AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 yearly review of modern awards

SUBMISSIONS: GROUP 3 EXPOSURE DRAFTS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

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1. BACKGROUND

1.1 These submissions relate to the Exposure Drafts of Group 3 Awards released in December 2015 and January 2016.

1.2 In Amended Directions issued on 22 March 2016, the Fair Work Commission (**Commission**) directed interested parties to file comprehensive written submissions on the technical and drafting issues related to the Group 3 Exposure Drafts by 14 April 2016.

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

1.4 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members.

1.5 NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act* 2009 and has some 18,000 members.

1.6 ABI and NSWBC has a material interest in the following Group 3 Awards:

(a) Banking, Finance and Insurance Award 2010;

(b) Business Equipment Award 2010;

(c) Clerks - Private Sector Award 2010;

(d) Commercial Sales Award 2010;

(e) Contract Call Centres Award 2010;

(f) Fitness Industry Award 2010;

(g) Labour Market Assistance Industry Award 2010;

(h) Legal Services Award 2010;

(i) Miscellaneous Award 2010;

(j) Real Estate Industry 2010;

(k) Telecommunications Services Award 2010;

(l) Educational Services (Post-Secondary Education) Award 2010;

(m) Educational Services (Schools) General Staff Award 2010;

(n) Gardening and Landscaping Services Award 2010;

(o) Horticulture Award 2010;

(p) Nursery Award 2010;

(q) Pastoral Award 2010;

(r) Sugar Industry Award 2010; and

(s) Wine Industry Award 2010.

1.7 ABI and NSWBC appreciate the opportunity to provide the following submissions on the Group 3 Exposure Drafts.

2. COMMON SUBMISSIONS ON THE EXPOSURE DRAFTS

Supported wage system clause

2.1 Most of the awards contain a clause regarding the supported wage system, which effectively acts as a signpost to the more detailed Schedule. Consistent with our submission (which has been adopted) in the Pharmaceutical Industry Award (see [2015] FWCFB 7236 at [148]), we submit that the words "because of the effects of a disability" should be removed from the relevant provision of each of the Exposure Drafts. Those words do not add anything to the clauses - employees are either eligible for a supported wage or they are not.

2.2 The concern is that the additional words may well lead employers and employees into error by assuming that employees with a disability are automatically eligible for a supported wage, without turning to the relevant Schedule. The Schedule properly sets out the eligibility requirements and these words have the risk of undermining those provisions.

References to "occupational health and safety"

2.3 The 'Dispute Resolution' provisions of each of the Exposure Drafts contain references to 'applicable occupational health and safety legislation'. In our submission, this terminology should be replaced with the phrase 'work health and safety legislation' to reflect the fact that harmonised WHS legislation is now in effect in the majority of States and Territories across Australia.

Inclusion of the words "at least" in part-time clauses

2.4 Some of the modern awards contain a clause relating to part-time employment which requires employers to agree on the number of hours to be worked, the days of the week to be worked, and starting and finishing times.

2.5 In some of the Exposure Drafts, the words 'at least' have been included in this clause.[1] The words 'at least' should be removed as they do not appear in the current Award and materially change the effect of the provision.

The phrase "modern award, as varied"

2.6 The Exposure Drafts contain a standard clause stating:

> *"This modern award, **as varied**, commenced operation on 1 January 2010".* [emphasis added]

2.7 This standard clause was inserted in accordance with the Full Bench's decision of 13 July 2015.[2]

2.8 In that decision, the Full Bench held at [8]:

> *[8] The decision to vary modern awards, rather than supersede them as outlined in paragraph 9 of the December decision, means the*

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[1] See, for example, clause 6.4 (c) of the Educational Services (Schools) General Staff Award; clause 6.4(b) of the Gardening and Landscaping Services Award.

[2] See [2015] FWCFB 4658, at [8].

commencement provision needs to be re-inserted. A commencement clause will be inserted into all exposure drafts as follows:

> *2.2 This modern award, as varied, commenced operation on 1 January 2010.* (**Standard Commencement Clause**)

2.9 In the respectful submission of ABI and NSWBC, the inclusion of the words "as varied" in the Standard Commencement Clause in each Exposure Draft gives rise to the potential for ambiguity or confusion in relation to the interpretation of modern awards.

2.10 Notwithstanding the content of the standard clause which follows it[3], the inclusion of the Standard Commencement Clause gives rise to the possibility that a reader of the Award could understand the varied award to have retrospective operation such that the award inclusive of all variations (or "as varied") has operation from 1 January 2010.

2.11 The potential for this erroneous interpretation would be entirely removed if the Standard Commencement Clause was altered to remove the words "as varied". Accordingly, we consider that the words "as varied" should be removed from the Standard Commencement Clause.

Note regarding FW Regulations in payment of wages clause

2.12 In most of the 'payment of wages' clauses, the Exposure Drafts contain a Note which reads:

> *"NOTE: Regulations 3.33(3) and 3.46(1)(g) of Fair Work Regulations 2009 set out the requirements for pay records and the content of payslips including the requirement to separately identify any allowance paid."*[4]

2.13 In our submission, Regulations 3.33 and 3.46 would be the more appropriate provisions to refer to in this circumstance, rather than 3.33(3) and 3.46(1)(g) specifically.

3. BANKING, FINANCE AND INSURANCE AWARD

3.1 Clause 7.7: As presently drafted, this clause creates a degree of ambiguity concerning the ordinary hours of shiftworkers. In this regard, we repeat and rely upon our application for variation of this clause in the current award, submitted to the Commission on 12 November 2015. We submit that the definition of "shiftworker" in clause 7.7(a)(i) of the Exposure Draft should be amended as follows:

> *"**shiftworker** means an employee whose ordinary hours of work are worked in accordance with the shifts defined in subclauses (ii) to (iv) on Mondays to Fridays or on Saturdays between 8am and 12pm".*

3.2 Clause 11.2: For the purpose of clarity, this clause should also state that a pro-rata amount will be paid to part-time employees.

