

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Finalisation of Exposure Drafts –
Tranche 3
(AM2019/17)

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Ai
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS
FINALISATION OF EXPOSURE DRAFTS – TRANCHE 3**

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1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation to the following ‘third tranche’ of exposure drafts published by the Fair Work Commission (**Commission**) 30 January 2020:
 - (a) *Black Coal Mining Industry Award* (**Black Coal Award**);
 - (b) *Business Equipment Award* (**Business Equipment Award**);
 - (c) *Electrical, Electronic and Communications Contracting Award* (**Electrical Contracting Award**);
 - (d) *Food, Beverage and Tobacco Manufacturing Award* (**FBT Award**);
 - (e) *Graphic Arts, Printing and Publishing Award* (**Graphic Arts Award**);
 - (f) *Horticulture Award* (**Horticulture Award**);
 - (g) *Miscellaneous Award*
 - (h) *Nurses Award*;
 - (i) *Professional Employees Award* (**Professionals Award**);
 - (j) *Sugar Industry Award* (**Sugar Award**);
 - (k) *Telecommunications Services Award* (**Telecommunications Award**);
 - (l) *Textile, Clothing, Footwear and Associated Industries Award* (**TCF Award**);
 - (m) *Timber Industry Award* (**Timber Award**); and
 - (n) *Wine Industry Award* (**Wine Award**).
2. Further, consistent with the submissions we have previously made in respect of the ‘Tranche 1’ and ‘Tranche 2’ exposure drafts, we submit that a period of not less than three months should be allowed to lapse between the issue of a final determination by the Commission varying each award to reflect the final iteration

of the exposure draft and the date upon which those variations commence operation. We continue to rely on the submissions we have previously made in this regard.¹

¹ Ai Group [submission](#) dated 20 September 2019 at page 3.

2. BLACK COAL AWARD

3. The submissions that follow relate to the exposure draft of the Black Coal Award.

Title of the award

4. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 2: Definitions – black coal mining industry

5. The following amendment needs to be made to the definition of 'black coal mining industry' in clause 2:

black coal mining industry has the meaning given in clause 4.2, clause 4.3 and in the Note that appears in clause 4.3.

6. Clause 4.2 only addresses types of work that are included in the 'black coal mining industry', and not types of work that are excluded. Clause 4.3 addresses types of work that are excluded from the 'black coal mining industry'. In addition, the Note in clause 4.3 is very important in interpreting the meaning of the 'black coal mining industry'. The Note particularly relates to the following wording in clause 4.2:

For the purposes of this award, '**black coal mining industry** has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal'. Subject to the foregoing, the black coal mining industry includes:

Clause 2: Definitions – ordinary week's pay

7. The reference to 'clause A.4' should be replaced with a reference to 'clause A.4 and B.2'.
8. The award currently defines 'ordinary week's pay' as follows:

ordinary week's pay means the amount in the total payment column for the award classification rate in respect of 35 ordinary hours

9. The defined term is used in clauses 14.3 and 14.4 of the award. Those provisions prescribe amounts payable to employees in the event of a redundancy.

10. As we understand it, clause 14 is not limited to ‘production and engineering employees’. It applies also to ‘staff employees’.
11. The basis for limiting the definition of ‘ordinary week’s pay’ such that it refers only to the minimum rates prescribed by the award for ‘production and engineering employees’ is not clear. In the context of ‘staff employees’, the extant award provisions require that the relevant rates prescribed in Schedule B apply.
12. Accordingly, we propose that the definition at clause 2 be amended as follows:

ordinary week’s pay means minimum weekly rate in the table of minimum rates in ~~clause A.4~~ Schedule A or B (as applicable), for the award classification rate in respect of 35 ordinary hours.

Clause 7.2(a): Facilitative provisions

13. Clause 14 is not a facilitative provision. We note that clause 15, however, contains two facilitative provisions.
14. The reference to clause 14 should be replaced with a reference to clause 15.

Clause 17.4: National training wage

15. Each time it appears, ‘20XX’ should be replaced with ‘2020’.

Clause 24.9(a): Shutdown

16. The reference to ‘clause 24.4’ should be replaced with a reference to ‘clause 24.10’. This appears to be a drafting error.

Clause 24.9(i): Shutdown

17. The reference to ‘clause 24.4’ should be replaced with a reference to ‘clause 24.10’. This appears to be a drafting error.

