



Fair Work Commission: 4 yearly review of modern awards

SUBMISSION: GROUP 3 EXPOSURE DRAFTS

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

9 AUGUST 2017

BACKGROUND

1. On 6 July 2017, the Fair Work Commission (the **Commission**) published a decision relating to Group 3 awards as part of the 4 yearly review of modern awards (the **July Decision**).
2. In the July Decision, interested parties were directed to file submissions on various issues, including:
 - (a) the hourly rates of pay schedule;
 - (b) the use of the term “occupational health and safety” in modern awards; and
 - (c) several revised Group 3 exposure drafts.
3. This submission is made on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009*.
4. In addition to addressing some of the general issues raised in the July Decision, this submission provides comments in relation to the following Exposure Drafts:
 - (a) the Banking, Finance and Insurance Award;
 - (b) the Business Equipment Award;
 - (c) Commercial Sales Award; and
 - (d) the Labour Market Assistance Industry Award.
5. Our clients intend to file a separate submission in relation to the Pastoral Award.
6. ABI and NSWBC appreciate the opportunity to provide this submission.

BANKING, FINANCE AND INSURANCE AWARD

7. Clause 6.4(d): At clause 6.4(d) of the Exposure Draft the Commission poses the parties a question in respect of whether the essential effect of the clause means that casuals are not entitled to overtime, penalty rates and other loadings. Clause 6.4(d) of the Exposure Draft provides:

(d) The casual loading is paid instead of annual leave, personal/carer’s leave, notice of termination, redundancy benefits and the other entitlements attributes of full-time or part-time employment.

8. ABI and the NSWBC confirm its view that the payment of the casual loading is in substitution for overtime, penalty rates and other loadings.

BUSINESS EQUIPMENT AWARD

9. Clauses 7.2(a)(i) and 15.2(b): In response to the query raised by the Commission regarding the provision that allows the spread of hours to be varied by up to one hour at either end of the spread, our clients rely on their submission dated 15 April 2016¹ and maintain their view that the clause allows for the spread of hours to be increased by one hour at both ends. The use of the words "at either end" demonstrates that the clause is intended to allow for the spread of hours to be increased at both ends (i.e. for one hour prior to 7.00 am and one hour after 7.00 pm). Our clients also submit that this interpretation applies where 'either' is also used in respect of clause 15.2(b) in the Exposure Draft with regards to standard shift work.

COMMERCIAL SALES AWARD

10. Clause 16.3: ABI and NSWBC note that the Commission proposed to vary clause 16.3 and remove the words 'in soliciting orders'.² However, this reference still appears at clause 16.3 of the further revised Exposure Draft. During the conference on 21 April 2016, there was a reference to utilising the wording provided by Business SA and ABI/NSWBC to remedy the issue.³ For convenience we provide the suggested wording from our submission dated 15 April 2016:

*"All work done by an employee, other than travelling, at the request of the employer on a public holiday..."*⁴

11. Our clients submit that the above wording should be adopted.

LABOUR MARKET ASSISTANCE INDUSTRY AWARD

12. Clause 11.2(b)(ii): Our clients agree to the proposed re-drafting of clause 11.2(b)(ii) by AMOD, save that our clients propose that the words "which is" be included after the words "employee's ordinary hourly rate of pay". The purpose of this amendment is to clarify the intention of the clause, which is that overtime is payable for time worked in excess of ordinary hours while on excursions.

¹ ABI and NSWBC Submissions dated 15 April 2016, paragraph 4.4.

² Transcript of Fair Work Commission Conference, Thursday 21 April 2016 at paragraph PN756.

³ See Transcript, 21 April 2016 at PN755.

⁴ See ABI and NSWBC submission dated 15 April 2016, at paragraph 6.4.

13. Clause 14.1(b)(ii): Our clients agree to the proposed re-drafting of clause 14.1(b)(ii) by AMOD as it reflects the position of the parties contained in the Joint Report filed on 25 July 2016.
14. Clause 14.2(c): Our clients agree to the proposed re-drafting of clause 14.2(c) by AMOD.
15. Clause 20.2: Our clients propose amending clause 20.2 to make reference to clause 14.2(c) on the basis that having two clauses relating to the payment on public holidays will cause ambiguity and confusion. Our clients propose the following wording:

“Payment for working on a public holiday is provided for in clause 14.2(c).”

OTHER MATTERS RAISED IN THE JULY DECISION

References to “Occupational health and safety”

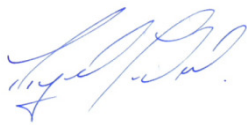
16. ABI and NSWBC support adopting the term ‘work health and safety’ uniformly across all modern awards, in replacement of ‘occupational health and safety’.

Reference to “allowances”, “rates”, or “loadings” as opposed to “shift penalties”

17. Our clients are generally supportive of the Commission’s desire to promote consistency in terminology across the modern awards system, and have no in-principle objection to the adoption of standardised terminology across modern awards.
18. We note the Commission’s reference to section 139 in the July Decision at paragraph [375]. As observed in the July Decision, section 139(1)(e) permits modern awards to include terms about “penalty rates, including for ... shift workers”. Notably, the only reference to “loadings” in section 139 relates to leave loadings; there is no explicit reference to “shift loadings” in section 139. Accordingly, if “shift loadings” are to be included in modern awards, they must fall into the characterization of penalty rates.
19. Accordingly, the language of section 139 supports the notion that the term “shift penalties” is appropriate.
20. However, there may be flow-on effects as a result of the proposed change in terminology, which may require further consideration and/or other ancillary changes to address any such issues.
21. By way of example of some of the potential consequences, sections 16 and 18 of the FW Act provide definitions for “base rate of pay” and “full rate of pay”, and those definitions variously contain references to “loadings”, “allowances” and penalty rates”. While consideration may need to be given as to whether any altered terminology results in

material changes to employees' base rates of pay under the FW Act, ABI and NSWBC's view in relation to this matter is that the proposed terminology change should not impact on the definitions because penalty rates are dealt with in the same manner as loadings under the same definitions.

22. A further example is the model 'Award Flexibility' clauses which appear in modern awards. Those clauses prescribe a number of terms which employers and individual employees can agree to depart from as part of an individual flexibility arrangement. The model provision allows an IFA to be created in relation to "overtime rates", "penalty rates", "allowances" and "leave loading", but does not explicitly refer to other non-leave related loadings such as "shift loadings".
23. It may be that any move to adopt the term "shift penalty" in favour of "shift loading" may result in an alteration to the operation of the model Award Flexibility clause in modern awards. However, ABI and NSWBC again do not see this as a matter that would prevent the Commission from making the changes that have been proposed.



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On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

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