



Business SA Submission

4 yearly review of
modern awards –
*Hospitality Industry
(General) Award 2010*–
and the *Restaurant
Industry Award 2010*
**(AM2014/272 &
AM2014/284)**
Plain Language Redraft

14 June 2017

Introduction

These submissions are filed by Business SA and relate to the statement¹ released by the Full Bench of the Fair Work Commission (Commission) on 10 May 2017 and the plain language exposure drafts for the Restaurant Industry Award 2010 (Restaurant Award) and the Hospitality Industry (General) Award 2010 (Hospitality Award) published on 21 April 2017 Business SA. Business SA has been involved in the drafting of the Plain Language Guidelines² and drafting of common and standard clauses arising from the Pharmacy Industry Award Plain Language Pilot³ and subsequently the *Clerks –Private Sector Award 2010*.⁴

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.⁵ Modern awards must be drafted such that those using the award are able to determine what they can expect and what is expected of them.
- The Plain Language re-drafting process must not simplify awards such that they lose legal clarity. Certainty must prevail over simplicity.
- Whilst the Pharmacy Industry Award 2010 was selected as the pilot award for this project the parties are obliged to consider the impact on other Awards.

For further information from Business SA's policy team, please contact Karen van Gorp, Senior Policy Adviser, or Chris Klepper, Policy Adviser, (08) 8300 0000 or at karenv@business-sa.com or chrisk@business-sa.com.

¹ [\[2017\]FWC 2579](#)

² [2016] FWCFB 7968.

³ [AM2016/15](#).

⁴ [AM2014/219](#).

⁵ *Fair Work Act 2009* (Cth) s 134(1).

Hospitality Industry (General) Award 2017 Plain Language Exposure Draft

Submissions

1. Clause 2 – Definitions

1.1. Definition of ‘resort’

Business SA notes the definition of ‘resort’ has been changed in the PLED when compared to the current award. We note the current award specifically states resort ‘includes an offshore island resort’. This statement is not present in the PLED definition and Business SA submits it be retained.

1.3 Definition of Restaurant

Business SA notes that the definition “catering by a restaurant business” has been deleted from clause 2 and continues to be referred to in clause 4 Coverage. Business SA submits the definition be retained.

2. Clause 7 – Facilitative provisions for flexible working practices

2.1. Table 1 – Missing clause 21.2 facilitative provision

Business SA submits Table 1 is missing a facilitative provision relating to payment of wages. Clause 21.2 of the PLED allows an employer and a majority of employees to agree that wages may be paid on the Friday of a week during which there is a public holiday. The key details of this provision for the purpose of Table 1 would be:

Clause: 21.2

Provision: Payment of wages

Agreement between...: a majority of employees.

2.2. Table 1 – Inaccuracy re clause 26.3

Business SA submits reference to clause 26.3 in Table 1 is not accurate. The facilitative provision relating to time off instead of payment for overtime is clause 26.3(a); the rest of clause 26.3 provides guidance for the cl 26.3(a) agreement. Business SA submits Table 1 refer to the specific facilitative provision.

2.3. Table 1 – Missing clause 27.4(c) facilitative provision

Business SA submits Table 1 should include reference to the facilitative provision in clause 27.4(c). Clause 27.4(c) allows an employer and an individual employee (full-time or part-time employee only) to change how they are paid for work on public holidays. The key details of this provision for the purpose of Table 1 would be:

Clause: 27.4(c)

Provision: Additional provisions for work on public holidays

Agreement between...: an individual employee.

2.4. Table 1 – Inaccuracy re clause 28.9

Business SA submits reference to clause 28.9 in Table 1 is not accurate. The facilitative provision relating to annual leave in advance is clause 28.9(a). Business SA submits Table 1 refer to the specific facilitative provision.

2.5. Table 1 – Inaccuracy re clause 28.10

Business SA submits reference to clause 28.10 in Table 1 is not accurate. The facilitative provision relating to cashing out of annual leave is clause 28.10(c). Business SA submits Table 1 refer to the specific facilitative provision.

