Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Further Submission

Plain Language Re-Drafting –

Hair and Beauty Industry Award 2010

(AM2016/15)

19 March 2021

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING

– HAIR AND BEAUTY INDUSTRY AWARD 2010

1. This further submission relates to the exposure draft (**Exposure Draft**) of the *Hair and Beauty Industry Award 2010* (**Award**), which was published by the Fair Work Commission (**Commission**) on 21 January 2021. It is filed on behalf of the Australian Industry Group, Hair and Beauty Australia and the Australian Hair Council.

2. The references to 'items' relate to the summary of submissions published by the Commission on 21 January 2021.

Item 8 – Clause 4.2(j) of the Exposure Draft

3. We do not agree with the unions' submissions and we remain concerned that the approach adopted in the Exposure Draft potentially narrows the scope of the coverage of the Award. Any change that might result in such an outcome should not be made.

Item 15 – Clause 9 of the Exposure Draft

4. Based on our recent discussions with the SDA, we understand that it no longer presses its submission.

Item 20 – Clause 11.4 of the Exposure Draft

5. Ai Group withdraws its submission in relation to this matter. We do not oppose the retention of clause 11.4.

Item 22 – Clause 12.2 of the Exposure Draft

6. Contrary to the SDA and AWU's reply submissions, clause 12.2 of the Exposure Draft creates a new Award-derived requirement, for which there is no equivalent in the Award. To that extent, it amounts to a substantive change and therefore, it should not be adopted.

Items 28 & 29 – Clause 13.2 of the Exposure Draft

7. Under the Award, it is clear that the classification level of an employee is determined by reference to the principal functions of their employment, as determined by the employer. That is, an employee's classification level is to be determined according to the skill level that an employee is required to exercise, in order to carry out the principal functions of their employment; those principal functions having been determined by their employer.

8. Clause 13.2 of the Exposure Draft amounts to a substantive change, as is expressly acknowledged by the SDA in its submissions. The union, however, supports the change.

9. Clause 16.2 of the Award has existed in its current form for many years. The unions have had every opportunity to seek a substantive change to the clause, had they identified that the provision was in fact resulting in unfair or inappropriate outcomes. They have not done so, nor have they led any material in these proceedings that might support such a variation being made.

10. For the reasons set out above and as articulated in our earlier submissions, clause 13.2 of the Exposure Draft should be amended to re-insert the relevant words from clause 16.2 of the Award.

Item 30 – Clause 14.1 of the Exposure Draft

11. The spread of hours prescribed by the Award plainly does not apply to casual employees. We continue to rely on our earlier submissions in this regard. The AWU's submissions propose a substantive change that should not be made.

Item 32 – Clause 15.1(a) of the Exposure Draft

12. Contrary to the SDA's position, clause 15.1(a) of the Exposure Draft is not 'aligned' with the Award. Similarly, the Award does not 'suggest' that 'casual employees are not intended to be excluded from clause 30'.

13. Clause 15.1(a) of the Exposure Draft *requires* an employer to prepare a roster for all employees, including casual employees. Clearly, the Award does not require this. Clause 29 of the Award requires that rosters are prepared in respect of full-time and part-time employees. No other provision of the Award prescribes such a requirement in relation to any category of employee. By virtue of clause 13.4 of the Award, clause 29 plainly does not apply to casual employees.

14. Accordingly, clause 15.1(a) of the Exposure Draft very clearly amounts to a significant substantive change, which would in our submission have serious implications for employers of casual employees covered by the Award. The change should not be made. Instead, the clause should be amended to make clear that it applies only to full-time and part-time employees.

Item 33 – Clauses 15.1(b) – (f) of the Exposure Draft

15. Clause 29 of the Award imposes an obligation on an employer to create and provide a roster to full-time and part-time employees. No such obligation applies in respect of casual employees. Clause 30 goes on to establish *'rostering principles'*. It sets parameters within which the rosters required by clause 29 are to be prepared. Clauses 29 and 30 are, therefore inherently interconnected.

