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Business SA Submissions

4 yearly review of modern awards – Technical and Drafting Issues Related to Sub-Group 4D, 4E and 4F Exposure Drafts

18 January 2017

Business SA
Chamber of Commerce
and Industry South Australia

Introduction

Business SA is pleased to provide this submission on the sub-group 4D, 4E and 4F exposure drafts in response to the Fair Work Commission's (the Commission/FWC) amended directions of 21 December 2016.[1] This submission addresses drafting and technical issues as well as questions posed by the Commission. We have made submissions in relation to the modern award exposure drafts listed below: *

- Amusement, Events and Recreation Award 2016
- Fast Food Industry Award 2016
- Food, Beverage and Tobacco Manufacturing Award 2016
- Hair and Beauty Industry Award 2016
- Professional Employees Award 2016
- Registered and Licensed Clubs Award 2016

Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- South Australian businesses are impacted by any changes in the award system.
- South Australian employers and employees will jointly benefit from well drafted and effective modern awards, better enabling both parties to understand their rights and responsibilities.
- Small business owners make up a large proportion of our membership, these businesses are often not able to devote the necessary resources to fully understand Australia's complex workplace regulations.
- The modern award objective is to provide a fair and relevant minimum safety net of terms and conditions. Modern awards must be drafted such that those using the award can determine what they should expect and what is expected of them.

*Note: All clauses refer to their relevant exposure draft unless a contrary intention is expressed.

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[1] [2016] FWC 6062.

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1.0 Amusement, Events and Recreation Award 2016

1.1 Clauses 4.5 and 4.6

Business SA submits clauses 4.5 and 4.6 be moved to appear after clause 4.2. Clauses 4.1, 4.2, 4.5 and 4.6 all relate to who is covered by the award, whereas clauses 4.3, 4.4, 4.7 and 4.8 all discuss who is not covered by the award. For the sake of continuity, Business SA submits clauses discussing who is covered by the award appear in together and in sequence, with clauses stating who is not covered by the award following, together and in sequence.

1.2 Clause 7.2 – Facilitative provisions for flexible working practices

Business SA submits reference to ordinary hours of work in the facilitative provisions table be edited to provide greater guidance to readers. The table, as it appears in the exposure draft, refers readers to clause 13.2 when altering the ordinary hours of work provision. Agreement to alter ordinary hours of work takes place under clause 13.3 or 13.4.

Business SA submits the facilitative provisions table be altered as follows: (changes emphasised)

~~13.2~~ *13.3*	Ordinary hours of work	The majority of employees~~ or an individual~~
13.4	*Ordinary hours of work*	*An individual*

1.3 Clause 17.3(b) – Meal allowance

In response to the Commission's query, Business SA is of the view that the meal allowance for overtime should be restricted to when overtime is immediately after finishing ordinary hours. The purpose of this allowance is to ensure an employee can purchase a meal if they have not had the opportunity to bring in their own food. If an employee is working overtime in a standalone situation, not attached to ordinary hours, there is opportunity for the employee to prepare and bring in their own food.

1.4 Clause 19.5 – Sunday and public holiday work

In response to the Commission's query, Business SA submits that overtime worked on Sunday should be at the rate of 150% for the first 3 hours and 200% thereafter. The penalty of 150% for all hours on a Sunday is the penalty rate (not overtime rate) for ordinary hours worked on a Sunday.

Business SA would support Clause 19.5 referring to "ordinary hours worked on a Sunday".

1.5 Schedule C – Summary of Hourly Rates of Pay – Exhibition Employees

In response to the Commission's query, Business SA submits Exhibition Employees may only be employed at Grades 2, 4 or 5.

2.0 Fast Food Industry Award 2016

2.1 Clause 17.2(d)(ii) – Travelling time reimbursement

Business SA submits the exposure draft has altered the legal effect of this clause. Clause 17.2(d)(ii) deals with payment for travel time where the employer provides transport from a pick up point.

