

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Submission**

Plain Language Re-Drafting –  
National Training Wage Schedule  
(AM2016/15 & AM2016/17)

**24 March 2017**



## 4 YEARLY REVIEW OF MODERN AWARDS

### AM2016/15 AND AM2016/17 PLAIN LANGUAGE RE-DRAFTING – NATIONAL TRAINING WAGE SCHEDULE

1. On 23 February 2017, the Fair Work Commission (**Commission**) issued a plain language re-draft of the National Training Wage Schedule (**NTWS**). In a statement<sup>1</sup> issued on the same date, interested parties were directed to file submissions in relation to the following:
  - Submissions on the plain language re-draft of the NTWS;
  - Submissions on the form of the NTWS to be inserted in the following awards (including which training packages should be included in each award):
    - *Airline Operations – Ground Staff Award 2010;*
    - *Airport Employees Award 2010;*
    - *Building and Construction General On-Site Award 2010;*
    - *Food, Beverage and Tobacco Manufacturing Award 2010;*
    - *Joinery and Building Trades Award 2010;*
    - *Manufacturing and Associated Industries and Occupations Award 2010;*
    - *Mobile Crane Hiring Award 2010;*
    - *Sugar Industry Award 2010;* and
    - *Surveying Award 2010.*

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<sup>1</sup> 4 yearly review of modern awards – National Training Wage [2017] FWCFB 1095.

2. This submission is filed in accordance with the Commission's Directions. Ai Group does not, at this stage, seek to make submissions regarding the specific form of the NTWS in the aforementioned awards. However, we intend to make a reply submission in response to various submissions filed in this regard by the other parties that proposed a separate NTWS in these awards.

### **The incorporation of the NTWS in the Miscellaneous Award 2010**

3. In its statement of 23 February 2017, the Commission stated as follows: (emphasis added)

**[8]** The Commission is of the provisional view that where parties have requested that the NTW schedule be tailored to a particular modern award that this should occur. A tailored version of the NTW schedule will be inserted in the awards listed above adopting the proposed plain language provisions where appropriate. Parties with an interest in those awards should file submissions setting out how the draft schedules should be tailored.

**[9]** For all other modern awards, apart from the Miscellaneous Award, the Commission is of the provisional view that the NTW schedule will be removed once the revised NTW schedule to be inserted into the Miscellaneous Award has been finalised. For modern awards which currently have an NTW schedule, the training wage conditions will be incorporated through reference to the Miscellaneous Award as outlined in the July Statement as follows:

**'X. National training wage**

**X.1** Schedule E to the *Miscellaneous Award 2010* sets out minimum wage rates and conditions for employees undertaking traineeships.

**X.2** This award incorporates the terms of Schedule E to the *Miscellaneous Award 2010* as at 1 July 2017.<sup>2</sup>

4. The Commission's statement does not expressly deal with whether the Full Bench has yet turned its mind to amendments that may need to be made to the NTWS itself in light of its determination that the NTWS will be incorporated into most awards by reference to the *Miscellaneous Award 2010*.
5. In order to maintain the current application and operation of the NTWS in all relevant awards, attention will need to be given to both the terms of the NTWS in the *Miscellaneous Award 2010* and to the terms of the clauses which

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<sup>2</sup> 4 yearly review of modern awards – National Training Wage [2017] FWCFB 1095 at [8] – [9].

incorporate the NTWS by reference, to ensure that there are no interaction problems.

6. For example, it needs to be clear that where a clause in the NTWS in the *Miscellaneous Award 2010* refers to provisions in the body of the *Miscellaneous Award 2010* (e.g. the coverage provisions referred to in clause A.2.1 of the re-draft), that the intent when the NTWS is incorporated by reference into another award, is to refer to the relevant clause in the other award and not the clause in the *Miscellaneous Award 2010*.

### **Clause A.1.1 – definitions – approved training**

7. Clause E.2 currently defines “approved training” as follows:

**approved training** means the training specified in the training contract

8. Accordingly, “approved training” is a reference to training that is specified in the training contract of the relevant trainee.

9. Clause A.1.1 of the re-drafted NTWS amends this definition:

**approved training, in relation to a trainee**, means the training specified in the training contract of the trainee.

10. We consider that the words “in relation to a trainee” are unnecessary, confusing and should be deleted. They appear to be superfluous.

