AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 Yearly Review of Modern Awards

SUBMISSIONS ON EXPOSURE DRAFTS: GROUP 2A & 2B AWARDS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

BACKGROUND

1. These submissions relate to exposure drafts of proposed modern awards released on 8 December 2014 in Group 2, sub-groups 2A and 2B, of the 4 Yearly Review.

2. In its Statement of 30 October 2014, the Fair Work Commission (**Commission**) indicated that exposure drafts for Group 2A and 2B awards would be published on 8 December 2014.[1]

3. In its Statement of 8 December 2014, the Commission then published exposure drafts for Group 2A and 2B awards and directed parties to make any written submissions regarding both the technical aspects of the exposure drafts and the substantive variations parties wish to pursue by no later than no later than 4pm on 28 January 2015.[2]

4. These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).

5. ABI is a registered organisation under the Fair Work (Registered Organisations) Act 2009. ABI has some 3,900 members.

6. NSWBC is a recognised State registered association pursuant to Schedule 2 of the Fair Work (Registered Organisation) Act 2009 and has some 17,000 members.

7. ABI and NSWBC appreciate the opportunity to make the following submissions in relation to the Exposure Drafts. ABI and NSWBC recognise the magnitude of the task imposed by s.156 of the Fair Work Act 2009 (Cth) (the **Act**) on the Commission (and indirectly onto parties with a material interest in modern awards) and also recognise the work done by the Commission to facilitate the review. They do not seek to make the task of the 4 Yearly Review more onerous. Rather, ABI and NSWBC seek to properly assist the Commission in the discharge of its discretion pursuant to s.156.

Group 2A and 2B Awards in which ABI and NSWBC have a material interest

8. ABI and NSWBC have a material interest in the following 2A and 2B awards:

Sub-group 2A

(a) Graphic Arts Award;

(b) Seafood Processing Award;

(c) Storage Services Award;

Sub-group 2B

(d) Health Professionals and Support Services Award;

(e) Nurses Award; and

(f) Pharmacy Industry Award.

[1] [2014] FWC 7743.

[2] [2014] FWC 8837.

GENERAL MATTERS

9. We have previously made submissions on a range of general drafting and technical issues common to multiple Exposure Drafts.[3] For example, we have previously made submissions on:

   (a) The issue of supersession of Awards versus variation;

   (b) The proposed architecture of the Exposure Drafts;

   (c) The use of notes in Awards;

   (d) The use of examples;

   (e) The inclusion of the 'payslip' provision;

   (f) The inclusion of an index of Facilitative Provisions and the proposed wording of the proposed model clause;

   (g) The inclusion of descriptions of the operation of National Employment Standards;

   (h) The inclusion of new terms and conditions not sought by any party; and

   (i) The use of the terms 'employed' and 'engaged'.

10. The above general issues were considered by a Full Bench of the Commission in relation to the Group 1A and 1B Awards, and on 23 December 2014 the Commission handed down its decision in relation to those issues.[4]

11. We note that the Group 2 Exposure Drafts were released prior to the Full Bench decision of 23 December 2014.

12. While not entirely clear, we have assumed that the Commission will take a consistent approach across all of the Awards, and that the Commission's decision in relation to these general drafting and technical issues common to multiple 1A and 1B Exposure Drafts will be followed when developing the Exposure Drafts for Group 2, 3 and 4 Awards. Therefore, we do not propose to make submissions in relation to the abovementioned general drafting and technical issues.

SPECIFIC SUBMISSIONS ON EXPOSURE DRAFTS

Graphic Arts Award

13. Clause 5.4: It appears that the table in clause 5.4 has omitted one of the existing facilitative provisions. The existing clause 8.4 of the Award includes reference to clause 12.3 as one of the facilitative provisions. However, this has not been included in clause 5.4 of the exposure draft.

14. Clause 10.6: The cross-reference in this clause should be clause 10.5(c) in line with the provisions of the *Graphic Arts - General - Award 2000* [AP782505] from where this provision derived.

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[3] See, for example, submissions of ABI and NSWBC filed on 29 September 2014 relating to Group 1A and 1B Exposure Drafts.

[4] [2014] FWCFB 9412.

