Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Plain Language Re-Drafting –
Fast Food Industry Award 2010
(AM2016/15)

25 November 2020

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/15 PLAIN LANGUAGE RE–DRAFTING

– FAST FOOD INDUSTRY AWARD 2010

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the exposure draft (**Exposure Draft**) of the *Fast Food Industry Award 2010* (**Award**), which was published by the Fair Work Commission (**Commission**) on 28 October 2020.

Clause 4.2(a) of the Exposure Draft – Coverage

2. Clause 3.1 of the Award defines the 'fast food industry' as follows: (emphasis added)

> **fast food industry** means the industry of taking orders for and/or preparation and/or sale and/or delivery of:
>
> - meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
>
> …

3. The Exposure Draft, at clause 4.2(a), replaces the 'meals' and 'snacks' with 'food'. That change potentially substantively alters the meaning of the coverage clause.

4. A 'meal' is defined by the Macquarie Dictionary as 'one of the regular repasts of the day, as breakfast, lunch, or dinner' and 'the food eaten or served for a repast'[1]. Similarly, a 'snack' is 'a small portion of food or drink; a light meal'[2].

5. By contrast, a single item that may be eaten can constitute 'food', which, together with other food items and / or subject to cooking / preparation, may form part of a meal or a snack. Importantly, 'food' is 'sold to the public primarily for consumption away from the point of sale' by a range of employers in other industries; most notably in the general retail industry, which is covered by the

[1] Online Macquarie Dictionary definition.

[2] Online Macquarie Dictionary definition.

General Retail Industry Award 2020. The 'fast food industry' is to be distinguished from such operations. The 'fast food industry' involves the sale of 'meals' or 'snacks'. Not all 'food' constitutes a 'meal' or a 'snack'.

6. Accordingly, 'food' should be replaced with 'meals, snacks'. The retention of these terms, which are well known to industry, will ensure that the instrument is simple and easy to understand.

Clause 4.2(b) of the Exposure Draft – Coverage

7. Clause 3.1 of the Award defines the 'fast food industry' as follows: (emphasis added)

> **fast food industry** means the industry of taking orders for and/or preparation and/or sale and/or delivery of:
>
> …
>
> - take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
>
> …

8. The Exposure Draft replaces 'take away foods' as underlined above with 'food'.

9. In our submission, 'take away foods' are a specific type of 'food'. Not all 'food' constitutes 'take away foods'. The terms are not synonymous. The redrafting of the relevant part of the clause broadens the scope of the 'fast food industry' in a way that could expand the coverage of the Award. Furthermore, 'take away foods' is a widely understood term amongst the industry.

10. Accordingly, 'food' should be replaced with 'take away foods'.

Clause 4.2(c) of the Exposure Draft – Coverage

11. Clause 3.1 of the Award defines the 'fast food industry' as follows: (emphasis added):

> **fast food industry** means the industry of taking orders for and/or preparation and/or sale and/or delivery of:
>
> …
>
> - food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment

12. The words underlined above do not appear in clause 4.2(c) of the Exposure Draft. Their absence may substantively alter the coverage of the Award.

13. Under the Award, the 'fast food industry' is defined as including taking orders for, preparation and/or delivery of food and/or beverages in food courts, shopping centres and/or in retail complexes. However, coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment are excluded from the final limb of the definition of the industry.

14. Under the Exposure Draft, the scope of the comparable exclusion is broader and accordingly, it appears that additional coffee shops, cafes, bars and restaurants providing primarily a sit down service may also be excluded from the coverage of the Award. The exclusion is not confined to businesses that provide a sit down service *inside the catering establishment* and would include any that provide a sit down service *outside* the catering establishment.

15. 'Catering establishment' is not a defined term and accordingly, its meaning is not abundantly clear. Moreover, the question of whether a sit down service is provided *inside* or *outside* a catering establishment is a question of fact that needs to be considered in the context of each specific scenario.