### **Clause A.1.2 – Definitions – out of school**

11. The term “out of school” is defined in the NTWS for the purposes of ascertaining the relevant minimum rate payable to full-time and part-time trainees. Relevantly, it states:

**out of school** refers only to periods out of school beyond Year 10 as at the first of January in each year and is deemed to:

...

- (c) not include any period during a calendar year in which a year of schooling is completed.

12. The effect of the above provision is to exclude from the calculation of the period out of school beyond Year 10, *any* period during a calendar year during which a year of schooling is completed. That is, when calculating the period for which a trainee has been out of school beyond Year 10 as at the first of January, the entire calendar year during which schooling was completed is to be excluded. No period during that year is to be included in the relevant calculation.

13. At clause A.1.2 of the re-draft, this element of the definition has been altered. It instead states: (emphasis added)

**A.1.2** A reference in this schedule to **out of school** refers only to periods out of school beyond Year 10 as at 1 January in each year and is taken to:

...

(c) not include any period during a calendar year after the completion during that year of a year of schooling.

14. Clause A.1.2(c) excludes only that period of time during a calendar year that falls *after* the completion of a year of schooling. The period of time during which the employee was in fact completing such schooling is no longer excluded. To this extent, the legal effect of clause A.1.2(c) is substantially different to the current NTWS and this would have a significant effect of wage entitlements.

15. For this reason, A.1.2(c) should be amended as follows:

(c) not include any period during a calendar year ~~after the completion during that year of~~ in which a year of schooling is completed.

### **Clause A.2.1 – Coverage**

16. The NTWS is presently expressed to apply “in respect of an employee covered by [the] award who is undertaking a traineeship” as there described: (emphasis added)

**E.3.1** Subject to clauses E.3.2 to E.3.6 of this schedule, this schedule applies in respect of an employee covered by this award who is undertaking a traineeship whose training package and AQF certificate level is allocated to a wage level by clause E.7 to this schedule or by clause E.5.4 of this schedule.

17. Consistent with s.143(2) of the Act, the coverage of modern awards is, in general terms, expressed to cover certain employers and certain employees of those employers. The NTWS applies to a subset of those employees *and employers*. It applies to employees *and employers* in respect of only those employees who are undertaking a traineeship as described by clause E.3.1.
18. Clause A.2.1 of the re-drafted NTWS has been drafted to apply only to employees covered by the award who are undertaking a traineeship as described. It contains no reference, expressly or by implication to their employer. It states:
- A.2.1** Subject to clauses A.2.2 to A.2.5, this schedule applies to an employee covered by this award who is undertaking a traineeship and whose training package and AQF certificate level are allocated to a wage level by clause A.6 or by clause A.4.4.
19. The NTWS creates entitlements for employees and obligations on employers in relation to those employees. It is therefore not appropriate that the application of the schedule be limited only to employees. Indeed, in our view clause A.2.1 is erroneous in this regard.
20. Accordingly, clause A.2.1 should be amended as follows:
- A.2.1** Subject to clauses A.2.2 to A.2.5, this schedule applies ~~to~~ in respect of an employee covered by this award who is undertaking a traineeship and whose training package and AQF certificate level are allocated to a wage level by clause A.6 or by clause A.4.4.

### **Clause A.3(b) – Types of traineeships**

21. Clause E.4.2 of the NTWS currently describes a part-time traineeship in the following terms: (emphasis added)
- E.4.2** a part-time traineeship based on less than 38 ordinary hours per week, with 20% of ordinary hours being approved training solely on-the-job or partly on-the-job and partly off-the-job, or where training is fully off-the-job.
22. The text underlined above does not appear in the re-draft. It states:
- (b)** a part-time traineeship based on fewer than 38 ordinary hours per week, with 20% of those hours being approved training.

23. The current clause makes clear that 20% of the employee's ordinary hours must constitute approved training which can occur in one of three ways:
- Solely on-the-job; or
  - Partly on-the-job and partly off-the-job; or
  - Fully off-the-job.
24. The clause aids in understanding the basis upon which a part-time traineeship may be undertaken. It explains the ways in which the employee's training may be arranged and clarifies that in any of the aforementioned circumstances, the employee would nonetheless satisfy clause E.4.2 and therefore be considered a part-time trainee.
25. Accordingly, we submit that the relevant words should be reinstated as follows:
- (b) a part-time traineeship based on fewer than 38 ordinary hours per week, with 20% of those hours being approved training solely on-the-job or partly on-the-job and partly off-the-job, or where training is fully off-the-job.

