

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission
Finalisation of Exposure Drafts –
Tranche 2
(AM2019/17)

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Ai
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS
TRANCHE 2 EXPOSURE DRAFTS**

TABLE OF CONTENTS

| | Title | Page |
|-----------|---|-------------|
| 1 | Introduction | 3 |
| 2 | Airline Operations – Ground Staff Award | 4 |
| 3 | Asphalt Industry Award | 6 |
| 4 | Clerks – Private Sector Award | 8 |
| 5 | Concrete Products Award | 8 |
| 6 | Gas Industry Award | 9 |
| 7 | Manufacturing and Associated Industries and Occupations Award | 9 |
| 8 | Meat Industry Award | 10 |
| 9 | Pharmaceutical Industry Award | 11 |
| 10 | Road Transport and Distribution Award | 11 |
| 11 | Road Transport (Long Distance Operations) Award 2010 | 13 |
| 12 | Vehicle Manufacturing, Repair, Services and Retail Award | 15 |
| 13 | Waste Management Award | 20 |

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission in relation to the following 'second tranche' of exposure drafts published by the Fair Work Commission (**Commission**) 14 October 2019:

- (a) *Airline Operations – Ground Staff Award* (**Ground Staff Award**);
- (b) *Asphalt Industry Award* (**Asphalt Award**);
- (c) *Clerks – Private Sector Award* (**Clerks Award**);
- (d) *Concrete Products Award*;
- (e) *Gas Industry Award* (**Gas Award**);
- (f) *Manufacturing and Associated Industries and Occupations Award* (**Manufacturing Award**);
- (g) *Meat Industry Award* (**Meat Award**);
- (h) *Pharmaceutical Industry Award* (**Pharmaceutical Award**);
- (i) *Road Transport and Distribution Award* (**RTD Award**);
- (j) *Road Transport (Long Distance Operations) Award* (**LDO Award**);
- (k) *Vehicle Manufacturing, Repair, Services and Retail Award* (**Vehicle Award**); and
- (l) *Waste Management Award* (**Waste Award**).

2. GROUND STAFF AWARD

Response to AWU Submission of 27 November 2019

Clauses B.2.4, B.3.4, B.4.4 and B.5.4

2. We refer to paragraphs 12, 13, 14 and 16 of our submission of 27 November 2019 in this regard.

Response to TWU Submission of 21 November 2019

Clauses B.2.4, B.3.4, B.4.4 and B.5.4

3. We refer to paragraphs 12, 13, 14 and 16 of our submission of 27 November 2019 in this regard.

Response to AMWU Submission of 27 November 2019

Clauses B.2.4, B.3.4, B.4.4 and B.5.4

4. We refer to paragraphs 12, 13, 14 and 16 of our submission of 27 November 2019 in this regard. We do not oppose the AMWU's proposal.

Rates for Casual Employees performing Overtime

5. Ai Group does not consider that the insertion rates payable to casual employees performing overtime are necessary. The schedule of rates at Schedule B is only a *summary* of the rates payable under the exposure draft. By its very nature, it is not exhaustive.
6. In any event, if the Commission is minded to introduce additional tables of rates as proposed by the AMWU, interested parties should be given an opportunity to review those rates before the award is varied to include them.

Response to Qantas Group Submission of 26 November 2019

Clause 4.2: Coverage

7. We agree with the submission made.

Clause 18.7: Higher duties

8. We have not identified any concerns with the placement of the higher duties clause we but do not oppose its relocation to another appropriate position.