2.6. Table 1 – Missing clause 31.2 facilitative provision

Business SA submits Table 1 should include reference to the facilitative provision in clause 31.2. Clause 31.2 allows an employer and a majority of employees at a workplace to agree to substitute another day for a public holiday. The key details of this provision for the purpose of Table 1 would be:

Clause: 31.2

Provision: Substitution of public holidays by agreement
Agreement between....: a majority of employees

3. **Clause 10 – Part-time employment**

3.1. Business SA submits clause 10.1 of the PLED does not fully reflect the wording of 12.2 in the current award. Clause 12.2 provides the indicia of a part-time employee. Clause 12.2(c) of the current award states a part-time employee receives a pro rata equivalent of pay and conditions available to those of full-time employees who do the same kind of work. This indicium has not been reproduced in clause 10.1 of the PLED.

4. **Clause 11 – Casual employment**

4.1 Business SA submits the current provisions in clause 3.1 be retained at 11.1. Business SA has raised this matter in both the Clerks Award and the Pharmacy Industry award plain language drafts.

4.2 Business SA submits use of a note in clause 11.2 is inappropriate. The note explains what the casual loading is paid in lieu of, stating: 'The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.' This explanation previously appeared in clause 13.1 of the current award.

Business SA submits the content of the note should be stated in a specific clause as is currently the case. We submit this could be achieved by moving it into its own clause, for example a new clause 11.3 (with subsequent clauses renumbered accordingly).

5. **Clause 15 – Ordinary hours of work**

5.1. **Clause 15.1(c) - Full-time employees**

Business SA submits clause 15.1(c)(vi) and (vii) of the PLED have not been appropriately drafted, are difficult for the reader to navigate and direct the reader to three different sub clauses, making the clause significantly less clear than its current award counterpart. Clause 15.1 of the PLED discusses hours of work for full-time employees, its current award counterpart is clause 29.1.

Business SA strongly submits this clause use the wording of the current award. In the alternative, we propose that this clause be redrafted such that its structure reflects the current award.

5.2. **Clause 15.2 – Catering in remote locations**

Business SA notes 'remote location,' for the purpose of 15.2(a,) is not defined in the PLED or in the current award.

5.3. **Clause 15.4 – Rosters (Full-time and part-time employees)**

Business SA submits clause 15.4(e) has a different legal effect to its equivalent current award provision at clause 30.1(b). Clause 30.1(b) clearly states: 'A minimum 10 hour break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day. In the case of changeover of rosters, eight hours will be substituted for 10 hours.'⁶

Clause 15.4(e) of the PLED states: 'An employee must have a minimum break of 10 hours between when the employee finishes work on one day and starts work on the next and a minimum break of 8 hours for a changeover of rosters.' The PLED no longer specifies the 10 hour break applies between the end of ordinary hours on one day and the commencement of ordinary hours on the following day.

⁶ *Hospitality Industry (General) Award 2010* cl 30.1(b).

The legal effect of the PLED clause is that the 10 hour break could be interpreted to apply between the end of overtime work and the start of ordinary hours on the following day. This is a clear and significant difference between the PLED and the current award.

6. Clause 16 Breaks

Business SA submits the plain language changes to the provisions of clause 16 are substantive and that the current provisions be retained.

7. Clause 18 – Minimum rates

7.1. Clause 18.1 – Table 3 – Minimum rates

Business SA submits Table 3 – Minimum rates in clause 18.1 is unclear as not all minimum weekly/hourly rate rows are populated. The reader is tasked with finding their classification and then scanning up the column to find the applicable rate. Business SA submits this table would be much clearer if all the relevant information for a particular classification in a particular classification level was contained in a single row. This submission accords with Draft Guideline 2.2 by making the award simple and easy to read.

