Fair Work Commission
Section 156 – Fair Work Act 2009
4 Yearly Review of Modern Awards

(AM2014/250 and others)
Award Stage – Group 4 Awards

(AM2014/264)
Dry Cleaning and Laundry Industry Award 2010

Exposure Draft - Dry Cleaning and Laundry Industry Award 2010
SUBMISSION IN REPLY
Textile, Clothing and Footwear Union of Australia
23 February 2017

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2014 AWARD REVIEW
(AM2014/250 and others)
AWARD STAGE – GROUP 4

(AM2014/264)
DRY CLEANING AND LAUNDRY INDUSTRY AWARD 2010

Exposure Draft - Dry Cleaning and Laundry Industry Award 2010
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1. BACKGROUND

1.1 The Textile, Clothing and Footwear Union of Australia ('TCFUA') files these submissions in accordance with Amended Directions issued on 21 December 2016[1] by the Fair Work Commission ('Commission').

1.2 The Amended Directions provided for interested parties to file submissions in reply on technical and drafting issues related to exposure drafts in Groups Group 4D, E and F (except those awards that are subject to the Plain language exercise).

1.3 On 3 November 2016, the Commission published an Exposure Draft for the Dry Cleaning and Laundry Industry Award 2010 ('DC&LI Award').[2] The preface to the Exposure Draft states:

> *'This exposure draft has been prepared by staff of the Fair Work Commission based on the Dry Cleaning and Laundry Industry Award 2010 (the Laundry award). This exposure draft does not seek to amend any entitlements under the Laundry Award but has been prepared to address some of the structural issues identified in modern awards.*
> *The review of this award in accordance with s.156 of the Fair Work Act 2009 is being dealt with in matter AM2014/264. Additionally a number of common issues are being dealt with by the Commission which may affect this award. Transitional provisions have not been included in this exposure draft pending the outcome of the review.*
> *This draft does <u>not</u> represent the concluded view of the Commission in this matter.'*

1.4 The TCFUA's Reply submissions are directed to providing a response to the Exposure Draft for the DC&LI Award in which the TCFUA has a primary interest.

2. EXPOSURE DRAFT – DC&LI AWARD

2.1 Attached is a table outlining the TCFUA's Reply submissions in relation to submissions previously filed by the AWU, the AFEI and ABI & NSWBC with respect to the Exposure Draft for the DC&LI Award.

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[1] (AM2014/250 and others), Amended Directions (21 December 2016)
[2] Exposure Draft: Dry Cleaning and Laundry Industry Award 2010 [MA000096] (3 November 2016)

2.2 The TCFUA notes that matter (AM2014/264) for the DC&LI Award has been listed for Conference for 2.30pm, Monday, 27 March 2017 before Commissioner Cirkovic. The TCFUA intends to appear at the Conference.

Filed on behalf of:

Textile, Clothing and Footwear Union of Australia
(National Office)

23 February 2017

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
ABI & NSWBC[1]		
Clause 5 Preliminary comments – all awards [para 2.1, submission]	**Cl 5** o A new clause has been inserted into Group 4 Exposure Drafts titled 'Effect of variations made by the FWC': *'A variation to this award does not affect any right, privilege or liability that a person acquired, accrued or incurred under the award as it existed prior to that variation.'* o Submit this clause is more appropriately located as a sub-clause of the 'Title and Commencement' clause rather than a stand- alone clause.	**[Cl 5]** o The TCFUA is not opposed to submission of the ABI&NSWBC.
Clause 1 (Title and Commencement) Preliminary comments – all awards [para 2.1, sub]	**Cl 1.2** o Refers to ABI's Submission (15/4/2016) re: Group 3 awards o The words 'as varied' should be removed from sub-clause 1.2 of the Exposure Drafts	**[Cl 1.2]** o The TCFUA does not support the submission of ABI & NSWBC. o Whilst it understands the issue raised, the deletion of the words 'as varied' from clause 1.2, would potentially create a further anomaly in context of the current formulation of clause 1.1 of the ED, which states *'This award is the Dry Cleaning and Laundry Award 2016'.* i.e. that award did not commence operation on 1 January 2010, but the *DC&LI Award 2010* did.
Clause 24 (Shiftwork) [Para 11.1, sub]	**Cl 24.8** o In response to FWC question at clause 24.8, we consider that the clause can be removed as it is unlikely to serve an ongoing purpose. o Cl 24.8 provides:	**[Cl 24.8]** o The TCFUA opposes the submission of ABI & NSWBC. o The TCFUA addressed this issue in its previous submission (18 January 2017, at page 5). o Clause 24.8 should remain as it still potentially has work to do. In relation to a possible claim on an employee to

