



Fair Work Commission: 4 yearly review of modern awards

SUBMISSIONS: TRANCHE 2 EXPOSURE DRAFTS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

27 NOVEMBER 2019

BACKGROUND

1. In a Decision¹ issued on 2 September 2019 (**Decision**) the Commission provided an updated overview of the status of the award stage of the 4 yearly review of modern awards and a timeline for the finalisation of exposure drafts.
2. This process involves the release and review of updated exposure drafts in three tranches. The second tranche of updated exposure drafts (**Tranche 2**) was released on 14 October 2019. Draft determinations giving effect to the updated exposure drafts were released concurrently.
3. The Commission directed interested parties to file written submissions on the content of the updated Tranche 2 exposure drafts by 27 November 2019
4. The Commission also directed parties to comment on the provisional view that:

“the variation of the modern awards in tranche 2 in accordance with the draft variation determinations ... is, in respect of each of these awards, necessary to achieve the modern awards objective”.
5. These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009*.
6. ABI and NSWBC have a material interest in the following Tranche 2 awards:
 - (a) Asphalt Award
 - (b) Cleaning Services Award
 - (c) Concrete Products Award
 - (d) Manufacturing Award
 - (e) Meat Award
 - (f) Pharmaceutical Award
 - (g) Poultry Award
 - (h) Vehicle Manufacturing, Repair Services and Retail Award
 - (i) Passenger Vehicle Transportation Award
 - (j) Road Transport (LDO) Award
 - (k) Road Transport and Distribution Award
 - (l) Storage Services Award
 - (m) Waste Management Award
 - (n) Clerks Private Sector Award
 - (o) Commercial Sales Award
 - (p) Contract Call Centres Award

¹ [2019] FWCFB 6077

- (q) Educational Services (Post-Secondary Education) Award
- (r) Educational Services (Schools) General staff Award
- (s) Labour Market Assistance Industry Award
- (t) Pastoral Award
- (u) Aboriginal Community Controlled Health Services Award
- (v) Dry Cleaning and Laundry Industry Award
- (w) Hospitality Industry (General) Award; and
- (x) Restaurant Industry Award 2010

COMMON ISSUES

Overtime for Casuals

7. Multiple exposure drafts contain tables setting out overtime rates of pay for casual employees, some of these which are currently in dispute before the Commission in matter AM2017/51.
8. We submit that, consistent with the approach taken with the first tranche of exposure drafts, these tables are not published until a decision has been handed down by the relevant Full Bench.

Expression of Numbers

9. One of the recent amendments to the exposure drafts replaced numbers that had been expressed in words with the relevant numeral.
10. This reflects the recommendations in paragraph 8.8 of the guidelines for plain language drafting of modern awards.
11. It appears that the “*Voluntary employee contributions*” clause in many of the exposure drafts has been overlooked.
12. For consistency, the terms “*three month’s written notice*” should be expressed as “*3 month’s written notice*”.

Coverage for Group Training Organisations

13. Many of the exposure drafts contain coverage clauses relating to group training organisations.
14. Consequential changes made to these clauses have drawn our attention to a potential anomaly.
15. For example, the exposure draft for the *Pharmaceutical Industry Award* now reads:

*“This award covers employers which provide group training services for trainees engaged in the pharmaceutical industry **and/or parts of that industry**”* (emphasis added).
16. It is unclear what is meant by “*and/or parts of that industry*”. Any trainee engaged in a *part of* the pharmaceutical industry, must also, by definition, be engaged in the pharmaceutical industry as a whole.

17. The use of the words “and/or”, suggest that an employee may be engaged in a part of the pharmaceutical industry, but not the pharmaceutical industry.
18. The words “and/or parts of that industry” do not appear in clause 4.1 (general coverage) or clause 4.4 (on-hire coverage).
19. Similar clauses apply to other exposure drafts.
20. We question whether different coverage provisions should apply to group training organisations that do not apply to other employers.
21. We also note that the use of “and/or” is also inconsistent with paragraph 5.10 of the guidelines for plain language drafting of modern awards.

PHARMACEUTICAL INDUSTRY AWARD

Clause 21.5 - Annual close down

22. There is a formatting discrepancy with this amended subclause.
23. The entirety of subclause 21.5 is indented into a single paragraph identified as 21.5(a). There are no further paragraphs in the subclause (i.e. there is no paragraph 21.5(b) or above).
24. Paragraph 21.5(a) is then further divided into subparagraphs 21.5(a)(i) to (v).
25. This is inconsistent with the ordinary modern award formatting.

CLERKS - PRIVATE SECTOR AWARD

Clause 1.3 - Title and commencement

26. Clause 1.3 currently states:

“A variation to this award made by the Fair Work Commission does not affect any right, privilege, obligation or liability acquired, accrued or incurred under this award.”
27. The words “as it existed prior to that variation.” should be appended for clarity and consistency with other awards.

EDUCATIONAL SERVICES (SCHOOLS) GENERAL STAFF AWARD

Clause C.2 - Expense-related allowances

28. The uniform/protective clothing allowance and laundry allowances payable under clause 19.3 (c) are subject to a weekly maximum of \$6.00 and \$1.50 respectively.
29. The summary table in clause C.2 describes the weekly cap for the uniform/protective clothing allowance as

“Uniform/protective clothing allowance—paid with laundry allowance—Maximum per week—an amount of up to [\$6.00 per week].”
30. Similarly, the laundry allowance (when paid in addition to the uniform/protective clothing allowance) is described as:

“Laundry allowance—additional to uniform/ protective clothing allowance—Maximum per week—an amount of up to [\$1.50 per week].”