16. For instance, clause 30.1 of the Award states that *'a roster period cannot exceed four weeks'*. This clause does not have any clear application to casual employees, because the Award does not require the preparation of a roster in respect of them.

17. Given that clause 29 does not apply to casual employees, it necessarily follows that clause 30 does not apply to casual employees either.

18. Accordingly, the Exposure Draft should be amended to make clear that clauses 15.1(b) – (f) do not apply to casual employees. The amendments proposed by Ai Group do not amount to substantive changes, as suggested by the unions.

Item 38 – Clause 17.2 of the Exposure Draft

19. We strongly oppose the unions' submissions in relation to clause 17.2 of the Exposure Draft.

20. In our respectful submission, it would be entirely inappropriate for changes of the nature proposed by the unions to be made in the context of these proceedings. They would, if made, potentially visit significant cost increases upon employers. There is no evidence or other material before the Commission that could satisfy it that the proposed provisions are necessary to ensure that the Award achieves the modern awards objective. Significantly:

    (a) By virtue of s.134(1) of the Act, the Commission is required to take into account various matters including:

        (i) The relative living standards and needs of the low paid;

        (ii) The need to encourage collective bargaining;

        (iii) The need to promote social inclusion through increased workforce participation (including the need to promote the employment of young persons, which may be undermined if the minimum rates payable to them are increased);

        (iv) The likely impact on business including on employment costs; and

        (v) The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

(b) The proposed variation would amount to a variation to modern award minimum wages, for the purposes of s.135 of the Act. Accordingly, the relevant wages can be varied only if the Commission is satisfied that the variation is justified by work value reasons (subject to s.135(1)(b), which does not appear to apply in the current context).

21. Apart from the unions' brief submissions, there is simply no material before the Commission about the aforementioned matters. Critically, there is no evidence before the Commission about any of the issues identified above. In such circumstances, the proposed changes should not be made.

22. It is axiomatic that the proposed changes would potentially increase employment costs and therefore, have an adverse impact on business. The Commission can take on notice that businesses in the hair and beauty industries have in the last 12 months been the subject of government-directed closures for the purposes of reducing the spread of COVID-19. Further:

(a) As Professor Borland identified in a research report published in 2020, the hair and beauty industries are likely to continue to be impacted by the pandemic due to *'decrease[s] in demand due to avoidance of COVID-19'* and that the sectors *'[c]ould be affected by future government closure[s]'*.[1]

(b) As at 20 March 2020, over 97% of businesses in the 'personal services' sector, which includes employers in the hair and beauty industries, were small businesses.[2]

(c) The hair and beauty sectors are largely Award-dependent.

23. As a result of these factors, the imposition of increased minimum wages would in our submission be particularly pronounced.

[1] Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements* (March 2020).

[2] Fair Work Commission, *Information note—Modern awards and industries* (30 March 2020).

24. We also observe that the AWU's submissions assert that not only should employees who are trade qualified be entitled to the adult rate regardless of their age; rather, all employees who have completed a Certificate II (classified at Level 2 under the Award) should also be entitled to the adult wage. To this end, the AWU appears to seek an outcome that falls beyond the scope of what was determined by a Full Bench of the Commission in a recent decision about the *General Retail Industry Award 2020*, which is cited by the union.[3]

25. If the unions wish to pursue this matter, it is open to them to file a separate application seeking the relevant variations to the Award. Any further consideration of the issue should be given in the context of such proceedings, rather than the matter here before the Commission.

Item 40 – Clause 18.3 of the Exposure Draft

26. Ai Group opposes the definition of 'pre-apprentice' proposed by the AWU. In particular, the basis for the two-week limitation proposed by the union is unclear. It is our understanding that pre-apprenticeships can take several weeks to complete.

27. Ai Group and the AWU have had some preliminary discussions in relation to this issue. We intend to continue those discussions over the coming fortnight, with the aim of reaching agreement about a proposed definition. We expect to be in a position to further address the matter in our reply submissions, due on 6 April 2021.