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[3] Namely: "A *variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the award as it existed prior to that variation.*"

[4] See for example clause 10.3 of the Telecommunications Services Award; clause 9.3 of the Business Equipment Award; clause 9.3 of the Commercial Sales Award; clause 10.4(b) of the Nursery Award; clause 10.6 of the Gardening and Landscaping Services Award; clause 10.4 of the Horticulture Award.

3.3 Clause 11.3(b): The current Award distinguishes between being paid for call-back when a person is on stand-by and when a person is not on stand-by. Thed Exposure Draft removes this distinction. In absence of this distinction, the reader may be confused as to whether they are entitled to the stand-by allowance when they are recalled to work, but are not on stand-by. On this basis such a distinction should be added for clarity and understanding.

3.4 Throughout the Exposure Draft, clauses refer to the "minimum hourly rate" as being the basis for calculating employee entitlements under the Award. For example, clauses 6.3 (part-time employees) and 6.4 (casual employees) state that an employee must be paid the "minimum hourly rate". While this is consistent with the general approach adopted by the Commission and consistent with the Commission's previous decisions[5], in our submission the term "minimum hourly rate" should be defined in the Exposure Draft.

3.5 For clarity, we submit that the table in clause 9.1 should include a column setting out the "minimum hourly rate" for each classification, and then the following definition should be inserted into Schedule H of the Exposure Draft:

> *"**minimum hourly rate** means the minimum hourly rate prescribed in clause 9 - Minimum wages".*

3.6 The table in clause 9.1 would then appear as follows:

Employee classification	Minimum annual rate	Minimum weekly rate	Minimum hourly rate
Level 1	36,317	698.40	$18.38
Level 2	39,775	764.90	$20.13
Level 3	42,011	807.90	$21.26
Level 4	44,112	848.30	$22.32
Level 5	45,906	882.80	$23.23
Level 6	51,418	988.80	$26.02

4. BUSINESS EQUIPMENT AWARD

4.1 Clause 7.2(a)(i): There is a query as to whether this clause allows for the span of hours to be increased by one hour at both ends. In our view, the use of the words "at either end" demonstrates that the clause is intended to allow for the span of hours to be increased at both ends (i.e. for one hour prior to 7.00 am and one hour after 7.00 pm).

4.2 Clauses 7.8, 11.3(b)(i) and 17.6: Parties are asked whether definitions should be provided for 'country employees' and 'country territory', and further whether the definition in clause 17.6 applies. To eliminate potential confusion and disputes, we consider that there would be merit in defining these terms. As an example, a definition for 'country employees' could be "employees who work in country areas" and 'country areas' could be defined as "those which are predominately rural, pastoral and/or agricultural." Perhaps the most helpful place to define those terms is in Schedule H.

[5] See [2015] FWCFB 4658; [2014] FWCFB 9412.

4.3 The definition in clause 17.6, presumably being "Employees who are required by their employer to remain away from their usual place of residence on more than two nights in any week" does not connote any connection to the country, that is, rural areas.

4.4 Clause 9: There is no clause which makes clear that hourly wages for part-time and casual employees are calculated by dividing full time rates by 38. In the interests of transparency and ease of comprehension, either a notice of this calculation should be provided (with the most helpful place likely being in clause 9), or including new "minimum hourly rate" columns to the three tables at clauses 9.2(a)(i) to (iii) inclusive.

4.5 Clause 11.4 (c)(iii): In response to the Commission's query, we consider that the wording 'and for the purposes of all relevant State workers compensation legislation' should be removed. In our submission, the modern award should not extend into the realm of workers compensation legislation. Further, while the clause generally deals with allowances, it is questionable as to whether clause 11.4(c)(iii) is permissible under s.139 as it purports to potentially override State workers compensation legislation.

4.6 Clauses 14.2, 14.3, 15.2 and 15.3(b): In these clauses allowances and penalties are proposed to be expressed as dollar amounts instead as percentages. The calculation from the percentage regime to the dollar amounts has resulted in deviations of one cent in the employee's favour. These deviations do not appear in other clauses sharing the regime change, being 11.2(b), 11.2(c), 11.2(d), 11.2(e)(i), 14.1, 15.2(c)(ii), 15.2(c)(iii) and 16.5. We propose that all dollar amounts are calculated in the same way, (that is, to the same decimal place). While a minute amount, for employers having significant workforces, this insubstantial error would account for a not insubstantial increase in wages.

4.7 Clause 15: In response to the query at clause 15, ABI and NSWBC consider there to be merit in including a definition of "shiftworker" in Schedule H of the Exposure Draft so as to clarify when the shiftwork allowances are payable.

4.8 Clause 15.2(d): This clause is titled "Rate for Saturday and Sunday shifts". It describes Saturday as "between midnight on Friday and midnight on Saturday." It describes Sunday in a corresponding way. In our view, midnight is the beginning of a day, not the end. Although the description is given and is the same description as in the current iteration of the Award, it is a misleading one, which could lead to interpretational disputes. In the interests of ease of comprehension, we propose that alternative wording be used, for example, describing a Saturday shift as being "between 12:00am Saturday morning to 11:59pm Saturday night inclusive". If that phrasing is adopted, corresponding phrasing for Sunday would also be necessary. If that phrasing is not adopted, the use of 24 hour convention of time keeping à la the military may be helpful.

4.9 Clause 15.4: This clause describes payment for shifts worked when daylight saving time starts or stops according to "adjusted time (i.e. the time on the clock at the beginning of the shift and the time on the clock at the end of the shift)." This means that when daylight saving begins, one shiftworker might be paid for an hour unearned and when daylight saving ends a different shiftworker might be paid an hour less than what was worked. This is an unfair system for employees and could lead to disputes with employers.