#### **Clause A.4.1(a) – Minimum wages for full-time traineeships – Wage Level A**

26. Clause E.5.1(a) of the current NTWS specifies minimum rates payable to the relevant group of employees there described. However, that clause operates "subject to clause E.5.3", which prescribes certain circumstances in which the NTWS requires the payment of a different minimum rate:

##### **E.5.3 Other minimum wage provisions**

- (a) An employee who was employed by an employer immediately prior to becoming a trainee with that employer must not suffer a reduction in their minimum wage per week or per hour by virtue of becoming a trainee. Casual loadings will be disregarded when determining whether the employee has suffered a reduction in their minimum wage.
- (b) If a qualification is converted from an AQF Certificate Level II to an AQF Certificate Level III traineeship, or from an AQF Certificate Level III to an AQF Certificate Level IV traineeship, then the trainee must be paid the next highest minimum wage provided in this schedule, where a higher minimum wage is provided for the new AQF certificate level.

27. The opening words of clause E.5.1(a) make clear the interaction between the entitlement that it provides and that which is provided by clause E.5.3. That is, it makes express that, in effect, clause E.5.3 overrides clause E.5.1(a) where relevant: (emphasis added)

Subject to clause E.5.3 of this schedule, the minimum wages for a trainee undertaking a full-time AQF Certificate Level I–III traineeship whose training package and AQF certificate levels are allocated to Wage Level A by Appendix E1 are:

28. Absent the underlined words, the instrument does not expressly state which of the two entitlements prevail where both would otherwise be applicable. We consider that the removal of those words at clause A.4.1(a) of the re-drafted NTWS is liable to giving rise to confusion as to how the NTWS applies in such circumstances.
29. For the purposes of clarity and ensuring that the schedule is ‘simple and easy to understand’, clause A.4.1(a) should be amended to make clear that it operates subject to clause A.4.3.

**Clause A.4.1(b) – Minimum wages for full-time traineeships – Wage level B**

30. The issue raised above also arises in relation to clause A.4.1(b). It too should be varied to make clear that it operates subject to clause A.4.3.

**Clause A.4.1(c) – Minimum wages for full-time traineeships – Wage level C**

31. The issue raised above also arises in relation to clause A.4.1(c). It too should be varied to make clear that it operates subject to clause A.4.3.

**Clause A.4.1(d)(i) – AQF Certificate Level IV traineeships**

32. The issue raised above also arises in relation to clause A.4.1(d)(i). It too should be varied to make clear that it operates subject to clause A.4.3.

**Clause A.4.1(d)(ii) – AQF Certificate Level IV traineeships**

33. The issue raised above also arises in relation to clause A.4.1(d)(ii). It too should be varied to make clear that it operates subject to clause A.4.3.

## **Clause A.4.2(a) – Minimum wages for part-time traineeships – Wage level A**

34. The issue raised above also arises in relation to clause A.4.2(a). It too should be varied to make clear that it operates subject to clause A.4.3.
35. In addition, the corresponding clause E.5.2(a) of the current NTWS is also expressed to operate subject to clause E.5.2(f):

Subject to clauses E.5.2(f) and E.5.3 of this schedule, the minimum wages for a trainee undertaking a part-time AQF Certificate Level I–III traineeship whose training package and AQF certificate levels are allocated to Wage Level A by Appendix E1 are:

36. Clause E.5.2(f) provides for certain circumstances in which the rates prescribed at clause E.4.2(a) are not payable:

### **(f) Calculating the actual minimum wage**

- (i) Where the full-time ordinary hours of work are not 38 or an average of 38 per week, the appropriate hourly minimum wage is obtained by multiplying the relevant minimum wage in clauses E.5.2(a)–(e) of this schedule by 38 and then dividing the figure obtained by the full-time ordinary hours of work per week.
  - (ii) Where the approved training for a part-time traineeship is provided fully off-the-job by a registered training organisation, for example at school or at TAFE, the relevant minimum wage in clauses E.5.2(a)–(e) of this schedule applies to each ordinary hour worked by the trainee.
  - (iii) Where the approved training for a part-time traineeship is undertaken solely on-the-job or partly on-the-job and partly off-the-job, the relevant minimum wage in clauses E.5.2(a)–(e) of this schedule minus 20% applies to each ordinary hour worked by the trainee.
37. In the re-draft published by the Commission, it is no longer clear from the face of the NTWS that clause A.4.2(a) operates subject to clause A.4.2(f). Rather in some circumstances the two clauses may give rise to inconsistent entitlements or obligations without any explanation as to which of those two is to be applied.
38. The relevant words at the commencement of clause E.5.2(a) of the current NTWS also have the effect of alerting a reader of the instrument to the existence of a separate set of entitlements that may be relevant to a particular employee in lieu of those prescribed at clause E.5.2(a).

