter advanced by the TWU for a range of reasons, the most simple of which being that there is not, in our respectful submission, any anomaly associated with the appropriate divisor for oil distribution workers having regard to both the modern award objectives, the history of industrial conditions for employees engaged in the oil distribution sector of the road transport industry and the plain meaning of the provisions of the Award.

37. We note that clause 14.2 of the Exposure Draft clearly states that the ordinary hours of work for oil distribution workers is either 35 hours per one week period or 70 hours per two week period. We also note that other provisions, including clauses 14.5 and 14.6, refer to oil distribution workers being engaged on the basis of 5 days for 7 hours per day, consistent with the conclusion that the industry has historically operated on the basis that oil distribution workers were engaged for 35 hours per week.
38. In NatRoad's various submissions, most recently that dated 18 November 2019, it has been stated that the appropriate divisor for the calculation of the minimum hourly rates for oil distribution workers is that of 38 as opposed to 35.
39. In the TWU's submission, that proposition is unacceptable for a range of reasons and will create a circumstance where workers engaged in the oil distribution sector are effectively paid less than the minimum weekly wage prescribed for their classification under the Award to complete their 35 hour working week consistent with the provisions of clause 14.2 of the Exposure Draft. To illustrate the effect of this disparity, please see the brief example set out at **Attachment 4** of this submission demonstrating that where a divisor of 38 hours per week is applied, the effect would be that oil distribution workers would be underpaid the minimum appropriate weekly wage under the Award.
40. On any occasion where an oil distribution employee works less than full time hours, for instance when an employee takes paid or unpaid leave, the calculation of entitlements would need to be based on hours worked. If the hourly rate does not reflect the ordinary hours of work, the result will be an underpayment. For example, an employee works four days of 7 hours and has 7 hours of unpaid leave. The calculation of entitlements for that week would be 28 hrs @ the hourly rate. Applying a divisor of 38 hours results in a payment of \$610.96. Applying a divisor of 35 results in a payment of \$663.32.
41. The only mathematical calculation that ensures oil distribution employees are not underpaid is to use the ordinary hours of work as the divisor of the weekly rate to determine the correct hourly rate. This is the only methodology that can be applied to produce a correlation between hours of work and weekly rates of pay.
42. We also submit that the methodology of applying a divisor less than 38 hours is not limited to the operation of oil distribution employees working 35 hours per week or 70 hours per 2 week period under this Award. The common position based on relevant awards is that where the full-time ordinary hours are 38 per week, a divisor of 38 will apply for the purposes of determining the correct hourly rate. However, in examples where the weekly full-time hours are less than 38 per week, the weekly rate is divided by the equivalent full-time number of ordinary hours for the purposes of determining the appropriate hourly rate. Please see **Attachment 5** which provides examples of the appropriate divisor applied to those relevant modern awards having regard to the prescribed number of ordinary full-time hours.
43. We note that in NatRoad's submission it has referred to the Decision of the Full Bench

in [2009] AIRCFB 354. We respectfully also refer to the same Decision with emphasis on the words set out at paragraph 177 in respect of the hours clause for oil distribution workers noting that the pre-reform regime was 35 hours per week or 70 hours per two week period and the decision of the Full Bench as follows:

*“The exposure draft clause reflected the existing regime of hours being 35 per week or 70 per fortnight. We are aware that these hours have operated within these sectors of the transport industry for many decades. We considered whether, in the context of this modern award, the ordinary hours for this sector should be less than those for the remaining sectors....On balance however **we have decided it is appropriate to retain the two minimum ordinary hours clauses.**”* (emphasis added)

44. Also relevant, is the distinction that the appropriate divisor when determining the hourly rate for those pre-reform awards was 1/35 of the minimum weekly rate. These applied in the following industrial instruments:

- a. *Transport Industry — Petroleum &c., Distribution (State) Award* – clause 28; and
- b. *Transport Workers (Oil Distribution) Award 2001* – clause 13.2.2 pertaining to casual employees.

45. The application of an incorrect divisor will impact on all clauses within the Award where hourly rates are referenced. The TWU has reviewed the exposure draft and notes the following clauses may be impacted: 10.5; 10.9; 11.1; 11.3(a)(i) and (ii); 11.5; 13.7(a)(ii); 14.6(a)(ii); 19.2; 20.2; 21.1; 21.4(c)(i); 21.5(b); 22.3; 22.5; 22.10; 23.1; and 23.2.

