



Fair Work Commission: 4 yearly review of modern awards

**SUBMISSIONS IN REPLY: TRANCHE 3 EXPOSURE
DRAFTS**

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

7 APRIL 2020

BACKGROUND

1. These submissions in reply are 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*.
2. These submissions in reply respond to submissions made in relation to 'Tranche 3' exposure drafts published by the Fair Work Commission in January 2020 and the 'Tranche 3 Background Paper' published by the Commission on 23 March 2020 (**Background Paper**).
3. ABI and NSWBC appreciate the opportunity to provide the following submissions in reply.
4. To assist the Commission and other parties, these submissions have followed the formatting adopted by the Commission in the Background Paper.

CHAPTER 2 – UNCONTENTIOUS AWARDS

Q1. Comment on the minor drafting errors identified in the awards and their subsequent footnotes at [10].

5. ABI and NSWBC have not identified any issues with the 'uncontentious awards' set out at paragraph [10] of the Background Paper, save for the minor drafting errors.

CHAPTER 3 – TIMING ISSUES

Q2. Comment on the timing issue in reply submissions at [13].

6. ABI and NSWBC recognise there are benefits in allowing time for parties to prepare for the introduction of the updated awards.
7. This is particularly so, given the ongoing COVID-19 pandemic and the disruption this has caused to workplaces across Australia.
8. Our clients are also mindful that the end of financial year can be a busy time for employers and consider it preferable that the awards are not varied during this period.
9. The timing of any annual wage review decision handed down by the Expert Panel should also be taken into consideration when determining the relevant effective dates.
10. There may be merit in waiting until after any annual wage review decision has taken effect before issuing the final determinations.

CHAPTER 4 – AWARD SPECIFIC ISSUES

General Comments

11. ABI and NSWBC have reviewed the sections of the Background Paper that relate to the awards in which it has an interest.
12. Unless otherwise stated in these submissions, our clients:
 - (a) agree with each of the provisional views expressed by the Commission; and
 - (b) support the amendments made by the Commission to rectify minor errors.

Broadcasting and Recorded Entertainment and Cinemas Award 2010

Casual Conversion Issue

Q7. Comment on the issue raised by CRA and the amendments proposed at [61].

13. ABI and NSWBC acknowledge that the terms of the exposure draft do not depart from the existing provisions in the modern award.
14. Despite this, our clients consider the CRA submission to have merit.
15. ABI and NSWBC agree that is unusual for a modern award to entitle employees on paid annual leave to both the shift rates they would have received had they not been on leave and a 17.5% loading.
16. This position was expressed by the Full Bench at [184] in the *Payment of Wages* decision handed down on 1 December 2016¹.
17. In this decision, the Full Bench considered annual leave loading clauses in the *Joinery Award 2010*, the *Food, Beverage and Tobacco Manufacturing Award 2010* and the *Electrical, Electronic and Communications Contracting Award 2010*.
18. These clauses could be read as entitling employees to payment of both a shift loading and an additional annual leave loading (or a double shift loading).
19. The Full Bench found this to be “*inconsistent with the norm expressed by the Commission in the 1971 Annual Leave Case*” and considered it necessary to vary these clauses in order to meet the modern awards objective.
20. ABI and NSWBC support the nature of the variations proposed by CRA.
21. Our clients question whether the proposed wording of the new clause 18.3(c) sufficiently considers the fact that the exposure draft variously expresses payment for shift work as:
 - (a) “*shift duty allowances*” to be paid as separate amounts in addition to the employee’s base rate of pay (e.g. clauses 32 and 45.2); and
 - (b) “*shift penalties*” to be paid as total amounts in lieu of the employee’s base rate of pay (e.g. clauses 44 and 51).

Additional minor error identified

22. Clause 44.4(b) of the exposure draft appears to contain a typographical error. The word “*sAn*” should be replaced with the word “*An*”.

Educational Services (Teachers) Award 2010

Q9. Reply to the provisional view at [73].

23. ABI and NSWBC do not agree with the provisional view expressed by the Commission at [73] to the extent it deals with the proposed variations to the payment of wages clause.

¹ [\[2016\] FWCFB 8463](#)

(ii) Payment of wages

24. ABI and NSWBC oppose the proposed variation to clause 18.1 on the grounds that it is unnecessary and creates ambiguity.
25. Clause 18.1(a) currently deals with the frequency of payments and simply requires that an employee is paid on a regular basis, once a fortnight.
26. This is distinct from clauses 18.1(b) and 18.1(c) which also impose additional requirements in relation to the specific pay periods that must be included in the payments (e.g. clause 18.1(b) requires payment of two weeks in arrears and two in advance).
27. Our clients are concerned that the proposed wording would require payment for work performed within any given fortnight to be made within that same fortnight.
28. It is common practice for employers to make payments a few days after the relevant pay period e.g. payments for a pay period that runs from Monday 1 to Sunday 14 may be processed and paid on Tuesday 16.
29. This is entirely acceptable under the current award and exposure draft.
30. The proposed variation could be seen to introduce requirements similar to those in clauses 18.1(b) and (c). If this were the case, employers would be required to pay employees partly in arrears and partly in advance in order to comply.
31. While this may not be too problematic for salaried teachers working consistent hours, it is impractical for employers of casual teachers, something that is particularly prevalent in the children's services and early childhood education industry.
32. ABI and NSWBC are unsure exactly what mischief the amendment I seeking to remedy. IEU submit that the proposed change is required so "*it is clear when payment is due.*"²
33. Our clients submit that the current wording of the clause clearly requires payment to be made once per fortnight.
34. ABI and NSWBC would not oppose varying clause 18.1(a) so that it:
 - (a) required payments to be made no later than the same day each fortnight; or
 - (b) required payments to be made on a working day.