4.10 The clause should be amended by requiring payment for each hour worked on those two days of the year, with wording to the effect of:

> *"For work performed on a shift that spans the time when daylight saving begins or ends, as prescribed by relevant state legislation, an employee must be paid according to the amount of time actually worked, and not by adjusted time (i.e. the time on the clock at the beginning of the shift and the time on the clock at the end of the shift)."*

4.11 Clause 16.1: This clause describes payment of overtime for "An employee who works in excess of or outside the employee's ordinary hours." This should be changed to "An employee required to work in excess of..." to avoid instances where payment is alleged to be owed by an employee for unauthorised overtime.

5. CLERKS - PRIVATE SECTOR AWARD

5.1 Throughout the Exposure Draft, clauses refer to the "minimum hourly rate" as being the basis for calculating an employee's entitlements under the award (e.g. clause 6.3(b)(i) and clause 13 - overtime). In our view, the use of the term "minimum hourly rate" is somewhat ambiguous as it is not a defined term in the Exposure Draft. To remedy this issue, we propose that the following definition is inserted into Schedule G of the Exposure Draft:

> *"**minimum hourly rate** means the minimum hourly rate prescribed in clause 10 - Minimum wages".*

5.2 Clause 5.2: There is an incorrect reference in the table. The facilitative provision in respect of 'Time off instead of overtime' is contained in clause 13.6(a) and not 13.5(c).

5.3 Clause 6.3 (d): In response to the Commission's query, we are not opposed to this clause being amended so that it specifically states that the minimum payment applies 'for each engagement'. This will remove any potential issues concerning the interpretation of the clause.

5.4 Clause 8.2(b): There is a query as to whether clause 8.2(b) allows for the span of hours to be increased by one hour at both ends. In our view, the use of the words "at either end" demonstrates that the clause is intended to allow for the span of hours to be increased at both ends (i.e. for one hour prior to 7.00 am and one hour after 7.00 pm).

5.5 Clause 9.1(a): In response to the Commission's query, ABI and NSWBC submit that clause 9.1(a) does <u>not</u> apply to shiftworkers as the provision in the current Award is expressed as being 'Subject to the provisions of clause 28—Shiftwork of this award', and clause 28.4(f) of the current Award creates a separate entitlement for shiftworkers concerning meal breaks.

5.6 Clause 13.1: contains a drafting error as the definition of "overtime" is inconsistent with the definition of "ordinary hours" set out in clause 8.1 of the Exposure Draft. The operative issue is that clause 13.1(a) needs to state that overtime is worked when an employee works in excess of 10 hours in one day (as per clause 8.1 of the Exposure Draft). Accordingly, we submit that clause 13.1(a) is amended as follows:

"(a) Overtime is any time worked:

(i) *within the hours fixed in clause 8—Ordinary hours of work (other than shiftworkers), but in excess of the hours fixed for an ordinary week's work; or*

(ii) *in excess of 10 hours in any one day; or*

(iii) *outside the hours fixed in clause 8".*

5.7 Clause 14.5(b): The Exposure Draft appears to contain an error at this clause. The 'comparison document' states:

> *"Clause 13.5(c) - Time off instead of overtime and clause 8.6 - Make-up time, apply to shiftworkers as well as day workers."*

The reference to clause 13.5(c) should again be clause 13.6(a).

5.8 Clause 14.1: In response to the query at clause 14.1, ABI and NSWBC consider there to be merit in including a definition of "shiftworker" in Schedule G of the Exposure Draft so as to clarify when the shiftwork allowances are payable.

6. COMMERCIAL SALES AWARD

6.1 Clause 8: Parties to provide clarification as to the meaning of 'regular and normal meals', including whether the meal breaks are paid or unpaid. There is no inference to suggest meal breaks are to be paid. In the absence of a positive indication, the sensible conclusion to draw is that meal breaks are unpaid. In other Awards which confer paid meal breaks on workers, the conferrals are expressed as such or in such other unmistakeable way. It is therefore submitted that "regular and normal meals" means an unpaid and uninterrupted break of no more than 30 minutes at times of the day typical for a worker to consume a meal, regularly observed from day to day within reason.

6.2 Clause 10.2(a) - In response to the Commission's query, ABI and NSWBC submit that "home or headquarters" could be made clearer by elaboration, e.g. "Home or headquarters, being the employer's usual place of residence or the office to which the employee most frequently reports or otherwise takes instruction in the usual course of employment." In our view, only the phrase "home" could be replaced or used interchangeably with "their usual place of residence."

6.3 Clause 10.2(f): This clause says that expenses are reimbursable when incurred "in the course of their employment," whereas in the current Award it is expressed as "in the discharge of their duties". The proposed wording arguably broadens the entitlement, as discharging one's duties implies actively working whereas in the course of employment has a more passive connotation. This exposes employers to be expected to reimburse employers for a greater array of goods and services. The change in wording is slight, but the effect would be great. The wording should go unchanged from the current Award.

6.4 Clause 16.3: Parties are asked whether only work 'in soliciting orders' is carried out on public holidays. The wording of clause 16.4 and the tables seen in Schedule A suggest a dichotomy of work performed on a public holiday: all work done in soliciting orders and travelling. It may also be possible that an employee may be requested to work on a public holiday, but not perform any tasks sufficiently proximal to soliciting orders or to travelling. It is submitted that clause 16.3 be amended so that the clause reads "All work

done by an employee, other than travelling, at the request of the employer on a public holiday...".

6.5 Clause 16.3: Parties are asked to clarify if the "two and a half days' leave" in clause 16.3 is in addition to a paid day for the public holiday. If an employee is requested to work on a public holiday, the employer may either pay the employee at a rate of 250% of the minimum hourly rate or provide the employee with two and a half days' leave with pay. Both alternatives result in the employee earning either increased payment or leave with ordinary payment. We submit that an employee, receiving two and a half days' leave with pay, ought not also receive payment for the public holiday. That submission appears to accord with section 116 of the FW Act, which confers an entitlement on employees to be paid when they are absent on a public holiday.