16. Nonetheless, the words underlined above purport to limit the scope of the exclusion and that limitation does not appear in the Exposure Draft. As a result, under the Award, if a 'hole in the wall' coffee shop in a shopping centre provided a sit down service in a seating area that was part of or connected with a food

court or a shared dining area with other food / beverage outlets, it would at the very least be necessary to consider whether that sit down service is being provided *inside* the catering establishment. If not, the exclusion would not apply to the employer. Under the Exposure Draft, however, the exclusion would necessarily apply to the employer and the question of *where* the sit down service was being provided would not arise.

17. Any risk that the redrafting of the Award may result in a substantive change to its coverage should, in our respectful submission, be avoided. Accordingly, clause 4.2(c) should be amended to include the relevant words at the conclusion of the provision.

Clause 4.3(a) of the Exposure Draft – Coverage

18. Clause 4.5 of the Award currently extends the coverage of the Award to certain employers that supply businesses in the fast food industry with labour on an on-hire basis and the relevant on-hire employees who work for such employers:

> **4.5** This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

19. In contrast, clause 4.3 the Exposure Draft deals with the matter in the following manner:

> **4.3** This industry award also covers:
>
> **(a)** on-hire employees working in the fast food industry (with a classification defined in clause 12.4) and the on-hire employers of those employees;

20. Clause 4.3 of the Exposure Draft potentially alters the coverage of the instrument, as it pertains to on-hire arrangements, by removing the requirement that an employee be engaged in the performance of work for a *business* in the fast food industry. Instead, under the proposed provision, the coverage of an employee and their employer would turn on whether the on-hire employee is working in the fast food industry.

21. Unlike the Award, the Exposure Draft also neglects to provide that the instrument only covers a labour hire employer in respect of on-hire employees *while* they are engaged in the performance of relevant work in the industry.

22. We propose that the most appropriate way of rectifying this issue may be to amend clause 4.3(a) of the Exposure Draft so that it adopts the wording and approach taken in clause 4.5 of the Award.

Clause 4.4(d) of the Exposure Draft – Coverage

23. Clause 4.4(d) of the Exposure Draft has the effect of excluding employers from its coverage if any of their employees are excluded its coverage by virtue of clauses 4.4(a) – 4.4(c). That exclusion extends beyond the scope of clauses 4.2 – 4.4 of the Award. It would likely have the effect of removing most employers from the coverage of the instrument by virtue of the fact that they employ at least some employees who are excluded from award coverage by the Act.

24. Clause 4.4(d) should be amended as follows, so that it excludes employers from the coverage of the Exposure Draft only in relation to the employees described at clauses 4.4(a) – 4.4(c):

> **(d)** employers in relation to ~~of~~ employees mentioned in clauses ~~4.4(b) or~~ 4.4(a) – 4.4(c); or

Clause 4.5 of the Exposure Draft – Coverage

25. Clause 4.7 of the Award deals with the issue of overlapping coverage with other awards as follows: (emphasis added)

> **4.7** Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.
>
> NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and employee are covered by an award with occupational coverage.

26. Clause 4.5 of the Exposure Draft is potentially ambiguous. It replaces 'the employee', as underlined above, with 'it'. As a result, it is not entirely clear whether the provision now requires an assessment of the environment in which the work is normally performed or the environment in which the work is normally performed *by the employee*. In some instances, these two questions may result in different outcomes.

27. For the avoidance of doubt, clause 4.5 should be amended as follows:

> **4.5** If an employer is covered by more than one award, an employee of the employer is covered by the award containing the classification that is most appropriate to the work performed by the employee and to the environment in which the employee ~~it is~~ normally performs the work ~~performed~~.

Clause 7.2 of the Exposure Draft – Facilitative provisions

28. Clause 10.5 is not a facilitative provision. The reference to it in Table 1 should be deleted.

29. Clause 10.5 contemplates an employer and employee agreeing to vary an agreement reached under the Exposure Draft. It does not allow for the 'standard approach in an award provision to be changed by agreement between an employer and an individual employee'.