7.2. Clause 18.3 – Table 4 – Casino gaming minimum rates

Business SA notes a minimum hourly rate is not provided for Casino gaming employees in Table 4 – Casino gaming minimum rates. Business SA also notes hourly rates (albeit the ordinary hourly rate) are provided in Schedule B.5.1. We submit a column be added to Table 4 containing the minimum hourly rate for Casino gaming employees.

7.3. Clause 18.3 – Table 4 – Casino gaming minimum rates

Business SA reiterates its submission at [7.1] regarding minimum rate tables. Each row should be populated with the information which applies for that specific classification.

8. Clause 19 - Apprenticeships

8.1. Clause 19.3(a) – Proficiency payments – cooking trades

Business SA notes a minor drafting inconsistency in clause 19.3(a). Clause 19.3(a) refers to the '4th' year apprentice specified in Table 7 whereas clauses 19.3(b) and (c) both refer to the '4th' year apprentice.

9. Clause 21 – Payment of wages

9.1. Clause 21.2

Business SA notes clause 21.2 contains a facilitative provision which has not been reflected in Table 1 – Facilitative provisions.

10. Clause 24 - Allowances

10.1. Clause 24.10 – Working away from usual place of work

Business SA reserves their position with regard to this question.

11. Clause 26 - Overtime

11.1. Clause 26.1 – Payment of overtime

Business SA notes clause 26.1 of the PLED omits an important clause found at 33.1(a) of the current award. Clause 33.1(a) of the current award states: 'Subject to clause 33.1(b) an employer may require an employee other than a casual employee to work reasonable overtime at overtime rates.' This clause sets out that an employer may require a non-casual employee to work reasonable overtime. Clause 26.1 of the PLED does not repeat this clause. Business SA submits clause 33.1(a) of the current award be reflected in clause 26 of the PLED.

11.2. Clause 26.2 – Overtime rates

Business SA notes clause 33.3(c) of the current award has not been reproduced in clause 26.2, or in clause 26 in general of the PLED. Business SA submits this is a substantive change and that this clause must be included in the plain language version of the award.

12. Clause 27 – Penalty rates

12.1. Clause 27.4 – Additional provisions for work on public holidays

Business SA notes clause 27.4(c) contains a facilitative provision which has not been included in Table 1 – Facilitative provisions. This omission has been discussed previously in this submission.

13. Clause 28 – Annual leave

13.1. Clause 28.5(a) – Special leave without pay arrangements for certain catering employees

Business SA submits clause 28.5(a) of the PLED has a different legal effect to clause 34.4 (its equivalent) in the current award. The introduction of clause 34.4 of the current award states: 'Where an employee is employed at or in connection with catering functions in primary and secondary boarding schools or residential colleges associated with tertiary educational institutions the following provisions apply:' (emphasis added).⁷ In comparison the PLED states at clause 28.5(a): 'Clause 28.5 applies to an employee whose work is connected with catering in primary schools, secondary boarding schools or residential colleges associated with tertiary educational institutions.' (emphasis added).

Business SA submits the PLED significantly changes the legal effect of this clause and that the scope of this clause be amended to accurately reflect present entitlements.

14. Clause 31 – Public holidays

14.1. Business SA notes clause 31.2 of the PLED contains a facilitative provision not reflected in Table 1 – Facilitative provisions. This omission has been discussed earlier in this submission.

⁷ *Hospitality Industry (General) Award* cl 34.4.

Restaurant Industry Award 2017 Plain Language Exposure Draft

Submissions

15. Clause 2 – Definitions

15.1. Definition of ‘spread of hours’

Business SA submits the definition of ‘spread of hours’ in the PLED is less clear than that found in the current award, despite the current award using a longer definition. Business SA submits the wording of the current award be used for the definition of ‘spread of hours’. In the alternative, Business SA submits the wording of the current award be used, but with the word ‘duty’ replaced with ‘work’.