Clause 24.10: Excessive leave accruals - Note

18. The reference to ‘clause 24.4’ should be replaced with a reference to ‘clause 24.10’. This appears to be a drafting error.

Clause 29.4: Employee required to work on a recognised public holiday

19. In response to the question contained in the exposure draft, Ai Group confirms that the claim is pressed. We continue to rely on the [submission](#) we filed on 13 November 2015; however given the renumbering of provisions in the exposure draft, references in that submission to 'clause 18.4(a)' should be read as 'clause 29.4(a)' and 'clause 18.4(b)' should be read as 'clause 29.4(b)'.

Clause A.1.5: Note

20. The reference to clause 31 should be deleted, consistent with the note following the extant A.1.5.

Clause A.8.2: Wage related allowances and reimbursements – height money

21. Height money is payable under the award per shift, not per hour. The final column should be amended accordingly.

3. BUSINESS EQUIPMENT AWARD

22. The submissions that follow relate to the exposure draft of the Business Equipment Award.

Title of the award

23. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 2: Definitions – minimum hourly rate

24. The definition is problematic as it requires the calculation of the minimum hourly rate by reference to the weekly rates contained in clause 14.2. This excludes employees who are not entitled to those weekly rates, such as employees to whom clause 14.3 applies (Supported Wage System) and clause 14.4 applies (National Training Wage).
25. The words "in clause 14.2" should be replaced with "prescribed by this award".

Clause 14.6: National training wage

26. Each time it appears, '20XX' should be replaced with '2020'.

4. ELECTRICAL CONTRACTING AWARD

27. The submissions that follow relate to the exposure draft of the Electrical Contracting Award.

Title of the award

28. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 16.4: Apprentice minimum rates

29. In relation to the question contained in the exposure draft, the fares allowance in clause 18.6(d) and the travel time allowance in clause 18.6(c) should not be included in the all-purpose rate. An all-purpose rate is paid not only for time worked but also on certain forms of paid leave under the award (including annual leave and personal / carer's leave), on public holidays not worked and where payment is made in lieu of notice upon termination.

30. Clause 18.6(c) clearly stipulates that the allowance is paid only on days the employee presents themselves for work and on rostered days off. It is not intended to be paid under any other circumstance. It therefore should not be included in the all-purpose rate.

31. Clause 18.6(d) similarly is an allowance that is payable when the employee is actually working and required to start or cease work on a job site. This allowance is not intended to be paid under any other circumstance. It therefore should not be included in the all-purpose rate.

Clause 16.7: National training wage

32. Each time it appears, '20XX' should be replaced with '2020'.

Clause 21.4(b): Annual Leave Loading

33. The reference in the last sentence of the clause to "clause 21.4" is an error and the reference should be amended to read "clause 21.2".

5. FBT AWARD

34. The submissions that follow relate to the exposure draft of the FBT Award.

Title of the award

35. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 4.3: Coverage

36. Each time it appears, '20XX' should be replaced with '2020'.

6. GRAPHIC ARTS AWARD

37. The submissions that follow relate to the exposure draft of the Graphic Arts Award.

Title of the award

38. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 4.3: coverage of on-hire employees

39. The following amendments should be made to clause 4.3 to correct an apparent error and to address the fact that the Award operates on an industry and occupational basis:

- 4.3** This award covers any employer which supplies labour on an on-hire basis in the graphic arts, printing, publishing and associated industries and occupations ~~industry~~ 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~~ those industries and occupations. Clause 4.3 operates subject to the exclusions from coverage in this award.

Clause 4.4: Coverage

40. The following amendments should be made to clause 4.4 to correct an apparent error:

- 4.5** This award covers employers which provide group training services for apprentices and/or trainees engaged in the graphic arts, printing, publishing and associated industries and occupations ~~industry~~ and/or parts of those industries or occupations and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described in clause 4.2 are being performed. This subclause Clause 4.5 operates subject to the exclusions from coverage in this award.

Clause 7.5(a): Facilitative provisions

41. An error appears in the table. Clause 13.3(a)(ii) is not a facilitative provision and is incorrectly listed in this table. It appears that the reference to clause 13.3(a)(ii) was intended to be a reference to clause 13.3(c)(ii). Clause 7.5(a) should be varied to reflect this.