Clause 7.2 of the Exposure Draft – Facilitative provisions

30. Clause 10.7 is not a facilitative provision. The reference to it in Table 1 should be deleted.

31. Clause 10.7 contemplates an employer and employee agreeing to vary an agreement reached under the Exposure Draft. It does not allow for the 'standard approach in an award provision to be changed by agreement between an employer and an individual employee'.

Clause 12.2 of the Exposure Draft – Classifications

32. Clause 16.2 of the Award clearly describes how an employee is to be classified under the Award:

> **16.2** The classification by the employer must be according to the skill level or levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

33. The words underlined above make clear that the *employer* is to assess what the principal functions of an employee's employment are and that an employee is to be classified accordingly. An assessment of the employee's 'principal functions' does not require an assessment of the work in fact performed by an employee over a specified period of time or the *employee's* assessment of what their principal functions are or should be.

34. Clause 12.2 of the Exposure Draft omits the relevant words and is, in our submission, less clear as a result. Relevantly, it is no longer clear how the 'principal functions of the [employee's] employment' are to be determined.

35. Accordingly, the concluding words of clause 16.2 of the Award should be added to the conclusion of clause 12.2 of the Exposure Draft.

Clause 12.4(a)(i) of the Exposure Draft – Classifications

36. Clause B.1.1 of the Award describes various activities that an employee engaged as a level 1 employee may be engaged to undertake: preparation, receipt of orders, cooking, sale, serving or delivery.

37. Each of the aforementioned activities are also mentioned at clause 12.4(a)(i) of the Exposure Draft, except for 'cooking'. Given that cooking is a significant and common activity undertaken by employees covered by the Award, we submit that it should be included to make clear that such employees may be classified at level 1.

Clause 12.4(a)(i) of the Exposure Draft – Classifications

38. For reasons similar to those advanced in support of our submissions about the coverage clause, the word ‘food’ should be replaced with ‘meals, snacks’.

Clause 12.4(a)(i) of the Exposure Draft – Classifications

39. Under clause B.1.1 the Award, an employee may be classified at level 1 if they are engaged in the relevant activities in relation to meals and / or snacks and / or beverages. By contrast, under the Exposure Draft, a level 1 employee is defined as one who undertakes the relevant activities in relation to food *or* beverages. Read literally, an employee who undertakes the relevant activities in relation to both food *and* beverages would not satisfy the relevant definition. This is a substantive change to the Award and may impact whether an employee would be covered by it.

40. Accordingly, ‘or’ should be replaced with ‘and / or’.

Clause 12.4(a)(i) of the Exposure Draft – Classifications

41. Under clause B.1.1 of the Award, an employee may be classified at level 1 if they are engaged in the relevant activities in relation to meals, snacks and / or beverages which are sold to the public primarily (but not exclusively) to take away.

42. By contrast, under the Exposure Draft, a level 1 employee is defined as an employee who is engaged in the relevant activities in relation to food or beverages that are sold to the public for consumption away from the point of sale. The definition does not contemplate that the food or beverages may also be consumed at the point of sale, even though they are sold *primarily* for consumption away from the point of sale.

43. Numerous fast food operators offer customers the option of consuming their meals and beverages at the point of sale by providing, for instance, a dine-in area. The redrafted classification structure raises doubt about whether employees performing their duties in that environment would be covered by the

Award. This change could obviously amount to a very significant change to the coverage of the Award.

44. Accordingly, we submit that ‘primarily’ should be inserted after ‘public’.

Clause 12.4(a)(i) of the Exposure Draft – Classifications

45. Under clause B.1.1 of the Award, an employee may be classified at level 1 if they are engaged in the relevant activities in food courts in shopping centres.

46. Clause 12.4(a)(i) of the Exposure defines a level 1 employee more expansively. It refers to employees engaged in the relevant activities in a food court, shopping centre or retail complex. The proposed drafting is substantively different to the comparable element of the Award and introduces new undefined terminology such as the reference to ‘retail complex’, the meaning of which is unclear.