39. For the purposes of ensuring that the NTWS is 'simple and easy to understand' in this regard, clause A.4.2(a) of the re-drafted NTWS should be amended to make clear that it also operates subject to clause A.4.2(f).

#### **Clause A.4.2(b) – Minimum wages for part-time traineeships – Wage level B**

40. The issues raised above in relation to clause A.4.2(a) also arise in relation to clause A.4.2(b). It too should be amended to make clear that it operates subject to clauses A.4.2(f) and A.4.3.

#### **Clause A.4.2(c) – Minimum wages for part-time traineeships – Wage level C**

41. The issues raised above in relation to clause A.4.2(a) also arise in relation to clause A.4.2(c). It too should be amended to make clear that it operates subject to clauses A.4.2(f) and A.4.3.

#### **Clause A.4.2(d) – School-based traineeships**

42. The cross reference to clause A.4.1 should be replaced with a reference to clause A.4.3. This appears to be a drafting error.

#### **Clause A.5.1 – Employment conditions**

43. The current clause E.6.1 of the NTWS provides that a school-based trainee may agree to be paid an additional 25% loading in lieu of certain entitlements including paid annual leave. That is, in such circumstances, the employee would not accrue or take paid annual leave in the sense contemplated by the NES:

**E.6.1** A trainee undertaking a school-based traineeship may, with the agreement of the trainee, be paid an additional loading of 25% on all ordinary hours worked instead of paid annual leave, paid personal/carer's leave and paid absence on public holidays, provided that where the trainee works on a public holiday then the public holiday provisions of this award apply.

44. The above clause appears in slightly different terms at clause A.5.1 of the re-draft:

**A.5.1** A trainee undertaking a school-based traineeship may agree to be paid an additional loading of 25% on all ordinary hours worked instead of being paid

annual leave, paid personal/carer's leave, paid compassionate leave and paid absence on public holidays. However, if the trainee works on a public holiday, the public holiday provisions of this award apply.

45. The word “being” is unnecessary and apt to confuse. It is *not* the case that where a school-based trainee is paid an additional 25% loading, he/she is entitled to (for instance) a form of leave called “annual leave” without pay. “Paid annual leave” is a specific reference to the entitlement that arises under s.87 of the Act. Where the 25% loading is paid, the employee is does not accrue and therefore cannot take that form of leave. Nor can they take paid personal/carer’s leave or paid compassionate leave.
46. Consistent with the current clause E.6.1, it should be deleted.

#### **Clause A.5.2 – Employment conditions**

47. The current clause E.6 has been the subject of consideration by the Federal Court when a question arose as to whether the effect of clause E.6.3 is to treat employees as working when they are attending training. In this context, the Court made the following observations regarding clause E.6.2, which states that an employee is “entitled to be released from work without loss of continuity of employment *and to payment of the appropriate wages* to attend any training and assessment specified in, or associated with, the training contract”: (emphasis added)
66. Clause E.6.2 requires payment of the appropriate wages to attend training. Courts have sometimes taken a broad view of the meaning of wages. The CEPU referred to the discussion of the case law in the maritime context in my judgment in *Visscher v Teekay Shipping (Australia) Pty Ltd (No 4)* (2012) 297 ALR 674; [2012] FCA 1247 (“*Vischer*”) at [81]. Indeed, in one case meal allowances were held to be “wages”: *The Tergeste* [1903] P 26. In *United States Trust Company of New York v Master and Crew of Ship “Ionian Mariner”* (1997) 77 FCR 563 Black CJ pointed out (at 582) that “[m]any emoluments and other advantages to which a member of a crew has become entitled have been regarded as wages for the purpose of a maritime lien” and that a “broad view of ‘wages’ will readily accommodate emoluments that can be seen as surrounding the core concept of money paid as a recompense for work done under a contract of employment”. But the context in which these decisions were made is quite different. Even if these cases were relevant to the interpretation of the TS award, which is doubtful to say the least, none of them recognises a travel allowance as a wage. “Wages” is not defined in the TS award and there is no definition in the Fair Work Act. The CEPU did not in fact contend that “wages” was wide enough to include travelling allowances. In my

opinion, “wages” in cl E.6.2 has its ordinary meaning of a payment for services rendered. See *Visscher* at [73], [75] where the relevant dictionary definitions appear. “Wages” would readily encompass overtime and penalty rates (and probably also annual leave) as they are paid for services rendered. But a travel allowance is not. The Navigation Act 1912 (Cth), with which *Visscher* was concerned, defined “wages” as “includes emoluments”, probably reflecting the position historically taken in maritime law. There is nothing in the TS award that implies that “wages” was intended to include emoluments. Indeed, the distinction between wages and conditions in cl E.6.3 might suggest otherwise.<sup>3</sup>