Payment under the current award applies to time spent travelling from that pick up point (to the place of work) and for time spent travelling from the place of work back to that pick up point. In the exposure draft this is changed. In the exposure draft, payment applies "for all time spent travelling to and from such pick up point."

The exposure draft suggests an employee is to be paid from the time they leave their house up until they reach the pick up point, and paid from the time they leave the pick up point and return home. This is a clear change between the current award and the exposure draft.

Business SA submits the current wording (found in clause 21.5(b)) be retained.

In the alternative, with eventual plain language redrafting of this award in mind, the word 'thereto' could be replaced. Business SA submits the following alternative wording:

> Where the employer provides transport from a pick up point, an employee will be paid travelling time for all time spent travelling from*, and returning to*, such pick up point ~~and return thereto~~. (changes emphasised).

2.2 Clause 21.3 – Sunday work

In response to the Commission's query, Business SA submits clause 21.3 could be altered to provide clarity. The intent of clause 21.3 appears to be to apply a penalty rate to all ordinary hours worked on a Sunday. Where work is conducted outside ordinary hours on a Sunday this is to be paid at overtime rates, per clause 20.1(d). Limiting the penalty to ordinary hours worked on a Sunday would be consistent with the national pre-modern award.[2]

Business SA submits the following alternative wording:

(a) 150% of the minimum hourly rate will apply for all *ordinary hours worked* on a Sunday for full-time and part-time employees. (changes emphasised)

(b) 175% of the minimum hourly rate will apply for all *ordinary hours worked* on a Sunday for casual employees, inclusive of the casual loading.

2.3 Clause 21.3 – Sunday work

Business SA submits subclauses (a) and (b) require slight adjustment. Subclause (a) begins: 'A 150% of the minimum hourly rate will apply…' Subclause (b) opens in a similar fashion. Business SA submits the 'A' be removed from the start of subclauses. This will make clause 21.3 more consistent with the other penalties under clause 21. These 'A's appear to be leftovers from the current award wording. Our alternative wording proposed above incorporates this submission.

2.4 Clause 22 – Annual leave

Business SA agrees with the Commission's suggestion, reference to shiftworkers should be removed from clause 22.

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[2] *National Fast Food Industry Award 2000*, AP806313CRV, clauses 24 and 25.1.4.

3.0 Food, Beverage and Tobacco Manufacturing Award 2016

3.1 **Introduction of the phrase "applicable rate of pay"**

Business SA submits that introduction of this phrase will create a substantive and significant change to the award. Specifically, the phrase is defined at clause 2 and is used in clauses:

- 13: Meal breaks at 13. 1(b) and 13.4 and 13.5
- 20.2(f)(iv): Travelling time payment
- 20.3: Extra Rates not cumulative
- 22.12: Standing by
- 22.9(b) and (c): Rest break
- 27.5(a)(i): Rostered day off falling on a public holiday
- 34: Transfer to lower paid job on redundancy.

Business SA is aware that use of this phrase is the subject of submissions in AM2014/75 *Manufacturing and Associated Industries and Occupations Award 2010*. Further to the Full Bench Decision in October 2015[3] we reserve our right to make further submissions when that matter is finalised.

3.2 Clause 7.2(a) – Facilitation by individual agreement

Business SA makes two submissions regarding the facilitative provisions table at clause 7.2.

Firstly, Business SA submits the items in the table be presented in order of appearance for ease of reference. The table's reference to clause 22.7 should appear before 22.9.

Secondly, Business SA submits reference to clause 22.9 be amended to clause 22.9(d). Clause 22.9(d) is the provision permitting a variation to clause 29 in general.

3.3 Clause 10.6 – Casual Conversion

Business SA notes that this clause may be effected by AM2014/197 and therefore will not make submissions on the changes proposed by the drafter.