Clause 22: National training wage

42. Each time it appears, '20XX' should be replaced with '2020'.

Clause 32.2: Annual leave

43. In a 9 June 2017 decision,² a Full Bench of the Commission decided that clause 37.2 of the Graphic Arts Award should be varied as follows:

Notwithstanding clause 33.5, employees engaged in a ~~regional~~ daily newspaper office, in circumstances where they work the prescribed public holidays, may, by agreement between the employer and an employee or employees, be credited with an extra two weeks and three days' annual leave instead of any penalty provision as provided for by clauses 41.3 or 41.4. ~~This provision does not apply to a shiftworker as defined in clause 37.4~~ Where there is an agreement between an employer and an employee under this clause 37.2, this clause 37.2 applies to the employee instead of clause 37.4.

44. Consistent with the above decision, the final sentence of clause 32.2 should be varied as follows:

32.2 Notwithstanding clause 29.5, employees engaged in a daily newspaper office, in circumstances where they work the prescribed public holidays, may, by agreement between the employer and an employee or employees, be credited with an extra 2 weeks and 3 days' annual leave instead of any penalty provision as provided for by clauses 37.3 or 37.4. ~~Where there is an agreement between an employer and an employee under clause 32.2,~~ Where there is an agreement between an employer and an employee under clause 32.2, clause 32.2 applies to the employee instead of clause 32.4.

Clause 41: Dispute resolution training leave

45. The reference in clause 41.6 should be amended as follows, to ensure consistency with the relevant provision in the current award:

41.6 ...For the purposes of ~~clause 41~~ clause 41.6, ordinary time earnings means the wage rate for the classification, over-award payment and shift loading which otherwise would be payable...".

46. The term 'ordinary time earnings' is used only in clause 41.6.

² [2017] FWCFB 3135

7. HORTICULTURE AWARD

47. The submissions that follow relate to the exposure draft of the Horticulture Award.

Title of the award

48. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 10.2: Part-time employees

49. The clause is incomplete. A cross-reference at the end of the clause has been omitted.

50. In our submission, however, clause 10.2 should be amended such that it reads as follows:

10.2 Subject to clause 15.2, for each ordinary hour worked, a part-time employee will be paid no less than the ordinary hourly rate for the classification.

51. The proposed amendment is advanced on the following bases:

(a) The opening words (underlined) would make the interaction between clause 10.2 and clause 15.2 clear. As provided by 15.2(d), if an employee is paid a piecework rate, the employee is not entitled to the minimum rates specified at clause 15. Clause 10.2 is presently inconsistent with clause 15.2(d). The added words rectify this.

(b) We have been unable to identify an appropriate cross-reference to be inserted at the end of the clause. For instance, we do not consider that clause 15 or clause 15.1 are appropriate cross-references. Neither prescribe the 'ordinary hourly rate'. Moreover, clause 15.1 prescribes only the adult rate. In the context of, for example, a junior employee, a reference to clause 15.1 in clause 10.2 would purport to entitle such a part-time employee to a higher rate than what they would be entitled to under clause 15.3.

Clause 15.6: National training wage

52. Each time it appears, '20XX' should be replaced with '2020'.

Clause 16.3: Payment on termination – Note 2

53. The reference to clause 16 should be replaced with a reference to clause 16.3.
This appears to be a drafting error.

8. MISCELLANEOUS AWARD

54. The submissions that follow relate to the exposure draft of the Miscellaneous Award.

Title of the award

55. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

9. NURSES AWARD

56. Ai Group has filed an application to vary the Nurses Award. The application relates to the rates payable to casual employees when working overtime, on weekends and public holidays.
57. Our application was made in part due to issues raised by the ANMF in the context of proceedings concerning the exposure draft of the Nurses Award. The union filed a submission³ proposing that the exposure draft be amended to reflect a recent decision⁴ of the Commission regarding the interpretation of various award clauses concerning the aforementioned entitlements. Ai Group opposed the ANMF's submission.⁵
58. Proceedings were held on 27 August 2019 and 9 October 2019 before His Honour, Justice Ross about how the issue might be dealt with. During the latter proceedings, His Honour indicated that the exposure draft process would not be an appropriate way to resolve the issue.⁶
59. Ai Group subsequently filed its application on 6 January 2020. That application has been filed outside the scope of the award review. Directions for the matter have since been issued, with a hearing scheduled for 1 September 2020.
60. Our application will, in part, put in issue the proper interpretation of various provisions of the award. This will necessarily turn on the language used in those provisions. We are concerned that if the award was varied to reflect what is now the exposure draft and as a result, the language used in the relevant provisions was altered, the position of one or more parties with an interest in Ai Group's application would be prejudiced.
61. In any event, it would appear from the ANMF's aforementioned submission that it would oppose the award being varied to reflect the exposure draft in its current

³ ANMF [submission](#) dated 13 June 2019.