15. Clause 14: The words "because of the effects of a disability" should be removed. Those words do not add anything to the clause - employees are either eligible for a supported wage or they are not. These additional words have the potential to lead employers and employees into error by assuming that employees with a disability are automatically eligible for a supported wage. The schedule properly sets out the eligibility requirements and these words have the risk of undermining those provisions. If the Commission considers additional words necessary to alert readers to what the supported wage system is about, it should be done in the annotated version of the Award.

16. Clause 15.1: This clause should be deleted as it is now obsolete.

17. Clause 18.3(a): The Commission has asked for clarification on the interaction between clauses 18.3(a)(i) and 18.3(a)(iv). We submit than in each case, only one meal allowance is payable - that is, either under clause 18.3(a)(i) or clause 18.3(a)(iv), but not both. This is because:

    (a) the word 'or' is used between clauses 18.3(a)(iv) and 18.3(a)(v), which suggests that the provisions are disjunctive and not conjunctive; and

    (b) An employee may work overtime by being notified either:

        (i) on the day that the overtime will occur and will be paid a meal allowance in accordance with clause 18.3(a)(i); or

        (ii) before the day on which the overtime will occur and is paid a meal allowance in accordance with clause 18.3(a)(iv).

18. Clause 22.3: The Commission has requested submissions on the proper penalty payable under clause 22.3. We submit that the current wording ("*time and a half extra*") is a typographical error. The clause should properly read "*one-half extra*" in accordance with clause 16.33 of the *Graphic Arts - General - Award 2000* [AP782505] from where this provision derived. Alternatively, the word "extra" should simply be removed so that the provision should be amended to simply read "time and a half".

19. Clause 23.1: We oppose the Commission's proposal to change the words "pause to acquire a refreshment" to "take a short paid rest break". The current clause does not provide for a "break" in the ordinary sense of the word. Rather, the entitlement is to have a refreshment whilst continuing to work. Neither ABI nor NSWBC is aware of any issue or difficulty with the current drafting and we submit that no change is required to the clause.

20. Clause 23.2: This provision is designed to apply to workplaces which allow, as a discretionary benefit, a morning rest break notwithstanding there being no Award obligation to provide a rest break. The clause provides that where an employer does so, the entitlement to pause to acquire a refreshment does not apply. We consider the clause to be appropriately drafted.

21. Part 5 'Penalties and overtime': ABI and NSWBC are not opposed to penalties being expressed as percentages.

22. Clause 24.2: The heading should be amended as follows (amendments underlined):

    Shift allowances - morning, afternoon and night shift<u>: employees other than non-daily and regional daily newspaper offices</u>.

23. Clause 24.6: ABI and NSWBC submit that the penalty payable in this clause should properly be expressed as 150%.

24. Schedule I: The definition of "default fund employee" has been removed. Although the term is not used in the Award, we note that a Full Bench of the Commission decided to include a definition of "default fund employee" in all Awards (see [2013] FWCFB 10016). Consideration should be given to retaining the definition in accordance with the Full Bench decision.

Seafood Processing Award

25. Clause 3.6: "The Fair Work Act 2009 (the Act)" should be replaced with "the Act" as this is defined in Schedule F.

26. Clause 8.5(c): The cross-reference should be to clause 18.8 which deals with non-rostered shift work.

27. Clause 8.7(b): It appears that this sub-clause is unnecessary as the terms defined in the provision are no longer contained in the redrafted clause 8.7(a).

28. Clause 10.7: The words "because of the effects of a disability" should be removed. Those words do not add anything to the clause - employees are either eligible for a supported wage or they are not. These additional words have the potential to lead employers and employees into error by assuming that employees with a disability are automatically eligible for a supported wage. The schedule properly sets out the eligibility requirements and these words have the risk of undermining those provisions. If the Commission considers additional words necessary to alert readers to what the supported wage system is about, it should be done in the annotated version of the Award.

29. Clause 13.5(b): The heading "Non-rotating night shift" should be reconsidered as it appears to provide for non-continuous shifts rather than non-rotating shifts.

30. Clause 14.7(b): For consistency purposes, the phrase "ordinary time rate" should be changed to "minimum hourly rate".

31. Schedule F: The definition of "default fund employee" has been removed. Although the term is not used in the Award, we note that a Full Bench of the Commission decided to include a definition of "default fund employee" in all Awards (see [2013] FWCFB 10016). Consideration should be given to retaining the definition in accordance with the Full Bench decision.