Item 47 – Clause 20.10(b) of the Exposure Draft

28. Ai Group continues to oppose clause 20.10(b) of the Exposure Draft, for the reasons set out in our submission of 25 November 2020.

[3] *4 Yearly Review of Modern Awards – Award Stage – General Retail Industry Award 2020* [2020] FWCFB 6301.

29. In addition, we note that taxi fares are regulated by state and territory governments. It is not appropriate that the minimum safety net require an employer to reimburse an employee for costs incurred in relation to other modes of transport, that are not regulated in that way.

30. Though a ride-share option may, in some cases, be more cost effective than a taxi; as is well known, ride-share operators can (and do) unexpectedly increase their rates because, for instance, the demand for their service is outstripping the number of drivers available (e.g. on a particular day because of a local event or due to bad weather). Further, some ride-share options also enable passengers to choose from a range of different types of vehicles or 'experiences'. Different fares apply to different options. For example, in addition to the basic ride-sharing option, Uber offers 'Premier' rides, which it describes as 'premium rides in luxury cars' and 'Comfort' rides, which involve 'comfortable midsized cars with top-rated drivers'[4]. The fares payable for such trips are higher than a basic Uber ride. It would not be fair to require employers to reimburse an employee for potentially excessive fares in such circumstances.

31. Despite the above, if the Commission nonetheless considers that it is necessary to redraft the extant provision, clause 20.10(b) of the Exposure Draft should be varied as follows:

> **(b)** The employer must reimburse the employee, as applicable, for any cost they reasonably incur in taking a taxi or commercial passenger vehicle that the employer agrees may be used, to travel:

32. The proposed change would enable an employer and employee to agree that the employee will be transported by a mode of transport other than a taxi, such as a ride-share option; however the employer would be liable to reimburse the employee for expenses incurred only if that is agreed by the employer. This would alleviate some of the concerns we have raised in our submission.

[4] Uber, Ride Share Options <https://www.uber.com/au/en/ride/ride-options/> (accessed 16 February 2021).

Item 49 – Clause 22.2 of the Exposure Draft

33. Ai Group continues to press its submission. We understand based on our discussions with the SDA that it no longer opposes the amendment proposed.

Item 50 – Clauses 22.2 and 22.5 of the Exposure Draft

34. The AWU submits that the Exposure Draft should expressly require the payment of overtime rates to full-time and part-time employees:

    (a) If they work outside the spread of hours prescribed by clause 14.4 of the Exposure Draft; and / or

    (b) If they work in excess of the maximum daily number of ordinary hours prescribed by clauses 14.7 – 14.9 of the Exposure Draft.

35. We no longer oppose an amendment to the Exposure Draft of the nature described at paragraph (a) above. We submit that this can be achieved by replacing clause 22.2 of the Exposure Draft with the following:

> **22.2 Payment of overtime for full-time employees**
>
> An employer must pay a full-time employee at the overtime rates in clause 22.5 for any hours worked at the direction of the employer:
>
> **(i)** In excess of an average of 38 ordinary hours per week.
>
> **(ii)** Outside the spread of hours prescribed by clause 14.4.

36. The Exposure Draft does not, in our view, require amendment to give effect to the proposition above in relation to part-time employees. Clause 22.3 requires that overtime rates are payable for time worked in excess of the ordinary hours agreed pursuant to clause 10.3, subject to any variations made pursuant to clause 10.4.

37. An agreement regarding a part-time employee's ordinary hours of work pursuant to clause 10.3 can necessarily only involve hours within the spread prescribed by clause 14.4. By extension, hours worked outside the spread would necessarily be hours that fall beyond the scope of a part-time employee's agreed hours and therefore would attract overtime rates pursuant to clause 22.3.

38. Finally, as a product of the discussions held between ourselves and the unions, the parties agree that a new clause should be inserted as follows (which we suggest should be inserted at clause 22.6):

> **22.6** For the purposes of calculating overtime rates, each day stands alone.