48. The above decision supports the proposition that “wages” in clause E.6.2 does not incorporate all amounts that might otherwise have been payable under the award to the trainee. Rather, it requires the payment of amounts due for “services rendered”.

49. We are concerned that the redrafting of this clause at A.5.2 alters this position. It states: (emphasis added)

**A.5.2** A trainee is entitled to be released from work without loss of pay and without loss of continuity of employment to attend any training and assessment specified in, or associated with, the training contract.

50. The use of the phrase “without loss of pay” may be interpreted to require the payment of any amount that would have been payable to the employee had they instead been working. Indeed many award clauses presently adopt this phrase and are interpreted to have that effect. This could, for instance, include allowances that a trainee would be entitled to when they perform specific work but which our view are not presently required to be paid while that trainee is released from work to attend training specified in the training contract. In this way, the re-draft expands the entitlement presently afforded by clause E.6.2 of the NTWS.

51. For these reasons, clause A.5.2 should be amended as follows:

**A.5.2** A trainee is entitled to be released from work ~~without loss of pay and~~ without loss of continuity of employment and to payment of the appropriate wages to attend any training and assessment specified in, or associated with, the training contract.

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<sup>3</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 at [66].

## Clause A.5.4 – Employment conditions

52. Clause E.6.4 of the NTWS is in the following terms:

**E.6.4** Subject to clause E.3.5 of this schedule, all other terms and condition of this award apply to a trainee unless specifically varied by this schedule.

53. The effect of this clause is simple. All terms and conditions prescribed by the relevant award apply to a trainee if relevant. That is, if a clause that prescribes a term or condition is in such terms that it applies to an employee who is a trainee, the fact that the employee is a trainee does not remove the employee from the scope of the clause. There are, however, two other matters of note:

- The relevant term or condition will not apply if the above position is specifically varied by the NTWS.
- Where the terms and conditions of the NTWS conflict with other terms and conditions of the relevant award dealing with traineeships, the other terms and conditions of the award prevail.

54. Clause E.5.4 has been redrafted in a manner that we consider problematic and unnecessarily lengthy. It states: (emphasis added)

**E.5.4** Subject to clause A.2.4, this award applies to a trainee in the same way that it applies to an employee who is not a trainee except as otherwise expressly provided by this schedule.

55. The clause states that the award applies to a trainee “in the same way” that it applies to an employee who is not a trainee. Whilst not abundantly clear, on one reading the provision purports to require that the relevant award in its entirety and/or each clause therein is to be applied to any particular trainee as it applies to an employee who is not a trainee.

56. For example, require that a meal break of not less than 30 minutes and not more than 60 minutes must be allowed to each employee. The precise length of the break is to be determined by the employer. Accordingly, an employer may decide to allow a full-time non-trainee employee a 60 minute meal break and a part-time trainee a 30 minute meal break.

57. We are concerned that clause E.5.4 of the re-draft may have the effect of, or at the very least give rise to the argument that, in the scenario described above, the trainee must also be granted a 60 minute meal break. This is because the meal break clause is to “apply in the same way that it applies to an employee who is not a trainee except as otherwise expressly provided by [the NTWS]”. Relevantly, the NTWS does not expressly state that an employer may exercise its discretion to apply the meal break clause in the relevant award in a different manner to trainees and non-trainees.
58. Such an interpretation would have the effect of narrowing the scope of an employer’s prerogative as to how a specific provision is applied to its employees. This would amount to an alteration to the legal effect of the clause.
59. Accordingly, clause A.5.4 should be amended as follows:

**A.5.4** Subject to clause A.2.4, all other terms and conditions of this award apply to a trainee unless specifically varied by this schedule.

#### **Clause E.6.3 – Employment conditions – Note**

60. The reference to “clause 0” should be replaced with a reference to “clause A.4.2(f)(ii)”. This appears to be a drafting error.