Storage Services Award

32. It appears the terms "ordinary hourly rate" (used in clauses 6.4(c)(i) and 16.4(b)(ii)) and "minimum hourly rate" are used interchangeably. We submit that the references to the applicable 'base rate' in the Exposure Draft should be uniform.

33. Clause 3.6(a): The reference to "Fair Work Act 2009 (Cth) (the Act)" should be replaced by the defined term "Act".

34. Clause 5.2: The Exposure Draft asks the parties to confirm if travelling allowance is a facilitative provision. Given that there does not appear to be any mechanism for agreement between an individual employer and an employee, or the majority of

employees in the workplace or a section of the workplace to depart from the standard provision, we do not consider Clause 12.3(b) to be a facilitative provision.

35. Clause 5.2: The Exposure Draft has included references to clause numbers of facilitative provisions. Specifically, clause 5.2(a)(ii) in respect of '*Hours of work—ordinary hours*' now includes a reference to clause 8.1. We consider that this may have the potential to give rise to ambiguity given the equivalent clause in the current award merely makes reference to "Hours of work - ordinary hours" and does not reference a clause. Given that there are multiple sections of clause 8.1, (including clause 8.1(e) which is separately referenced as a facilitative provision at clause 5.2 (a)(ii)), we consider that the Commission and the parties may wish to consider whether the inclusion of clause references in clause 5.2 will give rise to unintended consequences.

36. Clause 5.3(a)(i): This sub-clause should read "Clause 11 - Payment of wages - electronic funds transfer" as per the current award. The words "electronic funds transfer" have been omitted from the Exposure Draft.

37. Clause 9.1: The formulation of this clause in the Exposure Draft may give rise to a change in the entitlement. Whereas clause 23.1 of the current Award states that "No employee will be required to work longer than five hours without a break for a meal", clause 9.1 of the Exposure Draft states that an "employee is entitled to an unpaid meal break... after every five hours worked". We consider it arguable that the wording in the Exposure Draft may give rise to confusion that an employee can only be put on a meal break after completing 5 hours of work. Such a result would be unnecessarily inflexible and represent a change to the current award. In light of the above, we submit that the wording of clause 23.1(a) of the current Award be retained.

38. Clause 10.4: Consistent with our submission (which has been adopted in at least the Pharmaceutical Industry Award), we submit that the words "*because of the effects of a disability*" should be removed from this provision. Those words do not add anything to the clause - employees are either eligible for a supported wage or they are not. These additional words may lead employers and employees into error by assuming that employees with a disability are automatically eligible for a supported wage. The schedule properly sets out the eligibility requirements and these words have the risk of undermining those provisions.

39. Clause 12.3(d): We submit the drafting of this provision should be revisited. On a technical reading, the current drafting may give rise to an ambiguous general obligation to "provide overalls". We submit the clause should be redrafted as follows:

> The employer will provide overalls to, or reimburse the cost of purchasing overalls for:
>
> *(i) Any person employed in a paint manufacturer's store; or*
>
> (ii) *Any employee whose work normally involves the lifting or carrying of crates or similar containers which are likely to damage clothing.*

40. Clause 12.3(e)(i): In order to clarify the drafting of this clause, we submit that that words "the employee's" be included following the words "each set of" and the words "if they" be replaced by the word "which". The clause would accordingly read:

> An employer will reimburse an employee... for the replacement or repair of each set of the employee's dentures and/or prescription spectacles which are damaged or destroyed in the course of the employee's ordinary duties.

41. Clause 13: The parties are asked whether clause 13 should refer to a full-time or part-time employee instead of a "weekly employee". In our view it should refer to a full-time or part-time employee.

42. Clause 15.1: The words "**Saturday** - in accordance with 15.4(e)(i)" should be varied to read "**Saturday** - in accordance with 15.4(d)(ii) and 15.4(e)(i)". This change is necessary to clarify that the rate identified in clause 15.4(e)(i) arises through the operation of 15.4(d)(ii).

43. Clause 15.1: The words "**Sunday** - 15.4(e)(ii)" should be varied to read: "**Sunday** - in accordance with 15.4(d)(ii) and 15.4(e)(ii)". Again, this change is necessary to clarify that the rate identified in clause 15.4(e)(ii) arises through the operation of 15.4(d)(ii).