[1] ABI & NSWBC – Outline of Submissions (Group 4D-F Exposure Drafts), (18 January 2017)

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
	'The variation to clause 24.1(a) made by Fair Work Australia on 28 September 2012 but with effect from 1 January 2010, does not take effect so as to require any employee engaged on a morning shift to repay any component of the wages pertaining to the morning shift loading, paid in respect of the period 1 January 2010 to 28 September 2012 in an enterprise covered by this award except where such variation is introduced in accordance with the provisions of clause 16 – Rostering arrangements.	repay any component of wages relating to the morning shift loading, the period back to 28 September 2012 remains relevant for the purposes of the statute of limitations (6 years) which runs to 28 September 2018.
AUSTRALIAN FEDERATION OF EMPLOYER & INDUSTRIES (AFEI)[2]		
Clause 4 (Coverage) & Clause 2 (Definitions) [para 46, submission]	**Cl 4.2 and Cl 2** o The 'dry cleaning and laundry industry' is defined in both Clause 4.2 and Clause 2. This duplication is unnecessary and serves to make the Award a lengthier document. The definition at Clause 4.2 is not required.	**[Cl 4.2 and Cl 2]** o The AWU raises the same issue in their submissions[3] stating that it is not necessary to repeat the definition of the 'dry cleaning and laundry industry' in the definitions clause given it already appears in clause 4.2 o The TCFUA submits, that on balance, it is preferable to locate the definition of 'dry cleaning and laundry industry' in the definitions clause and delete the repeated definition in clause 4.2.
Clause 14 (Ordinary hours of work – laundry workplaces) [para 48, submission]	**Cl 14.4 – Ordinary hours of work – laundry workplaces** o Clause 14.4 of the ED ought to be amended to include the word 'average' in front of the phrase 'weekly wage'. This would reflect the wording and intention of the current award which specifically refers to '*the average weekly wage rate for the employee's classification*'.	**Cl 14.4 – Ordinary hours of work – laundry workplaces** o The TCFUA opposes the AFEI submission as it misconstrues the principal purpose of clause 14.4 of the ED (and clause 21.2(c) of the current award) o Clause 14.4 of the ED provides: *'Where such a roster system of averaging the hours applies, the weekly wage rate for ordinary hours of work*

[2] AFEI Submission; Submissions pursuant to Amended Directions of the FWC on 21 December 2016 concerning Group 4 Exposure Draft awards: AM2014/256, etc (18 January 2017)
[3] AWU Submission (20 January 2017) at para [3]