Transport Workers’ Union of Australia

21 November 2019

Attachment 1

Calculations below are based on a permanent full-time employee working 4 hours on a public holiday using a minimum hourly rate of \$20.

Pursuant to clause 23.2(a): Payment for 4 hours x (\$20 x 1.5) = \$120 plus payment for the day of 7.6 hrs x \$20 = \$152.00. Total payment \$272.00

Pursuant to Tables C.2.1, C.2.3 and C.2.5: Payment for 4 hours x (\$20 x 2.5) = Total payment of \$200

Attachment 2

Calculations are based on a minimum hourly rate of \$20:

Ordinary Hrs	Saturday - ord	Sunday - ord	Saturday O/T (clause 11.5)	Sunday O/T (clause 11.5)
125% = \$25	175% = \$35	225% = \$45	160% = \$32	210% = \$42

Attachment 3

Casual overtime rates

Casual Transport Workers other than shift workers:

Ordinary Hours	Saturday – first 9.6 hours	Saturday – after 9.6 hours	Sunday – all hours
125%	175%	210%	225%

Casual Transport Workers –shift workers:

Ordinary Hours	Saturday – first 9.6 hours	Saturday – after 9.6 hours	Sunday – all hours
125%	175%	210%	225%

Casual Oil Distribution Employees other than shift workers:

Ordinary Hours	Saturday – first 9.0 hours	Saturday – after 9.0 hours	Sunday – all hours
125%	175%	210%	225%

Casual Oil Distribution Employees – shift workers:

Ordinary Hours	Saturday – first 9.0 hours	Saturday – after 9.0 hours	Sunday – all hours
125%	175%	210%	225%

Casual Distribution Facility Employees – other than shift workers:

Ordinary Hours	Saturday – first 9.6 hours	Saturday – after 9.6 hours	Sunday – all hours
125%	175%	210%	225%

Casual Distribution Facility Employees – shift workers:

Ordinary Hours	Saturday – first 9.6 hours	Saturday – after 9.6 hours	Sunday – all hours
125%	175%	210%	225%

Attachment 4

Calculations are based on the current Award rate for a Grade 4 employee:

	Weekly Rate	Hourly Rate	Casual Weekly Rate	Casual Hourly Rate
Transport Worker	\$829.20 (divisor 38)	\$21.82	\$1036.50 (divisor 38)	\$27.28
Oil Distribution Worker	\$829.20 (divisor 35)	\$23.69	\$1036.50 (divisor 35)	\$29.61

Pursuant to clause 11.1 of the Award, a casual employee is paid by the hour. A casual oil distribution worker who works 35 hours in a week, pursuant to NatRoad's proposal, would be paid \$27.28 x 35 resulting in a weekly remuneration of \$954.80, an underpayment of \$81.55.

Attachment 5

Group 2 Modern Awards – Hourly Rate Divisors

Award Ref	Award	Ordinary Hours per week	Hourly Rate Divisor	Comments
MA000092	Alpine Resorts	38		Rates provided are hourly. Wkly rates not specified.
MA000118	Animal Care and Veterinary Services	38	38	
MA000114	Aquaculture Industry	38	38	
MA000110	Corrections and Detention (Private Sector)	38	38	
MA000111	Fire Fighting Industry	38	38	
MA000026	Graphic Arts, Printing and Publishing	38	38	
MA000027	Health Professionals & Support Services	38	38	
MA000008	Horse and Greyhound Training	38	38	
MA000031	Medical Practitioners	38	38	
MA000034	Nurses	38	38	
MA000063	Passenger Vehicle Transportation	38	38	
MA000012	Pharmacy Industry	38	38	
MA000014	Racing Industry Ground Maintenance	38	38	
MA000068	Seafood Processing	38	38	
MA000084	Storage Services and Wholesale	38	38	
MA000042	Transport (Cash in Transit)	38	38	
MA000043	Waste Management	38	38	

Awards with less than 38 Ordinary Hours – Hourly Divisors

MA000007	Higher Education Industry – General Staff	36.75	36.75	
MA000072	Oil Refining and Manufacturing	35	35	