3.4 Clause 12.2 – Ordinary Hours of work

The FWO has asked "Should the term 'shiftworker' be defined to clarify any entitlement to payments and breaks. For example, an employee who at times finishes work after 6.00 pm on a week day could be considered to be a day worker (working outside of the spread of ordinary hours) or as an afternoon shiftworker (clause 23.1(a))"

Business SA submits that the exposure draft adequately defines the term 'shiftworker'. An afternoon shift would be rostered as such, a day worker will be paid an appropriate overtime rate or will have an agreement to vary hours.

3.5 Clause 15.1 – Apprentice Minimum Wages - table

Business SA submits there is a rounding error in the calculation of the minimum hourly wage rate at stage 1 column 4. The weekly rate divided by 38 provides the hourly rate. In this instance that figure is 15.666 (595.31/38). This should round to $15.67 rather than $15.66.

[3] [2015] FWCFB 7236 [103].

3.6 Clauses 20.1(f)(iii) Hot places, (iv) Wet Places and clause 20.2 (f) Transfers, Travelling and working away from usual place of work (i) Excess Travelling and Fares and (ii)
Business SA submits the formatting of these clauses, and others in the award using dot points, be revised. Problems arise from dot pointing, for example, the third dot point in 20.1(f)(i) has been separated from the two points addressed in the current award at 26.4(a)(ii). Further, the third dot point in the Exposure Draft is actually a sub paragraph of the second dot point.

Unfortunately, the Draft Guidelines[4] do not contemplate sub paragraphs to this extent. We submit that rather than dot points the provisions of these clauses be identified by, for example, a capital letter to identify them as a separate topic, as is currently the case.

3.7 Clause 24.5 – Annual Leave Loading
The Commission has requested the parties comment on the following -Clause 27.5 provides that an employee must be paid the greater of the relevant shift/weekend penalties and a loading of 17.5%. In determining which rate is to apply, it may not be clear whether the two entitlements are to be compared:

- *on a daily basis with each day of annual leave being assessed separately; or*
- *as a whole over the entire period of annual leave.*

Business SA submits the payment would be: the wages due including any penalties the employee would have received, if they had worked the entire period; or 17.5% of the ordinary hourly rate for the entire period, whichever is the higher.

[4] Eamonn Moran PSM QC, 'Guidelines for plain language drafting of modern awards' (Guidelines, Fair Work Commission, October 2016).

4.0 Hair and Beauty Industry Award 2016

4.1 Clause 2 – Definitions – hair and beauty industry

Business SA submits the definition of 'hair and beauty industry' has been unnecessarily and inaccurately altered in the exposure draft. Of concern is the removal of the 'or' separating subclauses (a) and (b) of the definition. The importance of this 'or' is illustrated below.

The definition of 'hair and beauty industry' in the *Hair and Beauty Industry Award 2010* is split into two subclauses. Subclause (a) generally refers to the hair industry, while subclause (b) generally refers to the beauty industry. The 2010 award separates these subclauses with 'and/or'. The effect of this separation is that an employer may be covered by the award even if they only perform or carry out activities relating to the hair industry, or only to the beauty industry.

The exposure draft has split the definition of hair and beauty industry into two subclauses on the same basis as the current award. However, subclause (a) and subclause (b) are only separated by an 'and'; the 'or' has been removed in the exposure draft. This significantly changes the application of the definition. Where previously an employer or employee could be covered by the definition if they fell into either the hair industry or the beauty industry, under the exposure draft an employer or employee must carry out activities related to both the hair industry and the beauty industry to be covered by the award.

As this definition determines the coverage of this award, significant care must be taken to avoid the exposure draft inadvertently changing its application. Business SA submits the wording of the current award ('and/or') be retained.

4.2 Clause 2 – Definitions – hair and beauty industry

Business SA also submits the hair and beauty definition has been inappropriately altered by switching too many commas into semicolons. While in some instances semicolons have been appropriately used, in others they do not appear correct. See below for an example.