Clause 24.1(c): Payment for working overtime

9. We agree with the submission made. We refer to paragraph 10 of our 27 November 2019 submission.

Clauses B.2.4, B.3.4, B.4.4 and B.5.4

10. We refer to paragraphs 12, 13, 14 and 16 of our submission of 27 November 2019 in this regard.

Clause B.5.3: Full-time and part-time storepersons and logistics shiftworkers

11. We agree with the submission made. We refer to paragraph 15 of our 27 November 2019 submission.

3. ASPHALT AWARD

Response to AWU Submission of 27 November 2019

Clause 14.2(a): Paid rest breaks – employees other than shiftworkers

12. We agree with the submission made. We refer to paragraph 22 of our 27 November 2019 submission.

Clause 19.2: Overtime rates for employees other than shiftworkers

13. Whilst we do not oppose the insertion of an additional row dealing with public holiday rates, we are concerned that a reference to a 4 hour minimum payment would constitute a substantive change to the award.
14. Clause 28.3 of the award requires a 4 hour minimum for any work performed on a public holiday, regardless of whether it constitutes ordinary hours or overtime. Moreover, an employee is not entitled to a 4 hour minimum payment in respect of ordinary hours and an additional 4 hour minimum payment in respect of overtime worked on a public holiday, in circumstances where an employee works both ordinary hours and overtime on a public holiday.
15. Accordingly, we suggest that in the “minimum payment” column, the following words are inserted: “see clause 26.3”. Clause 26.3 provides the minimum payment period in the same terms as the current clause 28.3.

Clause 26.2: Payment for working public holidays

16. It is not clear whether the AWU is proposing a change to clause 26.2. In any event, we note that the change it has proposed to clause 19.2 would address its apparent concern about clause 19.2.
17. We also note that an alternate way of addressing the matter canvassed above would be to simply delete the words “ordinary hours” from clause 26.2 (in lieu of making any change to clause 19.2).

Clause A.2.2: Summary of hourly rates – full-time and part-time employees other than shiftworkers – overtime rates

18. We do not consider that the changes proposed are necessary. If they are nonetheless made, we seek an opportunity to review the revised rates before the award is varied to include them.

Clause A.2.3: Full-time and part-time shiftworkers – ordinary and penalty rates

19. We do not oppose the changes proposed. We seek an opportunity to review the revised rates before the award is varied to include them.

Clause A.3.3: Casual shiftworkers – ordinary and penalty rates

20. We do not oppose the changes proposed. We seek an opportunity to review the revised rates before the award is varied to include them.

Response to ABI and NSWBC Submission of 27 November 2019

Clause 13.6: Daylight saving - example

21. We do not oppose the submission made. We refer also to our submission of 27 November 2019 at paragraph 21.

Clause B.2.1: Expense-related allowances

22. We do not oppose the submission made.

4. CLERKS AWARD

Response to ABI and NSWBC Submission of 27 November 2019

Clause 1.3: Title and commencement

23. We support the submission made. The variation proposed would ensure that the terms of the clause reflects the drafting of comparable provisions in other exposure drafts.

5. CONCRETE PRODUCTS AWARD

Response to AWU Submission of 27 November 2019

Clause 11.3(b): Casual conversion

24. We consider that the reference should be to clause 11.3(b). We refer to paragraphs 38 – 39 of our submission of 27 November 2019.

Clause 21.7: Saturday shifts

25. We agree with the submission made.

Clause 21.9(b)(iii): Shiftworkers on other than continuous shifts

26. We agree with the submission made.

Clause B.3.2: Full-time and part-time employees – shiftworkers on continuous work – overtime rates

27. We agree with the submission made.

Clause B.3.3: Full-time and part-time employees – shiftworkers on other than continuous work – overtime rates

28. We do not oppose the submission made. The rates should be the same as those set out in the column currently furthest to the right.

6. GAS AWARD

Response to AWU Submission of 27 November 2019

Clause 14.1: Meal breaks

29. We refer to paragraphs 51 – 52 of our submission of 27 November 2019 in this regard.

7. MANUFACTURING AWARD

Response to AMWU Submission of 27 November 2019

Clause 4.8: Coverage

30. We agree with the submission made. We refer to paragraph 59 in our submission of 27 November 2019.

Clause 11: Casual employees

31. In Ai Group's view, the changes proposed by the AMWU are unnecessary. The issue raised by the AMWU is adequately dealt with in clause 11.2(b) of the exposure draft. In addition, the hourly rates payable to casual employees when working shifts and overtime are set out in Schedule C.