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
		applicable to the employee will be the weekly wage rate for the employee's classification as set out in clause 18-Minimum wages of this award, even though more or less than 38 hours are worked each week.' o Clause 14.4 of the ED is in relevantly identical terms to the current award clause 21.2(c), other than the inclusion of the word '*average'* before the words '*wage rate for the employee's classification as set out in clause 14-Minimum wages of this award'* o The wage rates contained at clause 14 of the award are characterised as 'Minimum Wages' not average wage rates as suggested by AFEI. The deletion of the word 'average' in the ED addresses an error in the current award. The express purpose of clause 14.4 of the ED (and clause 21.2(c) of the current award) is to ensure that an employee receives the *actual* minimum weekly wage rates, 'even though more or less than 38 hours are worked each week' i.e. the averaging is about the hours not the weekly wages. o
Clause 18 (Minimum wages) 18.2 & 18.3 Wages of junior employees [para 47, submission]	**Cl 18.2 & 18.3 – Wages of junior employees** o AFEI notes that the ED contains a clause 18.1 which has varied clause 14.1 of the current award to include in the table of minimum wages *hourly rates* of pay in addition to the current award weekly rates of pay. o Clause 18.2 and 18.3 of the ED, however, only provide juniors with payments of minimum wages equivalent to percentages of the *weekly* rate. For the purposes of clarification and consistency with the current award, Clauses 18.2 and 18.3 of the ED ought to be amended to provide payments for junior employees based on the *'minimum adult rate.'*	**Cl 18.2 & 18.3 – Wages of junior employees** o The TCFUA opposes the submission of the AFEI as it may alter the legal effect of the current award provision.

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
AUSTRALIAN WORKERS UNION[4]		
Clause 2 (Definitions) [para 3, submission]	**Clause 2 – Definitions** o It is not necessary to repeat the definition of the "dry cleaning and laundry industry" in the definitions clause given it already appears in clause 4.2.	**Clause 2 – Definitions** o Issue also raised by AFEI (above) o The TCFUA submits, that on balance, it is preferable to locate the definition of 'dry cleaning and laundry industry' in clause 2 (Definitions) and delete the repeated definition in clause 4.2.
Clause 11 (Casual employment) [paras 4-5, submission]	**Clause 11.4 – Casual employment** o Clause 10.5(c) of the DC&LI Award states that the 25% casual loading is paid "for all hours worked". Clause 11.4 of the ED states that the 25% casual loading is paid for "all ordinary hours worked" (our emphasis) o The addition of the word "ordinary" arguably removes the entitlement for a casual employee to receive their 25% loading when they work overtime hours. As a result it is a substantive change. The word "ordinary" should be deleted.	**Clause 11.4 – Casual employment** o The TCFUA agrees with the AWU's submission, including that the word 'ordinary' be deleted in clause 11.4 of the ED. o The TCFUA raised this issue in its previous submission (18 January 2017, at page 3).[5] o The current formulation in clause 11.4 of the ED is a substantive change affecting the legal effect of the current award provision.
Clause 13 (Ordinary hours of work – dry cleaning workplaces) [paras 6-8, submission]	**Clause 13.1 – Ordinary hours of work: dry cleaning workplaces** o The words "will average 38 hours per week" should be replaced with "will be 38 hours per week". There is no capacity currently for the averaging of ordinary hours in the dry cleaning stream. Clause 9.1 of the ED does not allow an averaging of the 38 hours for a full-time employee, clause 10.1(a) of the ED does not allow an averaging of part-time ordinary hours and clause 11.7 of the ED does not allow an averaging of casual ordinary hours.	**Clause 13.1 – Ordinary hours of work: laundry workplaces** o The TCFUA agrees with the AWU's submission. o Whilst clause 13 of the ED purports to include a term providing for the averaging of hours ('will average 38 hours per week') in dry cleaning workplaces, there is no actual, substantive averaging provisions which clarify how averaging would work. o This is in contrast to clause 14 of the ED which details averaging (and RDO) arrangements in the laundry

[4] (AM2014/264) – AWU submissions on the Exposure Draft for the *Dry Cleaning and Laundry Industry Award 2010* (20 January 2017)
[5] (AM2014/264) TCFUA submission – Exposure Draft for the *Dry Cleaning and Laundry Industry Award 2010* (18 January 2017). Note: In the TCFUA's submission, the TCFUA erroneously referred to the deletion of the word 'all' in clause 11.4 of the ED which is not the case. In fact, the issue of concern was the addition of the word 'ordinary' in clause 11.4 of the ED which currently does not appear in clause 10.5(c) of the DC&LI Award.