Current award

'…or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and/or'

Exposure draft

…or any process or treatment of the hair; head or face carried on; using or engaged in a hairdressing salon; and includes the sharpening or setting of razors in a hairdressing salon; and'

As demonstrated above, overuse of semicolons changes the way this section of the definition is read. As indicated above Business SA supports some of the semicolons used in the exposure draft clause. For those not supported, Business SA submits the following wording (changes emphasised and circled):

(a) performing or carrying out one or more of the following activities: shaving; haircutting; hairdressing; hair trimming; facial waxing; hair curling or waving; beard trimming; face or head massaging; shampooing; wig-making; hair working; hair dyeing; manicuring; eye-brow waxing or lash trimming; or any process or treatment of the hair, head or face carried on, using or engaged in a hairdressing salon, and includes the sharpening or setting of razors in a hairdressing salon; and

(b) performing or carrying out one or more of the following activities: manicures; pedicures; nail enhancement and nail artistry techniques; waxing; eyebrow arching; lash brow tinting; make-up; analysis of skin; development of treatment plans; facial treatments including massage and other specialised treatments such as lymphatic drainage; high frequency body treatments, including full body massage and other specialised treatments using machinery and other cosmetic applications and techniques; body hair removal including waxing chemical methods, electrolysis and laser hair removal; aromatherapy and the application of aromatic plant oils for beauty treatments using various types of electrical equipment for both body and facial treatments

4.3 Clause 18.8 – Beauty therapy graduates

In response to the Commission's question, Business SA submits the terms "trainee" and "graduate" are sufficiently clear and do not require definition.

4.4 Clause 19 – Payment of wages

Business SA submits clause 19, the restructured payment of wages clause, is not as clear as the current award equivalent (clause 25 of the current award). The current clause details payment of wages in a single sentence. This sentence is not long or difficult to interpret. The restructured clause splits this single sentence into sub-clauses, introducing interpretative complexity.

Business SA submits the wording of clause 25 of the current award be retained.

In the alternative, Business SA submits the following slight amendment to the original wording:

> Wages will be paid weekly or fortnightly according to the actual hours worked each week or fortnight, or may be averaged over a fortnight. (changes emphasised and/or circled).

4.5 Clause 20.3(f)(ii) – Travelling time reimbursement

Business SA submits the legal effect of this clause has been altered in the exposure draft. This clause generally deals with payment for travel time where the employer provides transport from a pick up point.

Payment under the current award applies for all time spent travelling from that pick up point (to the place of work) and for time spent travelling back to that pick up point. In the exposure draft this is changed. Under the exposure draft, payment applies "for all time spent travelling to and from such pick up point." This suggests an employee is to be paid from the time they leave their house up until they reach the pick up point, and paid from the time they leave the pick up point and return home. This is a clear change between the current award and the exposure draft.

Business SA submits the current wording (found in clause 21.5(b)) be retained.

In the alternative, with eventual plain language redrafting of this award in mind, the word 'thereto' could be replaced. Business SA submits the following alternative wording:

> Where the employer provides transport from a pick up point, an employee will be paid travelling time for all time spent travelling from*, and returning to*, such pick up point ~~and return thereto~~. (changes emphasised).

4.6 Clause 22.2 – Overtime rates

In response to the Commission's query, Business SA submits overtime is not payable for work on Monday-Saturday outside ordinary hours in clause 13.1. This conclusion is based on the current award's overtime clause[5]. Under the current award overtime is payable for overtime hours worked in excess of the ordinary number of hours of work. The current award does not state overtime is payable for work outside the span of ordinary hours.

Historically this has not always been the case. Overtime was payable for work outside the span of hours under several pre-modern awards, see for example:

- Clause 6.4.1 of the *Hairdressers and Beauty Salons Award* [South Australia] AN150062.
- Clause 30.2 of the *Hairdressing and Beauty Services – Victoria – Award 2001* AP806816CRV.
- Clause 6.3.1 of the *Beauty Therapy Industry Award – State 2003* [Queensland] AN140026.
- Clause 4(a)(i) of the *Hairdressing, Health and Beauty Industry Award* [Tasmania] AN170042.
- Clause 14.1 of the *Hairdressing and Beauty Industry (Northern Territory) Award 2002* AP818691CRN.