7. CONTRACT CALL CENTRES AWARD

7.1 Throughout the Exposure Draft, clauses refer to the "minimum hourly rate" as being the basis for calculating employee entitlements under the Award. While this is consistent with the general approach adopted by the Commission and consistent with the Commission's previous decisions[6], in our submission the term "minimum hourly rate" should be defined in the Exposure Draft. To remedy this issue, we submit that the following definition should be inserted into Schedule G of the Exposure Draft:

> *"**minimum hourly rate** means the minimum hourly rate prescribed in clause 10 - Minimum wages".*

7.2 Within the Exposure Draft, there are certain clauses which have been re-drafted in a manner that is inconsistent with the equivalent provision in the current award. Also, certain clauses in the Exposure Draft have been drafted in manner that creates a general lack of cohesion between the operation of certain provisions. This may cause some interpretational issues and therefore we submit that such issues should be rectified.

7.3 Clause 8.7(a)(i): There is a query as to whether clause 872(a)(i) allows for the span of hours to be increased by one hour at both ends. In our view, the use of the words "at either end" demonstrates that the clause is intended to allow for the span of hours to be increased at both ends (i.e. for one hour prior to 7.00 am and one hour after 7.00 pm).

7.4 Clause 10.6(b): This clause should include a reference to clause 8 (ordinary hours of work and rostering). This would be consistent with clause 18.5(b) in the current Award which states that a person's annual salary will compensate them in respect of clause 24 of the award (ordinary hours of work and rostering).

7.5 Clause 13.1 of the exposure is somewhat ambiguous, particularly the wording of the heading for clause 13.1 and the table of penalty rates set out in subclause (a). Accordingly, we submit that clause 13.1 should be amended as follows so that it is consistent with clause 8 of the Exposure Draft:

> *"13. Penalty rates*
>
> *13.1 Penalty rates for hours worked Monday to Friday prior to or after the spread of ordinary hours and time worked on weekends*

[6] See [2015] FWCFB 4658; [2014] FWCFB 9412.

(a) *Except as provided for in clauses 8.7(a)(i) and 13.2(a), employees are entitled to the following penalty rates for ordinary time worked:*

Ordinary hours worked:		***Full-time and part-time employees***	***Casual employees***
		% of minimum hourly rate	
Monday to Friday	*before 7.00am*	*125 (clause 8.6(c) - work adjacent to the spread of ordinary hours)*	*150*
	after 7.00pm		
Saturday *(clause 8.6(a)(ii))*	*between midnight Friday and midnight on Saturday*	*125*	*150*
Sunday *(agreed ordinary hours in accordance with clause 8.8(a))*	*between midnight Saturday and 7.00am on Sunday*	*175 (clause 8.8(b) - work adjacent to the spread of ordinary hours)*	*200*
	between 7.00pm on Sunday and midnight on Sunday		
	between 7.00am and 7.00pm	*150*	*175*

7.6 Clauses 13.1(a): The Commission has asked the parties to clarify whether the reference in clause 13.1(a) to clause 13.2(a) (shiftwork penalties) is correct. Arguably, the reference to clause 13.2(a) should instead be a reference to clause 13.2(b) as clause 13(2)(b) sets out the shiftwork penalties payable to employees. However, the penalties payable under clause 13.2(b) are subject to the application of clause 13.2(a). On that basis, we submit that the reference in clause 13.1(a) could remain as clause 13.2(a), or in the alternative it could be change to clause 13.2 as this encompasses subclauses (a) and (b) which apply to the payment of shiftwork penalties.

7.7 The Commission further asked for parties to clarify, with reference to clause 13.1(c), whether it correctly references only the Monday to Friday penalty rates. We submit that the referencing is correct as it is consistent with clause 22.7.3(a) of the pre-reform *Contract Call Centre Industry Award 2003*.

7.8 Clause 14: This clause states that an employee will be paid overtime when they work in excess of the daily or weekly permissible number of ordinary hours. However, the Exposure Draft does not state that an employee will be paid overtime if they work outside the spread of ordinary hours (see clause 8.6 of the Exposure Draft). This could potentially create difficulties if a person is rostered to work on Sunday, but Sunday is not agreed ordinary hours in accordance with clause 8.8 of the Exposure Draft. Accordingly, we submit that clause 14.1(a) should be amended to state that overtime must be paid when an employee works outside the spread of ordinary hours unless the hours are adjacent to the spread of ordinary hours (as per clause 8.6(c) of the Exposure Draft) or agreed ordinary hours on a Sunday (as per clause 8.8 of the Exposure Draft).

7.9 Clause 14.7(d): In response to the Commission's query, we submit that if an employee works between three and four hours, they are entitled to be paid overtime rates and receive at least ten consecutive hours off duty between finishing work on the day that overtime is performed and commencing work the following day. If the employee does not receive a ten (10) hour break, clause 14.4(b) of the Exposure Draft will apply.

7.10 Clause 24.1: Parties are asked whether the reference to 'Workplace Relations Act 1996 (Cth)' (**WR Act**) in clause 24.1 of the Exposure Draft should be replaced with 'the Act' (which is a reference to the *Fair Work Act 2009*). We submit that the reference to the WR Act should not be removed as the entitlement to training in clause 24 originally comes from the WR Act, not 'the Act'.

8. FITNESS INDUSTRY AWARD

Clause 7.4: This clause states that casuals are entitled to be paid the "minimum hourly rate" instead of "1/38th of the minimum weekly rate", as stated in clause 13.2 of the current Award. For clarity, we submit that clause 7.4(b)(i) is amended as follows:

> *"(i) for each ordinary hour worked on Monday to Friday, a casual employee must be paid:*
>
> - *the minimum hourly rate prescribed in clause 10 - Minimum wages; and*
> - *a loading of 25% of the minimum hourly rate,*
>
> *for the work being performed."*

8.1 As an alternative, given that the term "minimum hourly rate" is used throughout the Exposure Draft, we consider there t be merit in inserting a definition of the term in Schedule G.