(iii) Redundancy notice period

35. ABI and NSWBC do not oppose the proposed variation to clause 33.2 in its current form.
36. Our clients note that the non-standard notice period of 7 weeks does not apply to employees who are not employed in schools and so it is appropriate to use the generic words "*this award*".

² [IEU submissions of 4 March 2020](#)

Electrical, Electronic and Communications Contracting Award 2010

Q12. Comment on the issue raised by ABI at [86].

37. In response to the Commission's invitation, our clients propose that the issue could be addressed by removing references to "*fares allowance*" and "*travel time allowance*" in clauses 16.4(a)(iii), 16.4(b)(iii), 16.4(b)(iv), 16.4(b)(vi) and 16.4(b)(vii).

Q13. Comment on the submissions of ABI and Ai Group in respect of whether the fares allowance in clause 18.6(d) and the travel time allowance in clause 18.6(c) should be included in the all-purpose rate for apprentices at [88].

38. ABI and NSWBC agree with the Ai Group's submission.

Food, Beverage and Tobacco Manufacturing Award 2010

Q16. Comment on the amendments to clause 10 proposed by the AMWU and AWU at [102].

39. ABI and NSWBC do not oppose the nature of the amendments proposed by the AMWU which would essentially introduce a definition of "*casual ordinary hourly rate*" to clause 10 (**Proposed Definition**) and make it clear that penalty rates or shift loadings are be calculated on this basis.

40. Our clients note that the Proposed Definition would be inconsistent with the existing definition of "*casual ordinary hourly rate*" in clause B.2.1 of the exposure draft (**Existing Definition**).

41. Under the Existing Definition, all-purpose allowances do not form part of the "*casual ordinary hourly rate*" but must be added to it prior to the calculation of penalties.

42. Under the Proposed Definition, all purpose allowances are to be added to relevant hourly rate, prior to the calculation of the casual loading (by virtue of the interaction between clause 10.2 and the definition of "*ordinary hourly rate*" in clause 2).

43. Our clients note that this issue arises in part from clause 10.2 (a) which states that a casual employee is entitled to "*the ordinary hourly rate prescribed in clause 14—Minimum wages and classifications*".

44. Clause 14 prescribes "*minimum hourly rates*" and not "*ordinary hourly rates*".

45. ABI and NSWBC propose that clause 10 of the exposure draft be replaced with the following:

10.1 *A casual employee is one engaged and paid as a casual employee.*

10.2 *A casual employee working ordinary time must be paid:*

(a) the minimum hourly rate prescribed in clause 14—Minimum wages and classifications for the work being performed;

(b) a casual loading of 25% of the minimum hourly rate; and

(c) any all purpose allowances that apply to the employee under clause 20.2 – Wage-related allowances.

10.3 *The loading in clause 10.2(b) and the allowances in clause 10.2(c) constitute part of the casual employee's all-purpose rate.*

10.4 The resulting rate is the *casual ordinary hourly rate*.

10.5 Where this award refers to a penalty rate or shift loading as being calculated as a percentage of the ordinary hourly rate, that reference will (for a casual employee) instead be taken to be a reference to the casual ordinary hourly rate if the entitlement is applicable to a casual employee.

46. Our clients do not support the AWU's proposed amendments to clause 10.2.
47. We accept that there is no longer a dispute in relation to the calculation of overtime, but do not consider the proposed changes necessary.
48. This is particularly so if the amount described by 10.2 becomes the definition for "*casual ordinary hourly rate*".

Q17. Comment on the amendments proposed by the AMWU and AWU at [109].

49. ABI and NSWBC oppose the amendment sought by the AMWU on the basis that it seeks to change the method of calculating the "*casual ordinary hourly rate*".
50. Our clients agree with the AWU's submission that a casual overtime rates table can be inserted to the award.

Health Professionals and Support Services Award 2010

Q20. Comment on the amendment proposed by the PHIEA at [135].

51. ABI and NSWBC understand that the issue of casual loading on overtime is still in dispute in relation to this award.
52. Accordingly, our clients support the PHIEA's submission that clause 11.5(a) should not be amended until this has been resolved.

Horticulture Award 2010

Q26. ABI is invited to propose an amendment to address the issue it has raised at [148].

53. After further review, ABI and NSWBC no longer oppose the amendment to clause 11.3 and apologise for the misdirection in the previous submission.

Q27. Comment on Ai Group's proposed amendments to clause 10.2 at [152].

