
Fair Work Commission: 4 Yearly Review of Modern Awards

**SUBMISSIONS ON EXPOSURE DRAFTS:
GROUP 2C & 2D AWARDS**

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

BACKGROUND

1. These submissions relate to exposure drafts of proposed modern awards released on 18 December 2014 in Group 2, sub-groups 2C and 2D, of the 4 Yearly Review.
2. In accordance with its Statement of 8 December 2014, the Commission directed parties to make any written submissions regarding both the technical aspects of the exposure drafts and the substantive variations parties wish to pursue by no later than no later than 4 February 2015.¹
3. These submissions are made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
4. ABI is a registered organisation under the Fair Work (Registered Organisations) Act 2009. ABI has some 3,900 members.
5. NSWBC is a recognised State registered association pursuant to Schedule 2 of the Fair Work (Registered Organisation) Act 2009 and has some 17,000 members.
6. ABI and NSWBC appreciate the opportunity to make the following submissions in relation to the Exposure Drafts.
7. ABI and NSWBC have a material interest in the following 2C and 2D awards:
 - (a) Passenger Vehicle Transportation Award;
 - (b) Road Transport (Long Distance Operations) Award
 - (c) Road Transport and Distribution Award; and
 - (d) Waste Management Award.

GENERAL MATTERS

8. We have previously made submissions on a range of general drafting and technical issues common to multiple Exposure Drafts.² For example, we have previously made submissions on:
 - (a) The issue of supersession of Awards versus variation;
 - (b) The proposed architecture of the Exposure Drafts;
 - (c) The use of notes and examples in Awards;
 - (d) The inclusion of the 'payslip' provision;
 - (e) The inclusion of an index of Facilitative Provisions and the proposed wording of the proposed model clause;
 - (f) The inclusion of descriptions of the operation of National Employment Standards;
 - (g) The inclusion of new terms and conditions not sought by any party; and
 - (h) The use of the terms 'employed' and 'engaged'.

¹ [2014] FWC 8837.

² See, for example, submissions of ABI and NSWBC filed on 29 September 2014 relating to Group 1A and 1B Exposure Drafts.

9. The above general issues were considered by a Full Bench of the Commission in relation to the Group 1A and 1B Awards, and on 23 December 2014 the Commission handed down its decision in relation to those issues.³
10. We note that the Group 2 Exposure Drafts were released prior to the Full Bench decision of 23 December 2014.
11. Although not entirely clear, we have assumed that the Commission will take a consistent approach across all of the Awards, and that the Commission's decision in relation to these general drafting and technical issues common to multiple 1A and 1B Exposure Drafts will be followed when developing the Exposure Drafts for Group 2, 3 and 4 Awards.
12. Therefore, we do not propose to make submissions in relation to the abovementioned general drafting and technical issues.

SPECIFIC SUBMISSIONS ON EXPOSURE DRAFTS

Passenger Vehicle Transportation Award

13. Clause 3.5(a): The phrase "The Fair Work Act 2009 (the Act)" should be replaced with "the Act" as this is defined in Schedule G.
14. Clause 5.2: Whilst the current Award does not contain a clause dealing with facilitative provisions, we note the decision of the Full Bench of 23 December 2014 in which the Commission held that it sees "merit in inserting an index to facilitative provisions".⁴ In our submission, the table at clause 5.2 should more accurately describe the following facilitative provisions:
 - (a) In respect of clause 6.4(c), the table should state "Part-time employment - variation to hours" rather than "additional hours"; and
 - (b) In respect of clause 8.1(c)(i), the table should refer to "accumulation of rostered days off" rather than just a generic reference to "hours of work".
15. Clause 10.2: We note that the way in which the ages are expressed in the table has been altered. This may lead to confusion. For example, there is a risk that the phrase "18 years and under" might be misinterpreted. In our view the current phrase "Under 19" is clearer. Consideration should be given to whether the existing Award terminology should be retained to avoid any confusion within the industry.
16. Clause 13.2: It appears that clause 23.6(b) of the existing Award has been left out of the Exposure Draft. We submit that it should be retained in the Exposure Draft following the table at clause 13.2.

Road Transport (Long Distance Operations) Award

17. Clause 8.5(a): The reference to sick leave should be updated to "personal/carer's leave" to reflect the current terminology.
18. Clause 8.5(b): The word "maybe" should be replaced with the phrase "may be".

³ [2014] FWCFB 9412.

⁴ Ibid, [43].