8.2 Clause 8.3: In response to the Commission's query, on the face of the current Award, casual employees are not entitled to overtime if they work in excess of ten (10) hours on any one day.

9. LABOUR MARKET ASSISTANCE INDUSTRY AWARD

9.1 Clause 3.7: The Exposure Draft asks parties whether the note that has been added at the bottom of the clause should remain. We submit that the note should be retained as it serves to further clarify the provision and reinforce that, in the event that an employee is not covered by a classification in this award, another occupational award may apply. The same note has also been inserted in most of the other Exposure Drafts.

9.2 Clause 8.3(a)(i): The Exposure Draft asks parties whether the accrued days off "option" should be specifically prescribed as was the case in the Community, Employment, Training and Support Services Award 1999(Pre-Reform Award). We submit that this is not necessary and would only serve to limit the operation of how an employer and employee (by agreement) could utilise the flexibility provided by this clause.

9.3 Clause 8.4(b)(viii): The Exposure Draft requests parties to comment on whether the reference to "approved paid leave" contained in the definition of "Flex Debit", should be amended to "approved leave" so as to make it consistent with the definition of "Approved Leave". We submit that the phrase "approved paid leave" be retained as

"Approved Leave" is simply defined as meaning "**any leave of absence** other than core time approved by the employer" [our emphasis]. The need for the retention of the term "approved paid leave" under the definition of "Flex Debit" is because unpaid leave should not be taken into account when determining the difference between the sum of the standard days in a settlement period and the aggregate amount of time worked by an employee in this regard.

9.4 Clause 11.2(b): The Exposure Draft asks parties to clarify whether overtime rates apply for time worked by employees in excess of ordinary hours whilst on excursions. We submit that overtime payments do not apply to this clause as it describes a specific circumstance being:

> *"where an employee is required to **supervise** clients in **excursion activities** involving **overnight stays away from home**" [our emphasis].*

In this specific situation the clause prescribes that an employee is entitled to payment at ordinary rates of pay for time worked between the hours of 8.00 am to 6.00 pm Monday to Sunday (up to a maximum of eight hours per day), plus the specified sleepover allowance. The clause already contains the full benefits for an employee in these circumstances, and we note also extends the spread of ordinary hours of work set out in clause 8.2 which provides that they are worked between 6.00 am and 8.00 pm, Monday to Friday.

9.5 Clause 14.1(c)(iii): The Exposure Draft requests parties to comment on the amendment of a typographical error. We submit that the amendment appears correct in light of the language used in the Pre-Reform Award.

9.6 Clause 20.2: The Exposure Draft seeks the parties' views on the interaction of this clause with clause 14.2. Clause 20.2 provides that an employee will be paid at a rate of 250% of the minimum hourly rate for all time worked on a public holiday, as opposed to clause 14.2 which prescribes that an employee will be paid 250% of the minimum hourly rate for work performed on a public holiday during ordinary hours of work, and 350% of the minimum hourly rate for work performed on a public holiday that is outside the ordinary hours of work. We submit that clause 20.2 should be preferred to clause 14.2 and that all time worked on a public holiday be paid at a rate of 250% of the minimum hourly rate for all time worked. We note that this approach is consistent with the terms of the Pre-Reform Award which only prescribes a rate of 250% for time worked on a public holiday.

10. LEGAL SERVICES AWARD

10.1 Definition of legal services industry: The Exposure Draft, along with the current award, defines the legal services industry as follows:

> *legal services industry means employers engaged in the business of providing legal and legal support services*

10.2 ABI and NSWBC submit that, as a matter of form, defining the legal services industry in terms of "employers" is problematic. For example, clause 4.1 states, inter alia, as follows:

> *"This industry award covers employers throughout Australia in the legal services industry and their employees...".*

10.3 A strict application of the current definition to clause 4.1 would result in an interpretation that the award covers "employers throughout Australia in employers engaged in the business....". As a matter of form, this is obviously incorrect.

10.4 ABI and NSWBC submit that the definition of "legal services industry" should be varied so as not to create any substantive change as follows:

> *"legal services industry means ~~employers~~ the industry engaged in the business of providing legal and legal support services."*

10.5 Clause 11.2(b): In the submission of ABI and NSWBC, clause 11.2(b) in the Exposure Draft may give rise to a substantive new entitlement allowing employees to elect to receive a meal allowance on the same day as overtime is worked. Under the current award, such an election will only be available where the employer has not "supplied...an adequate meal where an employer has their own cooking and dining facilities". This change is a result of clause 11.2(b) now standing as a 'stand-alone' subsection, not contingent on the operation of 11.2(a). ABI and NSWBC submit that clause 11.2(b) should be varied as follows:

> *"Where an employee is paid a meal allowance under clause 11.2, o~~O~~n request, ~~a~~ the meal allowance must be paid on the same day as overtime is worked."*

10.6 Clause 13.4: Parties are asked to clarify the interaction between 13.4(c)(ii) & 13.4(c)(iii) as they appear inconsistent. This inconsistency appears to arrive from a transcription error between the current award and the Exposure Draft, clause 13.4(c)(iii). In the submission of ABI and NSWBC, clause 13.4(c)(iii) should be amended as follows:

> *"Where ~~a~~ shifts falls partly on a public holiday, the shift which has the major portion falling on the public holiday will be regarded as the public holiday shift."*

11. MISCELLANEOUS AWARD

11.1 Clause 7.4(d): Parties are asked whether a definition for a 'sub-professional employee' is required for the purposes of clause 7.1(d). In view of ABI and NSWBC, the word 'sub-professional' is commonly understood to mean 'below professional' and thus the phrase does not need definition. ABI and NSW would not however necessarily oppose the inclusion of an agreed definition if pursued by other parties.