4.7 Clause 27.3(a) – Public holidays

Business SA submits clause 27.3(a) of the exposure draft is incomplete and vague. This appears to be because the current award's wording (at clause 35.2) has inadvertently been too closely followed. The exposure draft states "If both days are worked an employee will be paid for the public holiday on day elected by employee;", this does read as a complete sentence.

The following wording attempts to give effect to the drafter's intent to convert the current award's bullet point approach into complete sentences:

> (a) If both days are worked, an employee will be paid for the public holiday on a day elected by the employee; (additions emphasised)

Business SA submits the complete sentence illustrated above is vague and does not properly explain the payment for substituted public holidays. Business SA proposes the following wording to more clearly explain the operation of this clause:

> (a) If both days are worked, an employee will be paid for the public holiday on either the actual public holiday or the substituted day, as elected by the employee; (additions to original emphasised).

4.8 Clause 27.4 – Public holidays

Business SA notes the exposure draft incorrectly states public holidays are to be compensated by payment of 200% of the minimum hourly rate. The current award states payment at the rate of double time and a half.

[5] *Hair and Beauty Industry Award 2010* clause 31.

5.0 Professional Employees Award 2016

5.1 Clause 7 – Facilitative provisions for flexible working practices

Business SA notes the exposure draft has incompletely reproduced the current award's facilitative provisions clause.[6] Specifically, clause 8.4 of the current award, which generally states facilitative provisions are not be used to avoid award obligations or result in unfairness, has not been reproduced.

5.2 Clause 13 – Ordinary hours of work

Business SA submits that there is no "cycle" specified in Clause 13 or the *Professional Employees Award 2016*. Section 63 of the *Fair Work Act 2010* (Cth) allows for a modern award or enterprise agreement to provide for the averaging of hours of work over a specified period. As wages may be fixed as annual remuneration (clause 13.4(c), 13.4, 14) Business SA believes it is appropriate to average ordinary hours of work over a 12 month period.

5.3 Clause 14.2 – Minimum wages

Business SA confirms that the method of calculating the hourly rate using the following calculation: Hourly rate = (annual wage x 6/313)/38, is correct. A change to the calculation would result in either a loss of wages for employees or increased expenses for employers. Business SA would not support a change to this equation.

5.4 Clause 15.3 – Vehicle allowance

Business SA submits the exposure draft's simplification of this clause has resulted in a substantive change. The current award's vehicle allowance clause (clause 16.2) specifies the employer and employee must mutually agree that the employee will use their personal vehicle before the vehicle allowance is payable. The exposure draft removes this mutual agreement requirement. This is an issue as, under the exposure draft, the employee could unilaterally decide they are required to use their personal vehicle on the employer's business and accrue the vehicle allowance; mutual agreement with the employer is no longer a prerequisite.

Business SA submits the wording at clause 16.2 of the current award be retained.

5.5 Clause 17.2(a) – Annual leave

Business SA submits the cap on annual leave under clause 17.2(a) of the exposure draft applies on the date when annual leave is taken, rather than when annual leave is accrued. Reference to the date of annual leave accrual appears to be an anachronism based on various pre-modern awards. These awards provided annual leave upon completion of 12 months continuous service, rather than progressive accrual; see for example:

- Clause 16 of the *Scientific Services Professional Scientists Award 1998* AP797607CNV
- Clause 22 of the *Information Technology Industry (Professional Employees) Award 2001* AP812692CAV
- Clause 7.1 of the *Professional Scientists (General Industries) South Australia Award 1998* AP150119
- Clause 7.1 of the *Professional Engineers (General Industries) South Australia Award 1998* AP150118.

[6] *Professional Employees Award 2010* clause 8.