⁴ *ANMF v Domain Aged Care (QLD) Pty Ltd T/A Domain Aged Care* [2019] FWCFB 1716.

⁵ Ai Group [submission](#) dated 13 August 2019.

⁶ Transcript of proceedings on 9 October 2019 at PN42.

form and that in order to deal with that controversy, the Full Bench as presently constituted would be required to determine many of the same questions that will be before the Full Bench constituted to deal with Ai Group's application.

62. Further, we have been unable to identify a potential means of finalising the exposure draft without giving rise to the aforementioned complexities (such as, for example, simply excluding any table of rates prescribing the amounts payable to casual employees during overtime, weekends and / or public holidays).
63. For all of the reasons above, we respectfully submit that the Commission should defer finalisation of the exposure draft of the Nurses Award until Ai Group's application has been determined. We make this submission also on behalf of the Private Hospital Industry Employers.
64. We note that in a submission filed on 4 March 2020, the ANMF has advanced the same position.

10. PROFESSIONALS AWARD

65. The submissions that follow relate to the exposure draft of the Professionals Award.

Title of the award

66. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 2: Definitions

67. In clause 2 of the exposure draft, a question is asked about whether APESMA's claim concerning Engineering Technologists is pressed. APESMA has advised Ai Group that this claim is no longer being pressed as part of the 4 Yearly Review.

Clause 4.2(b): Coverage

68. The reference to '20XX' should be replaced with '2020'.

Clause 4.2(d): Coverage

69. If our submission above concerning the Nurses Award is accepted, the reference to '20XX' should be replaced with '2010'.

Schedule A: Classification structure and definitions

70. In Schedule A of the exposure draft, a question is asked about whether APESMA's claim concerning Engineering Technologists is pressed. APESMA has advised Ai Group that this claim is no longer being pressed as part of the 4 Yearly Review.

11. SUGAR AWARD

71. The submissions that follow relate to the exposure draft of the Sugar Award.

Title of the award

72. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 20.3(c): Tool allowance for apprentices

73. In clause 20.3(c)(i), the cross-reference should be '20.3(c)(ii)' and not '20.3(b)'.

Schedule H: National Training Wage

74. The following corrections should be made to clause H.4.1(d)(ii) of Schedule H in the *Sugar Industry Award* to address errors:

- (ii) The minimum rate for a full-time adult trainee undertaking an AQF Certificate Level IV traineeship is the weekly rate specified in column 2 or 3 of Table 4—Wage level B minimum weekly rate for full-time trainees (**AQF Certificate Level I–III IV traineeship**) according to the year of the traineeship specified in those columns and the relevant wage level for the relevant AQF Certificate Level III traineeship specified in column 1:

Table 4—Wage level B minimum weekly rate for full-time trainees (AQF Certificate Level I–III IV traineeship)

12. TELECOMMUNICATIONS AWARD

75. The submissions that follow relate to the exposure draft of the Telecommunications Award.

Title of the award

76. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 2: Definitions – ordinary hourly rate

77. The definition is problematic as it requires the calculation of the ordinary hourly rate by reference to the rates contained in clause 15.1. This excludes employees who are not entitled to those rates, such as employees to whom clause 15.2 applies (junior employees) and clause 15.3 applies (apprentices).

78. The words "clause 15.1" should be replaced with "this award".

Clause 4.5(b): Exclusions

79. The reference to '20XX' should be replaced with '2020'.

Clause 15.6: National training wage

80. Each time it appears, '20XX' should be replaced with '2020'.

Clause 17: Annual salary arrangements for higher classifications

81. Clause 17 of the exposure draft corresponds with clause 15 of the award. Clause 15 has been varied since the exposure draft was published.⁷ The exposure draft therefore requires updating.

⁷ PR716768.

Clause B.2.4: Full-time and part-time employees – overtime

82. The rates at B.2.3 apply to full-time and part-time employees who are not performing shiftwork when working overtime.
83. The following set of rates, at B.2.4, are headed ‘full-time and part-time employees – overtime’. The rates set out therein appear to be the same as the rates at B.2.3. The distinction between the two sets of rates is not clear.
84. We suggest that B.2.4 is deleted.