54. ABI and NSWBC agree with Ai Group's submission that a cross reference is not required in clause 10.2.
55. Our clients do not oppose the proposed insertion of "*subject to clause 15.2*", but question whether a similar amendment should be made to clause 11.3 for consistency.
56. ABI and NSWBC also suggest that the words "*(which deals with pieceworkers)*" are also added immediately following the words "*subject to clause 15.2*" to assist those reading the clause.

Q29. Comment on the AWU's proposed amendment at [158].

57. ABI and NSWBC do not oppose the AWU's proposed amendment to clause 13.2.

Q31. Comment on the AWU's proposed amendment at [163].

58. ABI and NSWBC do not oppose the AWU's proposed amendment to clause 26.4.
59. We agree that the same issue applies to clause 20.4 and submit that a similar variation should be adopted.

Q32. Comment on the AWU's proposed amendment at [165].

60. ABI and NSWBC agree with the AWU's proposal in relation to a casual overtime table.

Nurses Award 2010

Q51. Comment on the proposal at [281].

61. ABI and NSWBC support the proposal outlined at [281].

Professional Employees Award 2010

Q52. Reply to the provisional view at [285].

62. The submission discussed at [282] to [285] was advanced by ABI and NSWBC.
63. Since making this submission our clients have spoken with other interested parties who have raised concerns about unintended consequences that may arise from the use of the word "*include*".
64. To avoid any unintended consequences, ABI and NSWBC no longer presses this matter and submit that the Commission should not adopt the provisional view expressed at [285].

Racing Clubs Events Award 2010

Q54. Comment on the AWU's proposal at [291].

65. ABI and NSWBC agree that a table of casual overtime rates can be included on the basis that casual employees are paid their 25% casual loading on a cumulative basis when overtime is worked.

Telecommunications Services Award 2010

Q63. Comment on Ai Group's proposed amendment at [325].

66. ABI and NSWBC support Ai Group's proposed amendment at [325].

Q64. Comment on the issue at [328].

67. ABI and NSWBC submit that the issue identified should be rectified in the manner suggested by the Commission at [327].
68. Our clients note that the rates in B.2.4 contain different public holidays rates from those in B.2.3.

Q66. Comment on the revised footnote and whether there are any other changes at [333].

69. It appears to ABI and NSWBC that the purpose of the footnote in question is primarily to explain the absence of particular rates that would not have applied to certain classifications due to exclusions arising out of the former clause 17.
70. Our clients support the revised footnote proposed by the Commission at [332] but submit that further variations will be required to the rates tables.
71. As Ai Group have indicated, the annualised salary provisions no longer automatically exempt certain classifications from the rates in question. These rates should be calculated and added to the relevant tables in Schedule B.

Textile, Clothing, Footwear and Associated Industries Award 2010

Q70. Comment on Ai Group's proposed amendments at [348].

72. ABI and NSWBC agree with Ai Group's proposed amendments.

Q71. Comment on Ai Group's proposed amendments at [352].

73. ABI and NSWBC agree with Ai Group's proposed amendments.

Q73. Comment on the CFMMEU (Manufacturing Division)'s proposed amendment at [362].

74. ABI and NSWBC oppose the CFMMEU (Manufacturing Division)'s proposed amendment.
75. Our clients acknowledge that clause 18.2 (a) of the exposure draft is derived from the existing award clause 38.2, which operates in conjunction with award clause 38.1.
76. Clause 18.2 (b) of the exposure draft, however, is derived from existing award clause 37.4 (b) which states:

Twenty minutes must be allowed each shift for a meal, which will be counted as time worked.

77. ABI and NSWBC submit that this twenty minute paid meal break is intended to be taken in lieu of the unpaid meal break in award clause 38.1.
78. The proposed amendments would therefore result in a substantive change with employees receiving two meal breaks per shift.
79. Our clients propose that the clause 18.2 should be amended as follows:

(a) Shift workers in the textile industry (other than 7 day continuous shiftworkers) are entitled to meal breaks in accordance with clause 18.1. Where 2 eight hour or 3 eight hour shifts are worked, instead of the meal break provided in clause 18.1, the employer has the discretion to, as opportunity offers, provide the shiftworker a 20 minute paid crib break per shift which will be counted as time worked.

(b) 7 day continuous shiftworkers in the textile industry are entitled to a paid 20 minute meal break during each shift. This entitlement applies instead of the unpaid meal break prescribed by clause 18.1.

Timber Industry Award 2010

Q76. Comment on the issue raised by the CFMMEU and the solution proposed at [377].

80. ABI and NSWBC agree that the definition of stand-by in clause 2 should include the qualification that is currently in 14.3(p).
81. Our clients question whether the definition in clause 14.3(p)(i) is still required, given that the definition of stand-by is included in clause 2.

Wine Industry Award 2010

Q83. Comment on the Association submissions and proposed amendment at [466].

82. ABI and NSWBC support the amendment proposed by the Association. We note that this change would reflect the current award provision.

Q84. Comment on the Association's submissions and proposed amendment at [470].

83. ABI and NSWBC support the amendment proposed by the Association. We note that this change would reflect the current award provision.

Filed on behalf of Australian Business Industrial and the NSW Business Chamber Ltd

7 April 2020