19. Clause 8.5(e): In response to the question posed by the Commission, the current clause 20.5(d) provides that “employees must be paid for RDOs at the rate prescribed by clause 13.1”. Clause 13.1 of the existing Award then sets out the relevant minimum weekly rates of pay. Whilst it is correct that the clause only sets out weekly rates, it is clearly the intention that employees be paid at the rate of 20% of the minimum weekly rate. Those rates at clause 13.1 do not include the industry allowance. The industry allowance only applies when an employee is engaged in a long distance operation pursuant to clause 13.3 - in which case the employee must be paid the “minimum driving rate” as set out in either clause 13.4 or 13.5. Accordingly, it may simply be easier to refer to clause 8.5(c) rather than clause 11.1.
20. Clause 11.1 Inserting a Daily Rate: In response to the question posed by the Commission, we consider the inclusion of a ‘minimum daily rate’ calculated on the basis of 20% of the minimum weekly rate to be useful. We also support the suggestion of making consequential changes by using the phrase ‘applicable minimum daily rate’ where appropriate.
21. Clause 11.5(b): In response to the question posed by the Commission, the number ‘40’ must not be replaced with ‘38’ as it would substantially alter the entitlements provided for in the Award. The change would have the effect of increasing the rates of pay for drivers whose pay is calculated by the hourly method. Such a change would be substantive in nature and accordingly would require a merit based argument to be advanced, accompanied by probative evidence.
22. Clause 11.6(c): In response to the question posed by the Commission, the number ‘40’ must not be replaced with ‘38’ as it would substantially alter the entitlements provided for in the Award. We refer to our submissions at paragraph 21.
23. Clause 12.2(b) Overtime allowance: The words “minimum hourly driving rates” should be deleted from the Exposure Draft provision. The current Award provision (14.1(b)) only states that the rates per kilometre are inclusive of this allowance.
24. Clause 12.3(d)(ii) Housing Allowance: In response to the question posed by the Commission, we submit that there is no need for the Award to specify the frequency of payment of the allowance. Parties are capable of negotiating such matters between themselves.

Road Transport and Distribution Award

25. Clause 3.2(h): We are not opposed to the re-drafting of this provision to resolve the issue of fruit juices not being milk derivatives. However, such drafting should be technical in nature and not substantively alter the intent or effect of the provision.
26. Clauses 5.2 and 5.3 Facilitation: Under the current Award, clause 23.3 is a facilitative provision capable of alteration by both individual agreement and/or majority agreement (see clauses 8.1(b)(i) and 8.1(c)(i) of the current Award). In the Exposure Draft, clause 23.3 has been separated into clauses 9.3 and 9.4. Those clauses must be included in both clauses 5.2(a) and 5.3(a) of the Exposure Draft.
27. Clause 6.6 Casual Conversion: In our submission, the amendments made to this clause are unnecessary. Clause 12.6 of the current Award operates effectively and any

amendment will likely create confusion and impose an administrative burden on employers.

28. Clause 13.2(a) All purpose allowances: There are a number of issues with this clause. Firstly, the all purpose allowance paid to Grade 7 and Grade 10 employees is not an industry allowance, and should not be described as one. We submit that clause 13.2(a)(i) be revised to read "Grade 7 / Grade 10 allowance (see Schedule B-Classification Structure and Minimum Rates of Pay)".
29. Secondly, the 'Leading Hand' allowance is not expressed as an 'all purpose' allowance in the current Award. In the absence of the current Award explicitly describing the leading hand allowance as an 'all purpose' allowance, it should not be treated as one. The inclusion of the leading hand allowance in clause 13.2(a), combined with the definition of "all purposes", arguably represents a substantive change to the entitlements under the Award. Accordingly, the leading hand allowance should be removed from clause 13.2(a).
30. Clause 13.4(d)(ii) Housing Allowance: In response to the question posed by the Commission, we submit that there is no need for the Award to specify the frequency of payment of the allowance. Parties are capable of negotiating such matters between themselves.
31. Clause 16.2 Casual rate on a public holiday: The Award makes a distinction in the penalty rate for employee who works on a public holiday within ordinary hours and outside ordinary hours. Given that the Award makes the distinction between ordinary hours and outside ordinary hours on a public holiday, it must follow that the conditions relating to overtime apply to those casuals. As a result, a casual employee's casual loading would be reduced from 25% to 10% as per clause 6.5 (f) if they work outside ordinary hours (as contained in clauses 8 and 9) on a public holiday. Therefore, the casual loading would be as follows:

(a) All time worked on a public holiday must be paid for at the following rates with a minimum payment of four hours:

Public holiday	% of the ordinary hourly rate	
	Weekly employee	Casual employee
Good Friday and Christmas Day	300%	325%
Public holiday other than Good Friday and Christmas Day	250%	275%

(b) An employee required to work on a public holiday during hours which, if the day were not a public holiday, would be outside the range of ordinary working time as mentioned in clause 8, will be paid for all work at the following rates:

Public holiday	% of the ordinary hourly rate	
	Weekly employee	Casual employee
Good Friday and Christmas Day	400%	410%
Public holiday other than Good Friday and Christmas Day	350%	360%

32. Clause 16.2(a): The phrase “All time worked by an employee on a public holiday” is problematic because it is qualified by clause 16.2(b). We submit that the words “All time worked...” be deleted and be replaced with “All time worked within ordinary hours...”.