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
	o It appears these general terms have been modified in the laundry stream because a 4 week roster period is specifically contemplated by clause 14.2(c) for day workers and clause 15.1 for shift workers. No corresponding averaging provisions appear for the dry cleaning stream. o The current reference to an "average" of 38 hours in clause 13.1 without any reference to an averaging period arguably does not satisfy the requirement in section 147 of the *Fair Work Act 2009* for an award to specify, or provide for the determination of, ordinary hours of work. The actual ordinary hours of work cannot be properly determined if no averaging period is specified because an average cannot be determined mathematically without the identification of the averaging period.	stream, and similarly in clause 15 dealing with shiftworkers in laundry workplaces. o The AWU's reference to s.147 of the FW Act is relevant, as is the intersection with the NES i.e. s 62 (maximum weekly number of hours) and s.63 (Modern awards and enterprise agreements may provide for averaging of hours of work).
Clause 14 (Ordinary hours of work – laundry workplaces) [para 9, submission]	**Clause 14.9 – Ordinary hours of work: laundry workplaces** o It is unclear why a cap of 12 RDO's is imposed for a 12 month period when the accrual of one day in each 4 week cycle should lead to 13 RDO's accruing for the year.	**Clause 14.9 – Ordinary hours of work: laundry workplaces** o The TCFUA agrees that ordinarily 13 RDO's would accrue over a 52 week period, based on 1 RDO accruing for every 4 weeks of work.
Clause 18.4 (Wages of apprentices) [para 10, submission]	**Clause 18.4 – Wages of apprentices** o The words "or the rate prescribed by clause 18.4(b) for the relevant year of the apprenticeship, whichever is the greater" can be deleted given the first year apprenticeship rate of 50% or 55% of the Level 5 dry cleaning rate will never be above the 80% of the Level 5 dry cleaning rate.	**Clause 18.4 – Wages of apprentices** o The AWU has identified that the words *"or the rate prescribed by clause 18.4(b) for the relevant year of the apprenticeship, whichever is the greater"* may have little practical work to do in context of clause 14.8(b) overall. o The TCFUA notes however, that the current clause 14.4(d) of the DC&LI Award was inserted as a result of the Apprentices Full Bench decision [2013] FWCFB 5411

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
		in the 2012 Transitional Review in response to the ACTU/Unions' apprentices claim.[6] o The reasoning underpinning the formulation of the common apprentice clause subsequently inserted into multiple awards can be gleaned from the Full Bench decision referred to above. o At paragraph [258] of that decision, the Full Bench noted that *'a number of awards provide for the first year adult apprentice to be paid between 80% and 90% of the base trade rate'* and provided examples of such awards. It went on to hold at [259]: *'We have decided with respect to the applications before us that the appropriate minimum rate for an adult apprentice, who is not an existing employee at an enterprise, in the first year or stage of the apprenticeship, should be 80% of the C10 or base trade rate unless an award already provides for a higher rate…'*
Part 5 – Heading [para 11, submission]	**Part 5 (heading) – Overtime and Penalties Rates** o The reference to "Overtime and Penalties Rates" should be "Overtime and Penalty Rates"	**Part 5 (heading) – Overtime and Penalties Rates** o The TCFUA agrees with the AWU's submission.
Clause 22.3	**Clause 22.3 – Time off instead of payment for overtime**	**Clause 22.3 – Time off instead of payment for overtime**

[6] Modern Award Review 2012 – Apprentices, Trainees and Juniors (AM2012/135) [2013] FWCFB 5411
https://www.fwc.gov.au/documents/decisionssigned/html/2013fwcfb5411.htm#P1240_197408

See also the Determination for the Dry Cleaning and Laundry Industry Award 2010
https://www.fwc.gov.au/documents/awardsandorders/html/pr544174.htm#P26_621