12. REAL ESTATE INDUSTRY AWARD

12.1 Clause 8.3: Parties are asked to clarify whether "At 18 years" includes employees younger than 18. ABI and NSWBC consider the answer to be 'yes'. It would be illogical for employees who are 17 years old or younger to not be governed by the 'junior rates' clause and to be required to be paid adult rates.

12.2 Clause 9.6: In light of the Full Bench decision in *Canavan Building Pty Ltd* [2014] FWCFB 3202, parties are asked to comment on whether clause 9.6(a) is consistent with the NES. We understand that this question has been referred to a separately constituted Full Bench and will defer our submissions in respect of this issue until further orders are made.[7]

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[7] See correspondence from President Ross to Mr Greg Paterson dated 21 March 2016.

13. TELECOMMUNICATIONS SERVICES AWARD

13.1 Clauses 6.3(b) and 15.1: These clauses describe payment of overtime for part-time and full-time and casual employees for any "time worked in excess of" the ordinary hours. In our submission, these clauses should be amended to read that overtime is payable where "an employee is required to work in excess of..." to avoid instances where payment is alleged to be owed by an employee for unauthorised overtime.

13.2 Clause 8.8: This clause describes payment for shifts worked when daylight saving time starts or stops according to "adjusted time (i.e. the time on the clock at the beginning of the shift and the time on the clock at the end of the shift)." This means that when daylight saving begins, one shiftworker might be paid for an hour unearned and when daylight saving ends a different shiftworker might be paid an hour less than what was worked. This is an unfair system for employees and could lead to disputes with employers. The clause should be amended by requiring payment for each hour worked on those two days of the year, with wording to the effect of:

> *"For work performed on a shift that spans the time when daylight saving begins or ends, as prescribed by relevant state legislation, an employee must be paid according to the amount of time actually worked, and not by adjusted time (i.e. the time on the clock at the beginning of the shift and the time on the clock at the end of the shift)."*

13.3 Clause 10.4(m)(ii): In our view, there is a risk that many employers will not be able to determine from the table the correct pay rate of adults in their second, third and fourth year of apprenticeship. The pay rates for those three groups are expressed as alternatives bearing to the national minimum wage or otherwise bearing to the rate of another classification of employee. For simplicity, to ensure employers can adequately assess their liabilities and to ensure workers are paid the right amount, these alternatives should be omitted and replaced with percentages as in the other classifications set out in the table (or better yet, all pay rates should be expressed as dollar figures).

13.4 Clause 10.7(b): Parties are asked whether clause 10.7(b) is still required. This national training wage clause refers to wages paid in respect of the period 1 January 2010 to 22 November 2010. It is likely that sufficient time has elapsed that clause 10.7(b) can safely be removed.

13.5 Clause 11: In response to the query regarding whether persons engaged in the classifications in clause 11.1 can only be engaged under an annual salary arrangement, the Award makes it clear that for the identified classifications at clause 11.1, the provisions listed in clause 11.2 do not apply to those employees. Clause 11.3 then makes it clear as to the obligations that *do* apply in respect of those employees. The Award terms are certain and do not provide any ability to alter the effect of the provisions by individual agreement within the scope of the Award.

13.6 Clause 11: Parties are further asked whether casual employees can be engaged in the classifications in clause 11.1, and if so, whether clauses 11.1 and 11.2 apply. We submit that although it may be unlikely, a casual could potentially be engaged in the classifications in clause 11.1. However, an annualised salary arrangement would seem ill-suited to a casual employee. Notably, clause 11.3 provides an entitlement to annual

leave loading, yet casual employees do not normally have any entitlement to annual leave. This suggests that clause 11 is not designed to apply to casual employees.

13.7 Clause 12.4(g)(ii): This clause requires an employer to reimburse a worker for the cost of accommodation "for up to six weeks" as opposed to the current Award clause 17.1(e)(iv) which says "not exceeding six weeks." If a difference is contemplated by that change, the effect ought to be made clear. If a difference is not contemplated, the current wording should remain.

14. EDUCATIONAL SERVICES (POST-SECONDARY EDUCATION) AWARD

14.1 Clause 10: Parties have been asked to confirm whether there should be rounding rules for annual and weekly rates in this clause of the Exposure Draft noting that they exist in the current award at clause 14.1. We do not oppose the continuation of rounding rules in the Award.

14.2 Clause 15.5 (d): clause 15.5 (a) states the method of calculating time off instead of the payment of overtime is on the basis of "one hour for each hour worked". Nothing in the clause indicates that the payment should be made by another method. Therefore, upon termination, the employee would receive the amount of hours they had accrued paid at their minimum rate of pay, not at an overtime rate.

14.3 Schedule I - Teacher or Tutor/Instructor: Parties are asked to give their views as to whether an employee who does not hold a teaching qualification and is teaching a course or units which are accredited falls within the definition of a teacher or tutor/instructor?

14.4 Firstly, we note that this ambiguity has arisen because the definitions of teacher and tutor/instructor do not cater for this particular situation. Therefore, in the absence of either of the above definitions, we must turn our attention to the definition of category D teacher in clause B .3 .1 (d). A category D teacher is defined as:

> *"any other teacher, including a Vocational Education and Training (VET) tutor who has the qualifications required by the accredited curriculum or training package and who delivers and/or assesses nationally recognised competency based training which may result in a qualification or Statement of Attainment under the Australian Recognition Framework (ARF)."*

14.5 As a minimum, to be considered a teacher for the relevant course the employee would need to meet this definition. If they do not meet this definition in the circumstances, they would have to be considered a tutor/instructor.

15. EDUCATIONAL SERVICES (SCHOOLS) GENERAL STAFF AWARD

15.1 Clause 6.4 (c): The words "at least" should be removed. They do not appear in clause 10.4(d) of the current Award and materially change the effect of the provision.