Schedule B: certain classifications exempt from various entitlements

85. We refer to footnote 1 to each of the table of rates set out in Schedule B. Footnote 1 applies to certain classifications and says:

See clause 17—Annual salary arrangements for higher classifications in relation to award provisions that do not apply to persons in these classifications.
86. While under the annualised salary clause that previously applied, certain employees were exempted in all circumstances from certain award entitlements, as a consequence of the introduction of new annualised wage arrangements (effective 1 March 2020), this will no longer be the case.
87. The relevant tables and footnotes require revisiting in light of the new annualised salary clause (see our submissions about clause 17 in this regard).

13. TCF AWARD

88. The submissions that follow concern the exposure draft of the TCF Award.

Title of the award

89. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 2: Definitions – all purposes

90. The definition of all purposes appears to have been deleted. We submit that it should be retained. Certain allowances in this award are designated as being 'all purpose' allowances.

Clause 4.5: Coverage

91. Each time it appears, '20XX' should be replaced with '2020'.

Clause 4.7: Coverage

92. We submit that clause 4.7 should be replaced with the following:

4.7 This award covers any employer which supplies labour on an on-hire basis in any of the industries set out in clause 4.1 (as defined in clause 4.2) 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 those industries. Clause 4.7 operates subject to the exclusions from coverage in this award.

93. The proposed amendments address two concerns with the clause contained in the exposure drafts:

(a) The clause contained in the exposure draft could be read such that the award applies to an employer only if they supply labour in each of the industries there listed. This is clearly not the intent and would in our submission amount to a substantive change to the current award provisions.

- (b) The reference to clause 4.6(c) in the final sentence of the clause is an error. The reference should be to clause 4.7.
- (c) The provision proposed above, although it requires consideration of other provisions contained in the instrument, is simpler and easier to understand than the provision contained in the exposure draft.

Clause 4.8: Coverage

94. For similar reasons as those stated above in respect of clause 4.7, clause 4.8 should be replaced with the following:

4.8 This award covers employers which provide group training services for apprentices and/or trainees engaged in the industry and/or parts of industry set out at clause 4.1 (as defined by clause 4.2) and those apprentices and/or trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. Clause 4.8 operates subject to the exclusions from coverage in this award.

Clause 11.1(g): Casual conversion to full-time or part-time employment

95. The first reference to clause '11.11(c)' should be replaced with '11.11(g)'. The first reference to 'clause 11.1(c)', read in its context, does not make sense. The proposed amendment is consistent with the extant clause 14.10(g).

Clause 18.4(f): Breaks, rests and meal allowance during overtime

96. A space should be added between '5' and '1/2'.

Clause 19.11: National training wage

97. Each time it appears, '20XX' should be replaced with '2020'.

Clauses 28.4(a) and (b): Overtime – weekend work

98. Consistent with the terminology used in the preceding clause and elsewhere in the exposure draft, "ordinary rate" should be replaced with "ordinary hourly rate", which is a defined term.

Clause C.3.3: Full-time and part-time employees – certain shiftworkers – ordinary and penalty rates

99. The rates under 'Monday to Friday – 12 hour shift, first 10 hours' appear to be incorrect. They should be the same as the rates in the second column.

14. TIMBER AWARD

100. The submissions that follow relate to exposure draft of the Timber Award.

Title of the award

101. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 20.10: National training wage

102. Each time it appears, '20XX' should be replaced with '2020'.

15. WINE AWARD

103. The submissions that follow relate to the exposure draft of the Wine Award.

Title of the award

104. The reference to '20XX' should be replaced with '2020' in the title of the award, the header and clause 1.1.

Clause 14.6: National training wage

105. Each time it appears, '20XX' should be replaced with '2020'.

Clauses 17.4: Piecework rates

106. The clause omits any reference to public holiday penalty rates and as a result, the exposure draft deviates substantively from the extant clause 23.4.

107. We submit this issue can be resolved by deleting clause 17.4(d) and amending clause 17.4(c) so that it instead reads: 'clause 23 – Penalty rates'.

Clauses 17.6(c) and (d): Piecework rates

108. Each time it appears, '20XX' should be replaced with '2020'.

Clauses 17.6(d): Piecework rates

109. The clause omits any reference to public holiday penalty rates and as a result, the exposure draft deviates substantively from the extant clause 23.6.

110. We submit that this issue can be resolved by deleting clause 17.6(d)(iv) and amending clause 17.6(d)(iii) so that it instead reads: 'clause 23 – Penalty rates'.

Clauses 20.1(b): Accident pay

111. Clause 20.1(b) should be deleted. It is a duplicate of clause 20.1(a).