31. The allowance cap can accurately be expressed as either:
- (a) a “*maximum per week*” or
 - (b) “*an amount of up to*”,
- but it cannot be both.
32. The words “an amount of up to” should be removed.
33. The summary table in clause C.2 describes the daily laundry allowance (where the uniform cost is reimbursed by the employer) as:
- “\Laundry allowance—where uniform cost reimbursed by employer—Per day—an amount of up to”*
34. The backslash at the start of the description is a typographical error and should be removed.
35. The words “*an amount of up to*” are also erroneous as the allowance is fixed at \$0.30 per day. These words should be removed.
36. It appears that these words were intended to be added to the below field in the table which is:
- “Laundry allowance—where uniform cost reimbursed by employer—Maximum per week”*
37. In accordance with our submissions at paragraphs 28 to 32, the words should not be included in this field either.

ROAD TRANSPORT (LDO) AWARD

Clause 4.2

38. The introductory wording in clause 4.2 is unusual. Clause 4.2 is effectively a new clause which does not appear in the current Award, and appears to serve the purpose of containing the definitions that are relevant to the coverage of the Award.
39. We do not have any difficulty with the definitions at clauses 4.2 (a), (b), and (c). However, the introductory wording of clause 4.2 (which states “In this award, the following applies to the private transport industry engaged in long distances operations...”) is curious. The definitions apply to the Award generally rather than applying to the “private transport industry engaged in long distance operations”. A clearer expression would be for clause 4.2 to simply state “In this award:” and then set out the relevant definitions as they currently appear in the Exposure Draft.

HOSPITALITY INDUSTRY (GENERAL) AWARD

Clause 29.3

40. We consider that the last sentence of clause 29.3(a) is not as clear as it could be, and should be re-drafted to more clearly articulate how the applicable penalty rate is to be determined.
41. We propose that the entirety of clause 29.3 be re-drafted as follows:
- (a) *Clause 29.3 applies where more than one penalty rate would be payable for hours worked at a particular time.*

- (b) *Subject to clause 29.3(c), where more than one penalty rate would be payable for hours worked at a particular time, the employer must pay the employee the highest applicable penalty rate, but no other applicable penalty rate is payable.*
- (c) *However, any penalty payable under clause 16—Breaks is payable in addition to the penalty rate payable in accordance with clause 29.3(b).*

MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD

Clause 4.4

42. The phrasing *'This award covers any employer which supplies labour on an on-hire basis in the manufacturing and associated industries and occupations industry (or industries)'* is unclear.
43. We suggest deletion of the words *'and occupations industry (or industries)'* such that the amended clause would read

'This award covers any employer which supplies labour on an on-hire basis in the manufacturing and associated industries'

Table C.3.2 (a)

44. The explanation of what the '100%' casual rate in this table is unclear.
45. Specifically, the text stating that the Casual rates are 'based on' 25% casual loading is not clear. We would suggest varying these words to provide that Casual rates are inclusive of 25% casual loading. This would decrease the likelihood that a reader of the award may interpret this table as requiring an additional 25% casual loading to be applied to the '100%' rate.

PASTORAL AWARD

Table at Clause 7.2

46. The second column in the clause 50.9(d)(iv)) row includes both 'rates' and 'wages'.

Clause 49.4(b)

47. The reference to '5 thousand' should be replaced with '5000'.

ASPHALT INDUSTRY AWARD

Example Box on page 17

48. This example includes the numbers '7 ½' and '8 ½'. These should be amended to '7.5' and '8.5'

Table at B.2.1

49. In the second row of this table, the number '5 and a half' appears - this should be amended to '5.5'.

LABOUR MARKET ASSISTANCE INDUSTRY AWARD

Clause 21.6(a)

50. There is a space missing between '4' and 'hours'

Schedule D.10.1

51. There is a space missing between '4' and 'hours'

MEAT INDUSTRY AWARD

Clause 10.1(b)

52. In clause 10.1(b), "predicable" should read as "predictable".

Schedule B.5

53. In Schedule B.5.1 and B.5.3, we support the inclusion of new columns into the tables for non-successive shifts, which refers the reader back to clause 23.3(d) (and 23.3(e) (for casuals) . If this step is undertaken, then the words "*including non-successive shifts*" can be removed from the heading in Schedule B.5.2.

VEHICLE, MANUFACTURING, REPAIR SERVICES AND RETAIL AWARD

Schedules

54. We support the changes made to the wage tables at Schedule B3.4(a) and B3.6(a).

55. We support the changes made to the wage tables at Schedule B7.1 and B7.2 with respect to the casual Sunday penalty rate.

OTHER INDIVIDUAL EXPOSURE DRAFTS

56. Our clients have reviewed each of the remaining updated exposure drafts in which they have an interest and have no comments to make in relation to any of the amendments.

57. It appears to ABI and NSWBC that the amendments made to the exposure drafts have been made to either:

- (a) implement a decision of the Fair Work Commission (determined on the basis that it was required to meet the modern awards objective); or
- (b) correct a minor technical or drafting error.

58. Accordingly, our clients agree with the Commission's provisional view that the variation of the modern awards (set out in paragraph 6 above) in accordance with the draft variation determinations is necessary to achieve the modern awards objective.

Filed on behalf of Australian Business Industrial and the NSW Business Chamber Ltd

27 November 2019