39. We continue to oppose the AWU's submission described above at paragraph (b). We understand that the union intends to seek that this matter is referred to the Full Bench dealing with AM2017/51 Overtime for Casuals, in light of its decision of 5 March 2021.[5] If the matter is not so referred, we may seek to make further submissions about this issue in the context of these proceedings.

Item 54 – Clause 23.1 of the Exposure Draft

40. As a product of discussions with the unions about this item, it is agreed with the SDA that Table 14 should be varied as follows:

    (a) The references to "see clause 22" should be replaced with "NA".

    (b) A new note should be inserted below the table, in the following terms:

> Full-time and part-time employees are subject to the overtime provisions in clause 22 for work performed outside the spread of hours prescribed by clause 14.4.

41. The aforementioned changes would resolve the concerns raised in our submissions about Table 14.

Item 55 – Clause 23.1 of the Exposure Draft

42. Ai Group withdraws its submission.

Item 56 – Clause 23.2(a) of the Exposure Draft

43. Ai Group continues to rely on its earlier submissions in relation to this issue. The purpose of the proposed amendments is to make clear that an employer and employee can agree in writing that the employee will work on a day that is their rostered day off.

[5] *4 yearly review of modern awards – Overtime for casuals* [2021] FWCFB 1121 at [13].

Item 59 – Clause 24.3 of the Exposure Draft

44. The manner in which the Exposure Draft has redrafted clause 33.3 of the Award is extremely problematic, as explained in our submission of 25 November 2020.

45. In addition, since filing our initial submissions in this matter, it has come to our attention that clause 24.3 of the Exposure Draft also deviates from the Award because it appears to require that the comparative exercise required by clauses 24.3(b)(i) and 24.3(b)(ii) are undertaken on an hourly basis. Under the Award, that comparison is required to be undertaken by reference to the entire period of leave.

46. Clause 33.3 of the Award is in the following terms:

> **33.3 Annual leave loading**
>
> **(a)** During a period of annual leave an employee will receive a loading calculated on the rate of wage prescribed in clause 17 of this award. Annual leave loading payment is payable on leave accrued.
>
> **(b)** The loading will be as follows:
>
> **(i) Day work**
>
> Employees who would have worked on day work only had they not been on leave—17.5% or the relevant weekend penalty rates, whichever is the greater but not both.
>
> **(ii) Shiftwork**
>
> Employees who would have worked on shiftwork had they not been on leave—a loading of 17.5% or the shift loading (including relevant weekend penalty rates) whichever is the greater but not both.

47. In our submission, clause 33.3:

    (a) Requires that in relation to a *'period of annual leave'*, an employee will receive *'a loading'*. That is, in relation to a period of leave, *one* additional amount is payable.

(b) If an employee would have worked on day work had they not been on leave, *'the loading'* payable to the employee in relation to the *'period of annual leave'* will equate to either 17.5% of the minimum wage prescribed by the Award or the relevant weekend penalty rates prescribed by clause 31; whichever is the higher, but not both.

(c) If an employee would have worked on shiftwork had they not been on leave, *'the loading'* payable to the employee in relation to the *'period of annual leave'* will equate to either 17.5% of the minimum wage or *'the shift loading'*, including relevant weekend penalty rates; whichever is the greater but not both. We note again, as we have done in earlier submissions filed in this matter, that the Award does not prescribe shift loadings. The effect of clause 33.3(b)(ii) is therefore inherently unclear.

48. Clauses 33.3(b)(i) and (ii) both require that a comparison is drawn between two amounts. Using clause 33.3(b)(i) as an example, the comparison is to be made between *'17.5% or the relevant weekend penalty rates'*. The higher of those two amounts will constitute *'the loading'* that is payable *'during a period of annual leave'*.