15.2 Clause 10: We consider that the definitions of shiftwork, which currently appear at clause 25.2 of the current Award, should be inserted back into clause 10 of the Exposure Draft as it deals with ordinary hours for shiftworkers, rather than appearing at clause 15 of the Exposure Draft. Alternatively, there may be merit in having the provision appear at both clauses 10 and clause 15. In our view, it is confusing that a clause titled "Ordinary hours of work - shiftworkers" not actually contain the ordinary hours of work for shiftworkers.

16. GARDENING AND LANDSCAPING SERVICES AWARD

16.1 Clause 6.4 (b): The words "at least" should be removed. They do not appear in the equivalent clause of the current Award and they materially change the effect of the provision.

16.2 Clause 10.2(b): ABI and NSWBC support the deletion of the second part of clause 10.2(b) as we consider rounding to the nearest quarter of a cent is unnecessarily complex.

16.3 Clause 11.4(e)(iii): In response to the query from the Commission, ABI and NSWBC submit that the rate of pay for 'travel time' would be single time rates. This is consistent with the approach taken in other modern awards and no other wording in the current Award suggests any higher entitlement.

16.4 Clause 11.2(a): The leading hand allowance is not expressed as an all purpose allowance in the current Award, and therefore should not be expressed as such in the Exposure Draft.

17. HORTICULTURE AWARD

17.1 Clause 15.1: NSWBC and ABI oppose the addition of the wording at clause 15.1 because such a provision is currently subject to applications by the ACTU and AWU in the casual/part-time Full Bench proceedings (AM2014/196 & AM2014/197), and those claims are opposed by ABI and NSWBC.

18. NURSERY AWARD

18.1 Clauses 9.2(a) and 6.3(a) - Averaging of ordinary hours for full-time employees: The Award contemplates that ordinary hours of work may be an average of 38 hours each week for full-time employees. Clause 9.2(a) of the Exposure Draft of the Nursery Award (which reproduces clause 24.2(a) of the current award) states:

> *"The ordinary hours of work for full-time employees are an **average** of 38 per week but not exceeding 152 hours in 28 days."*

18.2 However, clause 6.3 states that full-time employees can only work 38 hours per week and there is no reference to the averaging in clause 9.2(a). Clause 6.3(a) states:

> *"A full-time employee is an employee who is engaged to work 38 ordinary hours per week."*

18.3 Accordingly ABI and NSWBC submit that this is an error and a contradiction in the Nursery Award which should be resolved in favour of introducing a reference in clause 6.3 of the Exposure Draft which is consistent with the averaging provided for in clause 9.2(a). We propose the following amendment to clause 6.3(a)(the proposed addition is underlined):

> *"A full-time employee is an employee who is engaged to work 38 ordinary hours per week. <u>The ordinary hours of work for full-time employees may be average of 38 per week so long as they do not exceed 152 hours in 28 days</u>".*

18.4 Clause 13.1: Parties are asked whether all of the allowances in this award apply for all purposes. While we acknowledge that the current Award designates the meal allowance and travelling allowance as 'all purpose' allowances at clause 20.1, in our submission those allowances should not be construed as all purpose allowances. It is difficult to

conceive how allowances expressed to apply only in certain circumstances, the quantum of which will in many cases be unknown, could properly be regarded as all purpose allowances. Some of these allowances are more properly characterised as reimbursements.

19. PASTORAL AWARD

19.1 Clause 3.3(a): ABI and NSWBC support clause 3.3(a) as stating "the wine industry, as defined by the Wine Industry Award 2016". That phraseology is consistent with clause 3.3(d), and defining the wine industry in the same way will make clearer the delineation between it and the *Pastoral Award 2016*.

19.2 Clause 10.1: Parties are asked to clarify whether the travelling allowance should be included as an 'all purpose allowance'. While we acknowledge that the current Award designates the travelling allowance as an 'all purpose allowance' at clause 17.4, in our submission the travelling allowance should not and cannot be construed as an all purpose allowance, as it is only paid:

(a) where an employee who is required to travel from one place to another for the purpose of work - for time spent travelling; and

(b) where an employee is required to spend the night away from their usual place of residence - for reimbursement of the cost of suitable accommodation.

19.3 It is difficult to conceive how an allowance expressed to apply only in certain circumstances, the quantum of which will in many cases be unknown, could properly be regarded as an all purpose allowance.

19.4 Clause 23.2: References to 'OH&S procedures' should be changed to 'work health and safety procedures' throughout the Award.

19.5 Clause 24.3: In response to the query at clause 24.3, we agree that the second version of the clause is easier to understand than the version which is included in the current version of the Exposure Draft. ABI and NSWBC support the alternative proposed wording as follows:

> *"If keep is provided then the employer may deduct an amount of **$120.94** per week from the employee's total weekly wages."*

19.6 Clause 25: In response to the query at clause 25, it is clear from the current Award that the allowances in clause 25 only apply to the Broadacre Farming and Livestock Operations stream.

19.7 Clause 26.3: Parties are asked to comment on whether the fractional amounts of the 'appropriate weekly rate' in this clause should be amended to refer to percentages of the 'FL1 ordinary hourly rate' (which is the appropriate classification). We support this change.

20. SUGAR INDUSTRY AWARD

20.1 Clause 3.2(a): In response to the Commission's question requesting that parties confirm the currency of the terms "Cane Protection and Productivity Boards" and "Bureau of Sugar Experiment Stations", ABI and NSWBC understand that these references are

outdated should be replaced with the terms "Local Productivity Services" and "Sugar Research Australia" respectively.