Clause 33.12: Annual close down

32. We agree with the submission made.

Clause C.1.1: Table of rates

33. We agree with the submission made.

Response to AWU Submission of 27 November 2019

Clause 39.2: Public holidays

34. We agree with the submission made.

Clause C.1.1: Table of rates

35. We agree with the submission made.

Response to ABI and NSWBC Submission of 27 November 2019

Clause 4.4: Coverage of on-hire employees

36. We agree with the submission made.

Clause C.3.2(a): Casual hourly rates

37. We agree with the submission made.

8. MEAT AWARD

Response to ABI and NSWBC Submission of 27 November 2019

Clause 11.4(b): Part-time employee

38. We agree with the submission made.

Clause B.5: Shiftworkers

39. We agree with the submission made. We refer to paragraph 92 of our submission of 27 November 2019.

9. PHARMACEUTICAL AWARD

Response to ABI and NSWBC Submission of 27 November 2019

Clause 21.5: Annual leave shut down

40. It is unclear whether the ABI and NSWBC are proposing any variation to the clause. In any event we suggest that to address the matter raised, subclauses (i) – (v) be numbered (a) – (e) and that the preamble not be numbered.

10. RTD AWARD

Response to the TWU Submission of 21 November 2019

Clause 14.4: Ordinary hours for oil distribution workers

41. The TWU have proposed a variation to clause 14.4 to provide that ordinary hours of oil distribution workers be limited to 7 per day. Such a variation should not be made. The union appears to be seeking a potentially substantive change to the award without advancing any compelling reason.
42. All that has occurred in the context of a proposed change to clause 14.4 through the release of the most recent version of the exposure draft is the replacement of the word “eight” with the numeral 8. If the change is adopted, there will be no substantive change to the entitlements under the current award. Relevantly, clause 23.4 of the current award provides that ordinary hours of work must not exceed eight hours per day.
43. The TWU proposal would introduce an inconsistency between clause 14.4 and clause 14.6, which provides for the working of up to 7 hours and 47 minutes under an arrangement involving the accrual of RDOs.

Clauses C.4.1 – C.4.6: Overtime rates for casuals on Saturdays and Sundays

44. Ai Group is somewhat uncertain as to the basis of the TWU’s concern relating to the rate of pay for overtime worked by a casual employee on a Sunday, as articulated in paragraphs 14 to 18 submission and then elaborated upon in paragraphs 28 to 32.

45. The heart of the union's concern appears to be that rates for casuals on a Saturday or Sunday may be lower during overtime hours than ordinary hours. The union appear to be contesting that casual employees working overtime on a Sunday should receive a 10% casual loading rather than a 25% casual loading payable for ordinary hours of work and to be seeking amendments to relevant wage tables included in the Exposure Draft to overcome this proposition.
46. The TWU's submissions should not be accepted. The TWU proposed amendments would cause the tables to be out of step with the entitlements provided for in the body of the instrument.
47. Clause 11.5 of the Exposure Draft clearly provides that a casual employee must be paid for all overtime worked at the overtime rates specified in clause 21.1 plus 10%. It also squarely provides that a casual employee will not receive the 25% casual loading whilst working overtime. A helpful example of how to calculate the rates is also provided. No change to the tables is warranted in order to address the TWU's concerns.

11. LDO AWARD

Response to TWU Submission of 21 November 2019

Clause 25.3(b): Payment for work on a public holiday

48. The TWU contends that clause 25.3(b) conflicts with clauses 10.8 and 11.4. The union proposes that the issue should be resolved by replacing the reference to 4 hours in clause 25.3(b) with a reference to 8 hours.
49. Clause 10.8 and clause 11.4 provide for minimum payments that generally apply where a casual or part-time an employee is engaged to work. This equates to either an 8 hour or 500km minimum payment.
50. The TWU proposal should not be adopted. It would introduce a new entitlement for casual and part-time employees.
51. Clause 25.3 deals with the specific issue of payment for full-time and part-time employees who work on a public holiday. It provides for the same entitlement for these two different types of employment. Under the provision both types of employment attract a payment for either 20% or 30% (depending on the public holiday) of the relevant weekly wage plus payment for work performed, plus payment for a minimum of 4 hours work.
52. Clause 25.4 deals with the specific issue of payment for time worked by a casual employee on a public holiday. It requires payment for such time at 20% or 30% (depending on the public holiday) of the relevant weekly wage plus payment for work performed. There is no requirement for a minimum amount of work to be performed on such days.
53. The TWU submission appears to incorrectly assert that clause 25.3(b) of the exposure draft provides for a four hour minimum payment for all types of employment. There is no such minimum payment applicable to casual employees.