49. In our submission, the relevant calculations for the purposes of clause 33.3(b)(i) are to be made by reference to the entire period of leave taken in that instance. That is, if an employee is taking one week of annual leave, the two amounts relevant to the comparative exercise are:

(a) 17.5% of the minimum weekly wage prescribed by the Award; and

(b) The weekend penalties that would be payable to the employee during that week had the employee worked.

50. The employee is entitled to the higher of the two amounts mentioned above, in relation to the leave.

51. Clause 24.3 of the Exposure Draft is in the following terms:

> **24.3 Annual leave loading**
>
> **(a)** An employee is entitled to an additional payment for accrued annual leave calculated on the minimum hourly rate specified in clause 17—Minimum rates or clause 18—Apprentice, trainee and graduate rates, as applicable, for the classification in which they are employed.
>
> **(b)** The additional payment for the employee's ordinary hours of work when taking paid annual leave is as follows:
>
> **(i) Dayworkers**
>
> An employee who would have worked on day work only had they not been on leave must be paid the greater of either:
>
> - the minimum hourly rate plus a loading of 17.5% of the minimum hourly rate; or
> - the relevant weekend penalty rate specified in clause 23.1.
>
> **(ii) Shiftworkers**
>
> An employee who would have worked on shift work had they not been on leave must be paid the greater of either:
>
> - the minimum hourly rate plus a loading of 17.5% of the minimum hourly rate; or
> - the relevant penalty rate specified in clause 23.1, including relevant weekend penalty rates.

52. Clause 24.3 of the Exposure Draft deviates from the extant provision in various ways. Relevantly, for present purposes, clause 24.3 prescribes the amounts payable pursuant to it as hourly rates. In addition, using clause 24.3(b)(i) by way of example, the clause does not state that the amounts described by it at the first and second dot points are to be calculated by reference to the amounts that would be payable to the employee for the entire duration of the leave. Rather, the clauses appear to require an hour-by-hour comparison and calculation. Ai Group submits that this amounts to a substantive variation to the terms of the Award.

53. The Exposure Draft should be amended to make clear that the amounts referenced at clauses 24.3(b) are to be calculated by reference to the entire period of leave taken by an employee, consistent with the Award.

54. The AWU suggests replacing the Exposure Draft provision with the extant Award clause. Whilst such an amendment would alleviate some of our concerns, it would not, in our view, address all of the issues raised. We submit that clause 24.3 should instead be replaced with the following:

> **24.3 Annual leave loading**
>
> **(a)** During a period of annual leave an employee will receive a loading on annual leave accrued, in accordance with clause 24.3.
>
> **(b)** The loading will be the higher of the following two amounts, but not both:
>
> **(i)** 17.5% of the minimum hourly rate prescribed by clause 17, multiplied by the number of ordinary hours of work that the employee would have been required to perform had the employee not taken leave.
>
> **(ii)** The relevant weekend penalties that would have been payable to the employee for ordinary hours of work had the employee not taken leave.
>
> **(c)** For the purposes of clause 24.3(b), the amounts described by clauses 24.3(b)(i) and 24.3(b)(ii) are to be calculated in relation to the entire period of leave taken by the employee.
>
> **(d)** For the purposes of clause 24.3(b)(ii), the relevant weekend penalty is the applicable weekend penalty rate prescribed by clause 23.1, less the minimum hourly rate prescribed by clause 17.

55. Consistent with the submissions we have previously made about clause 33.3(b)(ii) of the Award, the above proposal does not include a provision that would apply to *'employees who would have worked on shiftwork had they not been on leave'*, because the Award (and therefore, the Exposure Draft), do not contemplate the performance of shiftwork.

Clause 18.6(a) of the Exposure Draft – Hairdressing trainee

56. We refer to our correspondence of 11 February 2021, in which we identified that we would seek a further opportunity to make submissions about the definition of 'hairdressing trainee' at clause 18.6(a) of the Exposure Draft.

57. Ai Group and the SDA have had some preliminary discussions in relation to this issue. We intend to continue those discussions over the coming fortnight. We expect to be in a position to further address the matter in our reply submissions, due on 6 April 2021.