6.0 Registered and Licensed Clubs Award 2016

6.1 Clause 4.5 and 4.6 – Coverage

Business SA submits these subclauses be moved to sit under the current 4.2, becoming 4.3 and 4.4. Clauses 4.5 and 4.6 discuss coverage of the award, rather than exclusion from coverage. For the sake of continuity, it is preferable the general coverage clause first discuss all those covered by the award, and then discuss all those excluded from coverage.

6.2 Clause 7 – Facilitative provisions

Business SA submits the following changes be made to the facilitative provisions table in this clause:

1. Insert clause 11.4 Casual Payment of Wages – An individual;
2. Clarify that the agreement referred to at 15.6 is special provisions for maintenance and horticultural employees;
3. Insert 18.5(b) Maintenance and horticultural level 1-4 salary arrangements – An individual;
4. Insert 28.2 Public Holidays Alternate Day – The majority of employees.

6.3 Clause 11.3 – Casual employees

Business SA notes a spelling mistake in this clause, 'causal employees' should be '*casual* employees'.

6.4 Clause 11.3 – Casual employees

Parties are asked whether a maintenance and horticultural employee may be engaged on a casual basis; and if so, do the percentages in clause 24.1 or 24.2 apply?

Business SA notes the award is silent in this regard. It appears that either the reasoning for lack of casual rates, or the casual rates themselves, were lost in the making of the 2010 award.

6.5 Clause 13 – Junior employees

Parties are asked whether clause 13.1 applies to: a junior waiter who may be required to deliver liquor to tables and/or take payment for liquor; or to a junior employee employed within the same premises as where liquor is sold but who does not them self sell or serve liquor (e.g. a junior kitchen hand).

Business SA is seeking member feedback regarding this matter.

6.6 Clause 15.7 – Special provisions for accrued rostered days off

Clause 26.7(a) of the current award refers to 'Overtime accrued rostered days off' whilst the exposure draft refers only to 'accrued rostered days off'. Business SA submits this is a substantive change.

6.7 Clause 18.4 - Casual fitness instructors

Parties are asked to confirm whether the rate in clause 18.4(a) is subject to penalties in clause 24.

Business SA notes that the fitness instructor rate does not seem to be excluded from the penalties in clause 24.

6.8 Clause 19.3(c)(i) – Clothing, equipment and tools

Parties are asked to clarify the interaction between clauses 19.3(c)(i) and 19.3(c)(ix).

Business SA suggests that discordance between the two subclauses is a result of blending multiple awards. Business SA submits that the current provisions require an employer to reimburse the employee for the cost of any tools purchased by an employee which is listed in 19.3(c)(ix); or tools purchased by a horticultural employee. The employer must also pay a tool allowance to a cook who is required to use their own tools.

6.9 Clause 24.4 – Late and Early Work Penalty

Parties are asked to comment on how the evening and night penalties in clause 24.4 apply in circumstances where an employee performs work for part of an hour. That is, whether the penalties in clause 24.4 are payable in units of whole hours only or are payable on a pro-rata basis for part hours worked.

For example, if an employee worked from 7:00pm to 9:30 pm (2.5 penalty hours) it may be unclear whether the employee should be paid:

- *2.5 hours (that is, pro-rata payment for "such time worked" within the said hours) x $2.06 = $5.15; or*
- *3 hours (that is, one unit of payment for the commencement of each "hour or part of an hour" worked) x $2.06 = $6.18.*

Business SA submits that the question only arises because of the changes made to this clause in the exposure draft. The current award provides a 10% loading (rather than a flat hourly dollar amount). The loaded rate is payable per hour or part thereof. Therefore, the payment is a pro-rata payment for the actual time worked.

Conclusion

Business SA would like to thank the Fair Work Commission for the opportunity to comment on the above exposure drafts. We look forward to reading the submissions of other interested parties and reserve our right to comment on exposure drafts not examined as part of this submission.