Waste Management Award

33. Clause 3.5(a): The reference to “Fair Work Act 2009 (Cth)” should be replaced by the defined term “Act”.
34. Clause 5.2: We submit that the following row should be added as a facilitative provision to the relevant table:

Clause 8.6	Make-up Time	An Individual
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35. Clause 6.5(h): The formula for calculating overtime hours for casual employees included in this clause appears to differ from the formula in the current Award at clause 14.5. The Exposure Draft applies an additional 10% loading to the overtime rate in circumstances where the rate should be paid at the overtime rate plus 10% of the relevant minimum rate for the time worked. We submit that the clause should be amended to state:

“A casual employee working overtime or outside ordinary hours will be paid the overtime rate in clause 16—Overtime plus an additional loading of 10% of the minimum hourly rate for the work performed.”

36. Clause 6.6(b)(iii) Second bullet point: In order to resolve any ambiguity arising between the 4 weeks’ notice provided by the employee and the notice provided by the employer in respect of casual conversion, we submit that the second dot point of Clause 6.6(b)(iii) be redrafted to provide:

- *after the expiry of the time for giving notice under clause 6.6(b)(i).*

37. Clause 6.6(b): An important element of clause 15.5 of the current Award has not been incorporated into this section with clause 15.5 of the current Award providing that:

“Within four weeks of receiving such notice the employer must either consent to or refuse the election but must not unreasonably so refuse.”

This element of the current clause should be retained in the Exposure Draft.

38. Clause 10.1: As per our submission in respect of the Storage Services Award, the Casual Hourly Rates appear to have been calculated by applying a 25% loading to an ‘already rounded’ Ordinary hourly rate instead of applying the 25% loading to 1/38th of the relevant weekly rates. This has resulted in minor mathematical discrepancies which should be remedied. As previously submitted, should the Commission wish to retain the wage rates columns, we consider that the Commission should include rounding rules for the assistance of the parties.
39. Clauses 16.6 and 16.8: Parties are asked to clarify whether clauses 16.6 and 16.8 are limited to weekend work or whether they have a more general application. On the basis of the text of the current Award, we submit that the clauses are limited to Saturday and Sunday work. This submission is supported by the placement of the clauses under the ‘Saturday and Sunday work’ heading in the current Award. A requirement to provide ‘after-hours’ transport is primarily relevant on weekends where the availability of

transport may be limited. Further, a requirement for employees to be 'on-call' for an overtime call back is likely to be more relevant during a weekend than during regular working days on which employees complete their ordinary hours.

40. Clause 16.7(b): In respect of 'Call-back', the Exposure Draft separates current clause 30.4(a) into 3 subsections. In order to ensure clarity, we submit that Clause 16.7(b) of the Exposure Draft to be amended to read:

"The employee is not required to work the full minimum hours **referred to in clause 16.7(a)** if the job....

Such amendment will ensure that the phrase 'full minimum hours' is not misinterpreted.

41. Clause 16.8: Parties are asked to comment on whether '*Subject to any custom now prevailing under which employees are required regularly to hold themselves in readiness for a call-back*' is a necessary preface to clause 16.8. We submit that the text should be retained. The current Award protects pre-existing systems relating to call-backs and this protection should not be compromised by a substantive amendment to the Award.
42. Clause 16.8: Parties are also asked to clarify the rate of pay for work under clause 16.8. We submit that the rate payable is the 'ordinary hourly rate'. The existing provision in the current Award (clause 31.2) states the employee is to be paid the 'relevant minimum wage' which is equivalent to 'ordinary hourly rate' in the Exposure Draft.
43. Clause 20.6: The parties are asked to clarify the meaning of 'weekly employee' in this clause. It appears that 'weekly employee' has been used in the current Award to designate full time and part-time employees as opposed to casuals. We suggest, for clarity, that the reference to 'weekly employee' be substituted with a reference to 'full time and part-time employees'.
44. Clause 20.6: Parties are asked to make submissions about whether the rates included in the Exposure Draft are correct. Our initial review discloses that the rates appear to be correct.
45. Parties are also asked to comment in the same notation as to whether there is a difference between "Christmas Day Holiday" and "Christmas Day" in the current Award. It appears that 'Christmas Day Holiday' may refer to the Christmas Day public holiday as opposed to Christmas Day itself (25 December). There does not appear however to be any necessity to change the current terms of the Exposure Draft in this respect except for the fact that Table A.2.1 in Schedule A includes a column headed '**Good Friday and Christmas day**' without differentiating between the rates for work on a Christmas Day Saturday or Sunday and the rates for work on a Christmas Day when it is a nominated public holiday. Given that clause 20.6(c) of the Exposure Draft expressly outlines a distinct pay rate for a Christmas Day which falls on a weekend, this should be reflected (or at least referred to) in the pay rate schedule in Schedule A.
46. Clause 20.5: This clause does not reflect the terms of the equivalent clause in current Award (clause 36.3), given that the Clause 20.5 of the Exposure Draft requires the agreement of '*a majority of employees in an enterprise*' while clause 36.3 of the current draft merely requires '*agreement between an employee or employees*'. The current threshold for agreement should be reflected in the Exposure Draft.



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