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
(Time off instead of payment for overtime) [para 12, submission]	o The ED needs to be updated to include the new TOIL term inserted into the Award on 14 December 2016.	o The TCFUA agrees with the AWU's submission. o The TCFUA also raised this issue in its 18 January 2017 submission (at page 5).[7]
Clause 22.4 (Rest period after overtime) [paras 13-14, submission]	**Clause 22.4 – Rest period after overtime** o The following wording may be clearer: *'An employee who works so much overtime after finishing their ordinary hours on a day or shift that they will not have at least 10 consecutive hours of duty before commencing ordinary hours on their next day or shift will, subject to this clause, be released after completion of the overtime until the employee has had 10 consecutive hours of duty without loss of pay for ordinary working time occurring during such absence.'* o The changes allow the provision to apply equally to day work and shift work and clarifies the 10 hour break is between the completion of overtime and the commencement of ordinary hours	**Clause 22.4 – Rest period after overtime** o The TCFUA does not support the AWU's proposed amendment to clause 22.4 of the ED. o The TCFUA notes that clause 22.4 of the ED is in a different formulation than the current clause 22.3 of the DC&LI Award, however, the legal meaning of the clause is not altered. o The TCFUA considers that the form of both clause 22.3 of the DC&LI Award and clause 22.4 of the ED are sufficiently clear. o The TCFUA is concerned that the AWU's proposed amendment to clause 22.4 of the ED may have the unintended effect of changing the legal effect of the substantive term, by narrowing its application.
Clause 22.5 (Recall to work overtime) [paras 15-16, submission]	**Clause 22.5 – Recall to work overtime** o This should be amended to read: *'An employee recalled ~~from home~~ to work after having left the premises of the employer will be paid **at the applicable overtime rate** for all time worked, with a minimum payment of four hours.'* o The operative factor for the clause should be the employee leaving the worksite and then having to return to work. The reference to "at home" could negate the entitlement for an employee who didn't actually return home after completing work. The employee may have attended a sick family member	**Clause 22.5 – Recall to work overtime** o The TCFUA in principle, supports the AWU's proposed amendments to clause 22.5 for the reasons outlined in the AWU's submission. o Given that clause 22.5 is a term about 'recall to work overtime' the reference to 'the applicable overtime rate' is an important point of clarification for readers of the award.

[7] TCFUA submission – Exposure Draft for the *Dry Cleaning and Laundry Industry Award 2010* (18 January 2017) at page 5

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
	in hospital or may have to travel a significant distance to get home. Employees in these circumstances should still receive the recall entitlement.	
Clause 23 (Weekend and public holiday work) [paras 17-19, submission]	**Clause 23.1 – Saturday work** o There is the potential under the ED for an employee to suffer a reduction in pay when they perform ordinary hours on a Saturday. This is because clause 23.1(a) provides a rate of 125% for all ordinary time worked before midday on Saturday. This presumably includes work from 12:00am on Saturday morning. o However, an employee may be receiving a 130% loading under clause 24.4 for working a permanent night shift or 150% or 200% for working non-successive shifts under clause 24.5 or 24.6. It is unjust for an employee in these circumstances to have their rate reduced to 125% and that is unlikely to have been the intent. o An approach to resolving this issue would be inserting the following words at the end of clause 23.1(b) of the ED: *'However, an employee who is receiving a higher penalty rate under clause 24 will continue to receive that higher rate.'*	**Clause 23.1 – Saturday work** o The TCFUA agrees with the AWU's submission and supports the proposed amendment to clause 23.1 of the ED. The proposed amendment would be consistent with how the provision is understood and works in practice.
Clause 23 (Weekend and public holiday work) [para 20, submission]	**Clause 23.4 – Time off instead of payment of work on a Saturday, Sunday or public holiday** o An additional provision should be inserted to guarantee payment on termination to an employee if the time off has not been taken. The wording used for the TOIL term in clause 22.2(h) of the Award appears suitable.	**Clause 23.4 – Time off instead of payment of work on a Saturday, Sunday or public holiday** o The TCFUA agrees, in principle, with the AWU's submission. o The TCFUA notes however, that clause 22.2(h) of the DC&LI Award is a term about 'Time off instead of payment for <u>overtime</u>' (our emphasis), whereas, clause 23.4 of the ED relates to time (ordinary or overtime) worked on a Saturday, Sunday or public holiday. Therefore if a term was to be included as proposed by the AWU (i.e. in similar form to the current clause 22.2(h)