54. Clauses 25.3 and 25.4 regulate the payment for work performed on a public holiday. These specific provisions should be read to the exclusion of the general provisions contained in clauses 10.8 and 11.4, which apply on other days.
55. If the TWU proposal was adopted it would be unclear how the payment would need to be calculated in the context of an employee being paid in accordance with the cents per kilometre method of remuneration available under the award.

12. VEHICLE AWARD

Response to AMWU Submission of 27 November 2019

Clause 22.4: Ordinary hours of work and rostering

56. The AMWU has proposed a variation to the exposure draft of the Vehicle Award to introduce a minimum 7 days' notice for the variation of a permanent employee's daily hours. The AMWU's suggested variation is in the form of a new clause 22.4 which states:

"A permanent employee's daily hours once fixed may vary with at least 7 days' notice."

57. Ai Group opposes this amendment to the exposure draft.

58. A determination giving effect to the AMWU's claim would not, as the AMWU asserts, 'clarify the intent' of clause 22.3. It would rather introduce a new requirement for 7 days' notice to be provided before an employer may vary an employee's daily hours.

59. Neither the exposure draft or current provisions of the award impose a requirement for 7 days' notice for the variation of an employee's daily hours. The relevant provisions of the exposure draft provide:

22.3 Employees may be required to work up to a maximum of 10 ordinary hours per day.

22.4 The commencing time of any permanent employee's daily working hours once fixed may vary day to day in a week but not by more than 2 hours.

60. The only change that the Commission has proposed to clause 22.4 in the exposure draft is the replacement of the work "two" with the numeral 2.

61. The Commission should not permit the process of finalisation of the exposure draft to be used as a vehicle to agitate a new claim for a substantive variation to the award. Given this context we here briefly address the AMWU submission in support of the proposed variation but observe that we would seek a greater period of time to advance a more comprehensive case against such a significant

change to the award should the Commission be minded to potentially make such a variation.

62. In support of its proposed variation, the AMWU refers to an alleged rostering practice of a single unnamed employer in the Vehicle Industry. No evidence pertaining to this arrangement is provided by the union.
63. In short, the union appears concerned that clause 22.3 of the exposure draft may permit an employer to implement a method of arranging ordinary hours that requires an employee to work more than 7.6 hours on any given day, without notice. This concern is misplaced. The provision serves to limit the number of ordinary hours that may be worked each day. It does not deal with the issue of notice that must be provided in relation to a change in working hours and as such does not introduce any change to the award's regulation of such matters.
64. No indication appears in clause 22.3 that an employer's capacity to direct an employee to work 10 ordinary hours in a day was intended to be subject to 7 days' notice. The award does not currently provide for any set period of notice which must be given prior to varying an employee's hours. This is neither anomalous nor an oversight on the part of the Commission.
65. The exposure draft already contains provisions which apply limits on an employer's capacity to direct an employee to perform varied hours of work:
 - Clause 10.3 - Any agreed variation to the hours of work of a part-time employee are required to be in writing.
 - Clause 22.4 – The commencing time of any employee's daily hours once fixed may vary from day to day in a week but not by more than two hours
 - Clause 36 – Consultation is required if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