44. Clause 15.2: Our above submission in relation to clause 8.2 also applies to clause 15.2.

45. Clause 16.6: The parties have been asked to clarify what the appropriate rate for clause 16.6(a) is. The "appropriate rate" will depend on whether the hours are worked in excess or outside the span of ordinary hours. We submit that the current drafting of this clause be retained.

46. Clause 17.4: The Ombudsman has identified that it is unclear what "qualifying period of employment" refers to. We agree that this clause may cause confusion and accordingly we submit that clause 17.4(c)(iii) should be deleted.

47. Clause 25.6: In light of legislation now operating in the majority of Australian jurisdictions, the reference to 'occupational health and safety legislation' should be updated to 'work health and safety legislation' to facilitate ease of reference and to ensure clarity.

48. Inclusion of Wage summary tables: We seek the inclusion of rounding rules in relation to the amounts listed in the relevant tables in the schedule. We also note that the 150%, 200% and 250% hourly rates appear to be calculated on the 100% hourly rate rounded to 2 decimal places as opposed to a calculation using an 'unrounded' $1/38^{th}$ of the weekly rate figure. We submit that this may give rise to slight discrepancies in payment rates.

Health Professionals and Support Services Award

49. Schedule B & C: In response to the issue raised by the Ombudsman, we submit that the list of 'Common Health Professionals' in the Award operates in the same manner as clauses found in other awards where it is listed that there are 'indicative job titles' or 'indicative tasks' (See for example clause B.1.3 in the General Retail Industry Award 2010 and clause B.3.15(b)(iii) in the Manufacturing and Associated Industries and Occupations Award 2010). The inclusion of these clauses serves as an example of what may be included in a particular classification or particular industry award. The list in the Health Professionals Award is indicative, meaning that it is not an exhaustive or an all-inclusive list, but it is useful and makes the award easier to understand and apply. On this basis, we submit that the clause should remain as it is presently.

50. Clause 18.4: The Commission has raised a question regarding whether the shiftwork and weekend penalties are paid on a casually loaded rate or applied separately to the minimum hourly rate of pay. In this Award, the casual loading is found at clause 10.4 and that provision does not describe the loading as an 'all purpose' casual loading. Nothing in the clause leads to a conclusion that it should be treated as a loaded rate. In our view, the casual loading in this Award is not 'all purpose' and therefore should not be treated as compounding when determining the rate of pay for weekends, public holidays or shiftwork. The drafting in the Exposure Draft is problematic in that it would lead to a significant increase in the calculation of casual wages.

51. Clause 18.4: In response to the issue raised by the Ombudsman, we do not consider this clause to be ambiguous. A shiftworker is defined in clause 18.4 as an employee that performs a rostered shift that finishes between 6pm and 8am or commences between 6pm and 6am. The span of hours prescribed in clause 23 of the current Award does not and cannot apply to shiftwork nor does clause 18.4 prescribe a span of hours, it is a categorisation of shiftwork only. If a span of hours applied to a shiftworker then their shift would not be a shift for shiftwork purposes but overtime. On this basis we submit clause 18.4 should remain as it is presently.

52. There also appears to be difficulty in understanding whether the shiftwork and penalties should apply at the same time. Applying both penalties represents a "double dip". In line with the long established principle that the highest applicable rate applies to the work of the day, a penalty should never be applied to a penalty unless the instrument expressly provides otherwise.

Nurses Award

53. Clause 6.1: The inclusion of the additional words "of the terms of their engagement" purports to impose a new and additional obligation on employers which does not currently exist. Under the current Award, employers are required to inform each employee whether they are employed on a full-time, part-time or casual basis. In contrast, the Exposure Draft suggests that employers must inform employees of all terms and conditions of their employment. The proposed wording is ambiguous, vague and may lead to increased disputation between parties. It is also a significant departure from the existing position. Having regard to the Commission's intention not to alter existing entitlements, the wording should be removed.

54. Clause 11.2: In response to the query in the Exposure Draft regarding registered nurses at levels 4 and 5, we confirm our view that the allowances described in that clause do not apply to registered nurses at levels 4 and 5.

55. Clause 17.5: Parties are asked by Commission to clarify whether the leave loading in clauses 17.5(b)(i) and 17.5(b)(ii) is based on 4, 5 or 6 weeks. ABI and NSWBC submit that the calculation of leave loading involves a calculation of the default annual leave loading of 17.5% against the weekend and shift penalties for the relevant period. The relevant period is the period of leave; this may be a comparison over the relevant period of a week, a day, or 4, 5, or 6 weeks.