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
		of the DC&LI award, it would need to be modified to reflect the above.
Clause 24.1 (Shiftwork – Definitions) Clause 24.1(b) [paras 21-22, submission]	**Clause 24.1 – Shiftwork – Definitions** **(24.1(b) Morning shift – laundry)** o In relation to the morning shift for laundry workers, the prescribing of only a commencing time trigger but not a finishing time trigger is unusual in awards and could create an uncertainty. For example, a shift commencing at 6pm the previous evening is arguably a shift which commences before 6:00am but this would not ordinarily be considered a morning shift. o Options to resolve this issue could include inserting either a span for the commencing time of the shift (e.g. 4am to 6am) or reference to the shift finishing after a particular time (e.g. midday) as per the dry cleaning definition.	**Clause 24.1 – Shiftwork – Definitions** o The TCFUA is considering its position regarding the submission of the AWU and will provide further detail at the Conference listed in this matter (27/3/2017)
Clause 24.8 [para 23, submission]	**Clause 24.8 – Question from FWC** o In response to the question posed by the Commission, the answer is no. Clause 24.8 still has work to do in terms of protecting employees from overpayment claims. The statutory limitation period for claims arising in 2012 has not passed.	**Clause 24.8 – Question from FWC** o The TCFUA agrees with the AWU's submission. o The TCFUA also addressed this issue in its previous submission (18 January 2017 at pp 5-6).[8] o Clause 24.8 should remain as it still potentially has work to do. In relation to a possible claim on an employee to repay any component of wages relating to the morning shift loading, the period back to 28 September 2012 remains relevant for the purposes of the statute of limitations (6 years) which runs to 28 September 2018. o TCFUA maintains its position as outlined in its previous submission (18/01/17)
Clause 36	**Clause 36 – Employee leaving during redundancy period**	**Clause 36 – Employee leaving during redundancy period**

[8] TCFUA submission – Exposure Draft for the *Dry Cleaning and Laundry Industry Award 2010* (18 January 2017) at pp 5-6

Exposure Draft clause & para no of submission	Submission/Issue identified	TCFUA Response to other parties submissions
(Employee leaving during redundancy period) [para 24, submission]	o The reference to "benefits and payments they would have received under clause 34 – Redundancy" should be amended to "benefits and payments they would have received under clause 34, 35 and 37".	o The TCFUA agrees with the AWU's submission and its proposed amendment. o The TCFUA raised this issue in some detail in its previous submission (18 January 2017 at pp 6-7).[9] o In substance, clause 36 of the ED would have the effect of limiting the entitlement to redundancy pay only, whereas the current clause 12.3 of the Award includes redundancy pay, transfer to lower paid duties, employee leaving during notice period and job search entitlement. o The ED formulation in clause 36 is a substantive change to the Award.
Schedules C.2.1 and C.3.2 [para 25, submission]	**Schedules C.2.1 and C.3.2** **C.2.1 (Full-time and part-time employees other than shiftworkers – ordinary and penalty rates)** **C.3.2 (Casual employees other than shiftworkers – ordinary and penalty rates – Laundry employees)** o The columns for day work ordinary hours worked on a Saturday can be deleted. Day workers in the laundry stream cannot work ordinary hours on the weekend under clause 14. The different Saturday ordinary time rates in clause 23 would only apply to shift workers in the laundry stream.	**Schedule C.2.1 and C.3.2** **C.2.1 (Full-time and part-time employees other than shiftworkers – ordinary and penalty rates)** **C.3.2 (Casual employees other than shiftworkers – ordinary and penalty rates – Laundry employees)** o The TCFUA agrees with the AWU submission. o Clause 21.2 of the DC&LI Award provides that ordinary hours of work can only be worked Monday to Friday.

[9] TCFUA submission – Exposure Draft for the *Dry Cleaning and Laundry Industry Award 2010* (18 January 2017) at pp 6-7