20.2 Clause 3.2(f) and Schedule I: In response to the Commission's question, ABI and NSWBC consider that the terminology in clause 3.2(b)-(e) should be consistent with the definitions in Schedule I. In this regard, it is proposed that the definition of 'sugar industry' at clause 3.2 should be amended to read:

> *"In this award **sugar industry** means work performed in the following:*
>
> *(a) field sector;*
>
> *(b) milling sector;*
>
> *(c) refinery sector;*
>
> *(d) distillery sector; and*
>
> *(e) bulk terminal operations."*

20.3 Alternatively, it is submitted that the detail of clause 3.2(b)-(e) should be reviewed against Schedule I to ensure that the wording adopted is consistent. That is, there should not be two different definitions of the work undertaken in the various sectors of the sugar industry.

20.4 Clause 6.2(e)(ii): In response to the Commission's question about whether a provision that limits the maximum number of hours of a part-time employee to less than 38 hours is permissible, such a provision does not appear to be inconsistent with either section 139 nor section 62(b) of the FW Act. The FW Act does not contain definitions of 'full-time' or 'part-time' employment, but rather this is a matter that is left to modern awards to deal with.

20.5 Clauses 10.2(c) and 25.2(b): in response to the question raised by the Fair Work Ombudsman about the interaction of clause 10.2(c) with clause 25.2(b), ABI and NSWBC submit that the two clauses envisage the payment of different penalties in different circumstances. It is clear from the headings that while clause 10.2(c) concerns ordinary time worked on Saturdays and Sundays, clause 25.2(b) deals with overtime worked on a Sunday. This is clear from the structure and location at which the clause is located within the current Award, the fact that clause 31.1 of the current Award which is headed 'Payment for working overtime', and then reinforced by clause 31.2(a) which refers to 'An employee required to work overtime'.

20.6 To clarify the interaction between the provisions and avoid any ongoing confusion in this regard, ABI and NSWBC support the proposal to amend the words "all work" to "overtime work" in clause 25.2(b), and consider that such an amendment clarifies the current position with respect to entitlements and resolves a clear ambiguity.

20.7 Clause 11.5(c): ABI and NSWBC support a variation to the Award which allows an employer to provide a meal allowance as an alternative to the provision of a meal for the field sector. It seems sensible and largely uncontroversial.

20.8 Clauses 16.1(f)(ii) and 16.1(r): ABI and NSWBC are not opposed to a sensible rounding of these measurements - for example, from 508kg to 510kg in clause 16.1(f)(ii) and from 15.24 and 22.86 metres, to 15.5m and 23m respectively.

20.9 Clause 16.1(t)(iv): ABI and NSWBC submit that the allowances that do not apply when this allowance applies include sub-clauses 16.1(a), 16.1(c), 16.1(d), 16.1(k), 16.1(m), 16.1(aa), 16.1(u), 16.1(v), 16.1(cc), 16.1(dd) and 16.1(ee). ABI and NSWBC reserve its rights to make further submissions in relation to this question should it subsequently identify further allowances which are not payable when this allowance is paid.

20.10 Clause 16.1(v)(iii): the term "in addition to the rates prescribed" refers to the allowance set out in clause 16.1(v)(iv) of $0.66 per hour for the time an employee is engaged in using hot bitumen.

20.11 Clauses 17.3(b) and (c): It is apparent that the hourly rates tables set out at Schedule D.2 do not contemplate the method of payment set out at 17.3 since they are based on a 38 hour week only. While this may be applicable to seasonal employees during the nominal slack season, this does not take reflect the correct pay rate for non-seasonal employees during nominal slack season or the applicable pay rate for all employees during nominal crushing season.

20.12 In the circumstances, ABI and NSWBC submit that if the hourly rates tables at Schedule D2 are to remain in the Award, it is necessary to include additional tables which clarify the applicable hourly rates, where these are calculated by dividing the weekly rate by 36 hours and 40 hours respectively. For clarity, ABI and NSWBC propose that these be separated by headings which indicate when and to whom these rates would apply (e.g. Nominal Slack Season - Seasonal Employees, Nominal Slack Season - Employees Other than Seasonal Employees, Nominal Crushing Season - All Employees).

20.13 Clause 17.4(c): ABI and NSWBC submit that the current drafting of the Exposure Draft is correct and that the clause should read:

> *"An employee absent for part of a day... will incur a proportion of the debit for the day, based upon the proportion of the working day that the employee was* ***not*** *in attendance."*

20.14 Clause 26.9: We are not aware of any express legislative mechanism which would confer a power on the Commission to approve a roster system, except for perhaps consent arbitration under clause 35.3 of the Exposure Draft.

20.15 Clause 35.6: In response to the Commission's question, ABI and NSWBC submit that the standard wording of "safe and appropriate" should be adopted to ensure consistency with other awards. It would be difficult to envisage a situation where work that is "safe and appropriate" would be illegal for an employee to perform.

21. WINE INDUSTRY AWARD

21.1 Clause 3.5(a): The phrase "The Fair Work Act 2009 (Cth)" should be replaced with "the Act" as this is a defined term in Schedule H.

21.2 Clause 8.5(b)(iii): The Exposure Draft asks the parties whether this sub-clause is still relevant. We submit that this sub-clause is no longer relevant given that the period of vintage that the sub-clause refers to would have completed by June 2014, at the latest. In addition, the earlier decision to amend this clause in the award[8] acknowledges that this

[8] [2013] FWC 9683.

transitional provision would be able to be removed as part of this review of modern awards, given that it would have no further work to do.[9]

21.3 Clause 19.3(b)(ii): The word "during" should be removed from the first dot point as the sentence does not make sense with it included.

21.4 Clause 20.9: The Exposure Draft asks parties whether a clause relating to transfer of business needs to be included in the award. This issue was decided in the proceedings relating to "alleged NES inconsistencies". By decision dated 8 May 2015[10], a Full Bench of the Commission decided at paragraphs [30]-[39] that clause 31.9 of the Wine Industry Award would be removed. That decision was then put into effect by a Determination dated 16 October 2015.[11] It follows that clause 20.9 of the Exposure Draft should be removed.

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[9] [2013] FWC 9683 at [37].
[10] [2015] FWCFB 3023.
[11] See PR568686.