47. Accordingly, clause 12.4(a)(i) of the Exposure Draft should be amended as follows:

> (i) Engaged in taking orders for … consumption away from the point of sale or in a food court~~,~~ in a shopping centre ~~or retail complex~~; and

Clause 12.4(b)(i) of the Exposure Draft – Classifications

48. Under clause B.2 the Award, an employee may be classified at level 2 if the employee has supervisory responsibilities for level 1 employees and / or training new employees.

49. By contrast, clause 12.4(b)(i) of the Exposure Draft defines a level 2 employee as one who has supervisory responsibilities for supervising level 1 employees *or* an employee who trains new employees. It appears that an employee would not satisfy the relevant definition if they performed both of those duties. This is a substantive change that could affect the coverage of certain employees under the instrument.

50. Accordingly, the first ‘or’ in clause 12.4(b)(i) should be replaced with ‘and / or’.

Clause 13.1 of the Exposure Draft – Ordinary hours of work and rostering

51. Clause 13.1 is expressly confined in its application to full-time employees. No other provision of the Exposure Draft makes clear that a casual employee cannot work more than 38 ordinary hours each week. This could have implications for the manner in which superannuation entitlements are calculated and it may give rise to the issue of whether section 147 of the *Fair Work Act 2009* has been satisfied.

52. Accordingly, we suggest that a provision in the following terms is inserted in the Exposure Draft:

> The ordinary hours of work for a casual employee may be no more than an average of 38 ordinary hours per week, averaged over a period of no more than four weeks.

Clauses 13.2(a) – 13.2(d) of the Exposure Draft – Ordinary hours of work and rostering

53. In order to make clear that clause 13.2 concerns the arrangement of *ordinary* hours, 'ordinary' should be inserted before 'hours' in clauses 13.2(a) – (d).

Clause 14.4 of the Exposure Draft – Breaks

54. Clause 14.4 of the Exposure Draft creates a new obligation on employers. It requires that an employer must seek to ensure that the employee has meaningful breaks during work hours. The Award does not contain such an obligation. The relevant provision of the Exposure Draft is therefore substantively different from the Award.

55. Accordingly, clause 14.4 of the Exposure Draft should be deleted or replaced with the extant clause 27.1(b).

Clause 15.2 of the Exposure Draft – Minimum rates

56. The 'or' in Table 4 should be replaced with 'of age'.

Clause 17.6(a)(ii) of the Exposure Draft – Travelling time reimbursement

57. Pursuant to clause 19.4(a) of the Award, an employee is entitled in the relevant circumstances to be paid for any fares reasonably incurred in excess of those normally incurred in travelling between their home and their usual place of employment.

58. Clause 17.6(a)(ii) of the Exposure Draft does not properly reflect the aforementioned Award clause in three important respects:

    (i) It requires payment for *any additional costs* which potentially incorporates costs other than *fares*.

    (ii) It requires payment for *any additional costs*, regardless of whether they were *reasonably* incurred. If, for example, an employee incurs additional costs because they choose to take a detour on the way home for reasons disassociated with their employment, the relevant fares would not be said to have been *reasonably* incurred and therefore under the Award, an employer would not be liable to reimburse an employee. This limitation is not contained in the Exposure Draft.

    (iii) Though the provision refers to *additional* costs, it does not make clear what those costs would be *additional* to. Specifically, it does not make clear that the relevant comparison is to be made against the fares that would reasonably be incurred in travel to and from the employee's usual place of work.

59. For all of these reasons, clause 17.6(a)(ii) of the Exposure Draft should be replaced with the following:

    (ii) reimburse the employee for any fares reasonably incurred in travelling to and from the employee's residence and the other place of work that are in excess of the fares normally incurred in travelling between the employee's residence and their usual place of work.