56. Clause 26: The Ombudsman has raised the question of whether employees who work on weekends are entitled to overtime rates or penalty rates. We submit that the Award is problematic in that clause 22 in the current award limits ordinary hours of work to

Monday to Friday and that the position to be preferred is that employees can perform work on weekends subject to the appropriate penalty being paid.

57. Schedule A: The Ombudsman has queried the classification definitions and whether they allow an enrolled nurse to remain at a level if they have more than "one further year of practical experience". The wording of "not more than" which precedes the phrase in question provides this answer, which is no.

Pharmacy Industry Award

58. Clause 6.5(c)(ii): The reference to "paid personal leave" should be deleted as it is already included in "paid personal/carer's leave".

59. Clause 8.2(f): This sub-clause has the tendency to suggest that the other provisions of clause 8.2 do not apply to part-time and casual employees. Consideration should be given as to whether this sub-clause should be retained, or alternatively re-drafted to avoid any potential ambiguity.

60. Clause 8.3(a): The formatting of clause 8.3(a), particularly sub-clauses (iii) and (iv), creates unnecessary ambiguity. Clause 25.4(a)(iii) of the existing Award should be maintained as clause 8.3(a)(iii).

61. Clause 10.5: The words "because of the effects of a disability" should be removed. Those words do not add anything to the clause - employees are either eligible for a supported wage or they are not. These additional words have the potential to lead employers and employees into error by assuming that employees with a disability are automatically eligible for a supported wage. The schedule properly sets out the eligibility requirements and these words have the risk of undermining those provisions. If the Commission considers additional words necessary to alert readers to what the supported wage system is about, it should be done in the annotated version of the Award.

62. Clause 11.2(a)(iii): The Commission has sought clarification as to whether clause 11.2(a)(iii) applies to both clause 11.2(a)(i) and clause 11.2(a)(ii), or just 11.2(a)(i). Clause 19.1(b) of the current Award contains an almost identical provision to clause 11.2(a)(iii). Clause 19.1 of the current Award is formatted in such a way that it is clear that clause 19.1(b) applies equally to both allowances which are set out on clause 19.1(a) (split into clauses 11.2(a)(i) and 11.2(a)(ii) of the Pharmacy Exposure Draft). It is clear from the Pharmacy Award that the exclusion clause is intended to apply to both meal allowances that are payable. We submit that this exclusion equally applies in the Exposure Draft based on the current formatting. If, however, the Commission considers that the formatting of the Exposure Draft makes clause 11.2(a)(iii) unclear, we propose the following amended wording (amendment underlined):

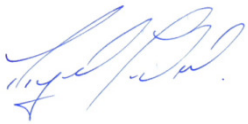
> Clause 11.2(a)(iii) <u>The meal allowances in</u> this provision will not apply when the employer has advised the employee of the requirement to work overtime on the previous day.

63. Clause 11.2(a)(v): We submit that there is no ambiguity in clause 11.2(a)(v) - the meal allowance is not payable where a part-time employee has agreed in writing to vary the regular pattern of work, either permanently or temporarily (as per clause 6.4(c)). A variation in accordance with clause 6.4(c) makes these varied hours the part-time employee's new ordinary hours. The meal allowances provided in clause 11.2(a) only

apply in circumstances where an employee works overtime. Where a part-time employee works overtime in accordance with clause 6.4(b)(vi), a meal allowance will be payable when the conditions of clause 11.2(a) are met. No change is necessary to clause 11.2(a)(v) to clarify the provision.

64. Clause 13.2: Casual employees and overtime. The Commission queries whether the award should state when causal employees are entitled to overtime. Currently, clauses 13.2(a) and (b) of the Pharmacy Exposure Draft specifies when full-time and part-time employees are entitled to overtime. There is no similar provision relating to casual employees. Clause 13.2 in combination with clause 13.1(a), which provides that an employee, other than a casual employee, may be required to work overtime, indicates that casual employees are not entitled to overtime payments.

65. Schedule G: The definition of "default fund employee" has been removed. Although the term is not used in the Award, we note that a Full Bench of the Commission decided to include a definition of "default fund employee" in all Awards (see [2013] FWCFB 10016). Consideration should be given to retaining the definition in accordance with the Full Bench decision.



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