66. The AMWU states, at paragraph [14] of its submission, that clause 22.4 does not allow for the rostered number of ordinary hours worked to vary day to day. It seeks to persuade the Commission to read into clause 22.4 a requirement that if an employee is required to start work 2 hours early under clause 22.4, the same employee is also required to finish 2 hours early, such that the actual number of ordinary daily hours of work is not varied. This interpretation should be rejected as requiring the Commission to give the words in clause 22.4 a meaning which they do not bear and, in effect, read words into the Vehicle Award.
67. Contrary to paragraph 16 of the AMWU submission, failing to make the proposed variation to the Vehicle Award would not result in the implementation of a “major unintended consequential change to the Award”. No provision is present in the award which mandates a specified notice period for the alteration of the hours of work.
68. The only current restrictions on an employer’s capacity to direct alterations in the hours of work are those listed above.
69. In relation to the AMWU submission concerning a rostering practice recently adopted by an unnamed employer in the Vehicle Industry, the union contends that the practice adopted would be “..*contrary to the ordinary hours of work and rostering and overtime provisions that have governed full time employees under the various publications of the Vehicle Industry Repair, Service and Retail Award (pre-modern award) as well as the 2010 Award, since at least the introduction of the 38 hour week into the Award in October 1998.*” However, the AMWU fails to identify what provisions the arrangement would contravene.
70. The example which the AMWU provides, at paragraphs 7 to 10 of its submission, fails to illustrate any need for a set notice period for varying an employee’s hours. The AMWU’s example refers to an employee working a 38-hour roster from Monday to Friday pursuant to a 7-day cycle with each day made up of 7.6 ordinary hours. The AMWU has expressed the concern that an employer may require such an employee to work 10 ordinary hours on Thursday without accruing overtime for the additional 2.4 hours worked on this day.

71. The AMWU's concern is misplaced. No disadvantage is suffered by the employee in this scenario as overtime will begin to accrue earlier (after working 5.2 hours) on the Friday. The AMWU claims, at paragraph 9 of its submission, that the same employee may be directed to leave early on the Friday, thereby defeating the employee's entitlement to an overtime payment for that week. Ai Group considers the problem to be illusory. Under such circumstances, the employee has not worked overtime and has worked his/her ordinary hours for the week. Where no overtime is worked, an entitlement to payment for overtime of course does not arise.
72. In support of its submission, the AMWU has claimed that the variation would be necessary to achieve the modern awards objective, taking into account the considerations mandated by s.134(1)(da) and 134(1)(g).
73. The correct manner of construing s.134(1)(da) was outlined by the Full Bench in the context of the *Penalty Rates Case 2017* where it was acknowledged that the subclause was not a direction to provide additional remuneration during the periods described in s.134(1)(da)(i)-(iv).¹
74. Section 134(1)(da) provides no support for the AMWU's proposed variation to the Vehicle Award. The variation would not alter any existing entitlement to overtime rates of pay contained in clause 24 of the exposure draft. That is, the imposition of a 7-day notice period for any change in a permanent employee's hours of work would not alter an employee's fundamental entitlement under the award to overtime rates of pay in the circumstances outlined in clause 24.2 of the exposure draft.
75. The AMWU's proposed variation would be contrary to the modern awards objective. The imposition of a 7-day notice period for the variation of an employee's hours would not be conducive to the promotion of flexible modern work practices, would have a detrimental impact on businesses, and would

¹ Four yearly review of modern awards - Penalty Rates [2017] FWCFB 1001, [195] – [201].

impose a new regulatory burden. The considerations in s.134(1)(d), (f) and (g) of the Act weigh against the Commission making the proposed change.

Clause 24.2(a): Definition of overtime

76. Ai Group does not oppose a variation to clause 24.2(a) to clarify that overtime is calculated on a daily basis. That is, the rate at which overtime is paid is calculated on a daily basis.

77. In response to the approach to drafting an amendment dealing with this issue adopted by the AMWU we observe that it is potentially confusing to deal with the concept of what is overtime and the rate at which it applies, in the same clause. We suggest that these matters be dealt with separately.

78. In this regard the exposure draft for the Manufacturing Award states, at clause 31.1(e):

In computing overtime each day's work stands alone.

79. A similar approach could be adopted in this award.

80. We also suggest that it would be more appropriate for this matter to be dealt with in the award clause dealing with overtime rates, rather than in the definition of overtime. Relevantly, a new clause 24.3(c)(iv) could be inserted in the following terms:

In computing overtime each day's work stands alone.

13. WASTE AWARD

Response to TWU Submission of 21 November 2019

Entitlement of Casual Employees during Overtime

81. As we understand it, the TWU is not seeking any variation to the exposure draft in this regard.

Clause A.2.3: Full-time and part-time employees – overtime

82. We agree that the footnote should not be inserted. We refer to paragraphs 169 – 170 of our submission dated 27 November 2019.