Clause 17.7(b) of the Exposure Draft – Transport of employee reimbursement

60. Clause 17.7(b) requires an employer to reimburse an employee for any cost they reasonably incur in taking a 'commercial passenger vehicle'. This is to be contrasted to clause 19.7(a) of the Award, whereby the obligation on an employer is limited to the cost of a taxi fare.

61. The Exposure Draft provision is potentially much broader than the Award. Not only does it include ride-sharing options (such as Uber, Ola etc), it could also include, for instance, certain types of bus services and hire cars. This would amount to a substantive change to the Award and should therefore not be adopted.

Clause 17.7(b)(ii) of the Exposure Draft – Transport of employee reimbursement

62. The words following the comma should appear in a separate line below clause 17.7(b)(ii). They are to be read with clauses 17.2(b)(i) and 17.2(b)(ii).

Clause 18.3(d) of the Exposure Draft – Accident pay

63. Pursuant to clause 20.3(b)(ii) of the Award, an employee's entitlement to accident pay continues on termination of the employee's employment where such termination arises from a declaration of bankruptcy or liquidation of the employer. In such circumstances, the employee's entitlement will be referred to the Commission for determination.

64. The position is substantively different under clause 18.3(d) of the Exposure Draft. Pursuant to clause 18.3(d)(ii), an employee's entitlement to accident pay would continue on the termination of their employment if the termination was because of the employer's bankruptcy or the liquidation of the employer's business. The Exposure Draft does not go on to require that the matter must be referred to the Commission for determining the employee's entitlement. Rather, a subsequent note states that the Commission *may* determine the entitlement of an employee to accident pay in the circumstances mentioned in both clauses 18.3(d)(i) and 18.3(d)(ii).

65. To ensure that the Exposure Draft is consistent with the relevant terms of the Award, clause 18.3(d)(ii) of the Exposure Draft should be replaced with clause 20.3(b)(ii) of the Award and the note should be deleted.

Clause 20.5 of the Exposure Draft – Overtime – Minimum payment on a Sunday

66. Clause 26.4 of the Award requires a minimum payment of four hours to an employee who works overtime on a Sunday, unless the overtime is not immediately before or after ordinary hours. Whether certain work has been performed during 'ordinary hours' is to be determined by reference to the various parameters prescribed by the Award within which ordinary hours may be worked. The provision does not draw any distinction between *rostered* ordinary hours and other ordinary hours. Further, the Award does not contain any obligation to prepare or provide a roster.

67. Despite this, the note at clause 20.5 of the Exposure Draft refers to a 'roster of ordinary hours'. The reference to a 'roster' is confusing and the provision is, as a result, ambiguous.

68. Accordingly, 'a roster of' should be deleted.

Clause 20.6 of the Exposure Draft – Overtime rates

69. Clauses 26.1(a) and 26.1(b) of the Award prescribe overtime rates. They describe the rates payable on Monday – Saturday as applying 'on any one day'. As a result, under the Award, each such day stands alone when calculating overtime rates.

70. Clause 20.6 of the Exposure Draft does not make this clear. The aforementioned phrase is not used, nor does the Exposure Draft describe the concept in some other way. Having regard to the way in which the relevant rates are described in Table 5, the Exposure Draft is susceptible to being interpreted as requiring that overtime rates are to be calculated on some other basis, such as a weekly basis.

71. Accordingly, a new subclause should be inserted in the following terms:

> The overtime rates prescribed in Table 5 for overtime worked on Monday to Saturday are to be calculated on the basis that each day's work stands alone.

Clause 22.2 of the Exposure Draft – Additional annual leave for shiftworkers

72. Under the Award, by virtue of clause 28.2, a shiftworker may be entitled to an additional week of annual leave only if the employee is a seven day shiftworker.

73. The Exposure Draft does not confine the application of the shiftworker definition at clause 22.2 to seven day shiftworkers. It is, on its face, broader in scope. This substantive change should at the very least be addressed by inserting the words 'seven day' before 'shiftworker'.

74. We also make the obvious observation that the Award does not contemplate the performance of shiftwork. It appears therefore that neither clause 28.2 of the Award or clause 22.2 of the Exposure Draft have any work to do. Accordingly, clause 22.2 of the Exposure Draft should be deleted.

Clause 22.3 of the Exposure Draft – Annual leave loading

75. Clauses 22.3(a) and 22.3(b) of the Exposure Draft both state that an employee is entitled to an additional payment for accrued annual leave. Clause 22.3(b) goes on to prescribe the quantum of the additional amount payable. Though it is not abundantly clear what those amounts are to be paid in addition to, read alongside the NES, it would appear that the Exposure Draft is purporting to require the payment of the prescribed amounts in addition to the employee's base rate of pay.

76. Read in this way, the effect of clause 22.3(b)(i) of the Exposure Draft would be to require the payment of:

    (a) The minimum hourly rate and 17.5% of the minimum hourly rate *in addition to* the employee's base rate of pay, or

    (b) The relevant weekend penalty rates (125% or 150% of the minimum hourly rate) *in addition to* the employee's base rate of pay.

77. Taking by way of example an employee whose base rate of pay equates to the minimum rates prescribed by the Exposure Draft, an employee would be entitled to 217.5%, 225% or 250% of the minimum hourly rate of pay. A similar outcome would flow from clause 22.3(b)(ii) of the Exposure Draft.

78. Clause 28.3(b) of the Award is also somewhat unclear and potentially anomalous. However, we anticipate that it is not contentious that the clause is not intended to operate in the manner reflected in the Exposure Draft.

79. Clause 22.3 of the Exposure Draft should be amended to resolve the aforementioned issues. We again note that the given the absence of provisions contemplating shiftwork in the Award, it may be appropriate to delete clause 22.3(b)(ii) of the Exposure Draft.

Clause 22.6(a) of the Exposure Draft – Excessive annual leave

80. If clause 22.2 of the Exposure Draft is to be deleted in light of our earlier submissions, the reference to it in clause 22.6(a) should also be removed.

Clause 22.8(d) of the Exposure Draft – Excessive annual leave

81. The reference to clause 22.8(b) should be replaced with a reference to clause 22.8(a).

Clause 22.8(e) of the Exposure Draft – Excessive annual leave

82. The reference to clause 22.8(b) should be replaced with a reference to clause 22.8(a).

Clause 32.1(c) of the Exposure Draft – Redundancy – Transfer to lower paid duties

83. The reference to clause 32.1(b)(i) should be replaced with a reference to clause 32.1(b)(ii). This appears to be a drafting error.

Clause 32.3(c) of the Exposure Draft – Redundancy – Job search entitlement

84. The reference to clause 32.3(a) should be replaced with a reference to clause 32.3(b). This appears to be a drafting error.

Clause A.1.1 of the Exposure Draft – Summary of hourly rates – Full-time and part-time adult employees

85. The heading of the third column should be amended by replacing 'and' with 'to'. This appears to be a drafting error.

Clause A.2.1 of the Exposure Draft – Summary of hourly rates – Casual adult employees

86. The heading of the third column should be amended by replacing 'and' with 'to'. This appears to be a drafting error.

Clause A.3.2 of the Exposure Draft – Summary of hourly rates – Full-time and part-time junior employees

87. The heading of the third column should be amended by replacing 'and' with 'to'. This appears to be a drafting error.

Clause A.3.4 of the Exposure Draft – Summary of hourly rates – Casual junior employees

88. The heading of the third column should be amended by replacing 'and' with 'to'. This appears to be a drafting error.

Clause B.2.1 of the Exposure Draft – Summary of monetary allowances

89. The second and third rows of the table at B.2.1 refer to meal allowances. They are described as being payable 'per meal'.

90. The entitlement to the allowance arises under the Award and Exposure Draft on each occasion that an employee satisfies the relevant criteria. The allowance is not payable by reference to each meal that is consumed. Accordingly, clause B.2.1 should be amended by replacing 'per meal' with 'per occasion'.