16. Clause 7 – Facilitative provisions for flexible working practices

16.1. Table 1 – Inaccuracy re clause 24.4

Business SA submits reference to clause 24.4 in Table 1 is not accurate. The facilitative provision relating to time off instead of payment for overtime is clause 24.4(a); the rest of clause 24.4 provides guidance for the clause 24.4(a) agreement. Business SA submits Table 1 refer to the specific facilitative clause.

16.2. Table 1 – Missing facilitative provision

Business SA submits Table 1 should include reference to the facilitative provision in clause 25.4(c). Clause 25.4(c) allows an employer and an individual employee to change how they are paid for work on public holidays. The key details of this provision for the purpose of Table 1 would be:

Clause: 25.4(c)

Provision: Additional provisions for work on public holidays

Agreement between...: an individual employee

16.3. Table 1 – Inaccuracy re clause 26.8

Business SA submits reference to clause 26.8 in Table 1 is not accurate. The facilitative provision relating to taking annual leave in advance is clause 26.8(a); the rest of clause 26.8 provides guidance for the clause 26.8(a) agreement. Business SA submits Table 1 refer to the specific facilitative clause.

16.4. Table 1 – Inaccuracy re clause 26.9

Business SA submits reference to clause 26.9 in Table 1 is not accurate. The facilitative provision relating to cashing out annual leave is clause 26.9(c); the rest of clause 26.9 provides guidance for the clause 26.9(c) agreement. Business SA submits Table 1 refer to the specific facilitative clause.

17. Clause 11 – Casual employment

17.1. Clause 11.2

Business SA submits use of a note in clause 11.2 is inappropriate. The note explains what the casual loading is paid in lieu of, stating: ‘The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act.’ This explanation previously appeared in clause 13.1 of the current award.

Business SA submits the content of the note should be stated in a specific clause as is currently the case. We submit this could be achieved by moving it into its own clause, for example a new clause 11.3 (with subsequent clauses renumbered accordingly).

18. Clause 13 – Junior employees

18.1. Clause 13.4

Business SA submits the wording of clause 13.4 is less clear than its equivalent wording at clause 15.1 of the current award. Specifically, use of ‘relevant place’ in the phrase ‘under the law applying in the relevant place’ in the PLED is more complex than the phrase ‘where the law permits’ found in the current award. An average employer or employee may not understand what is meant by the relevant place. Business SA

submits the wording of the second sentence in current award clause 15.1 should be used instead of the wording at clause 13.4 of the PLED.

19. Clause 15 – Ordinary hours of work

19.1. Clause 15.1(e)

Business SA submits clause 15.1(e) of the PLED has a different legal effect to clause 31.2(d) of the current award (its equivalent provision). Clause 31.2(d) of the current award makes clear that the ordinary hours of work must be arranged such that an employee is given a minimum break of 10 hours between finishing ordinary hours of work on one day and the commencement of ordinary hours of work on the next day.

The PLED uses different language and changes the requirement. The PLED requires ordinary hours to be arranged such that an employee has a minimum break of 10 hours between when the employee finishes work on one day and starts work on the next day. Use of the term 'work' as opposed to 'ordinary hours of work' increases the scope of this clause.

Business SA submits the wording in clause 15.1(e) of the PLED be replaced by the wording of the current award at 31.2(d).

20. Clause 18 – Minimum rates

20.1. Clause 18.1 – Table 2 – Minimum rates

Business SA submits Table 3 – Minimum rates in clause 18.1 is unclear as not all minimum weekly/hourly rate rows are populated. The reader is tasked with finding their classification and then scanning up the column to find the applicable rate. Business SA submits this table would be much clearer if all of the relevant information for a particular classification in a particular classification level was contained in a single row. This submission accords with Guideline 2.2 by making the award simple and easy to read.

21. Clause 22 - Allowances

21.1. Clause 22.6 – Allowance for distance work

Business SA reserves their position regarding the Commission's question in this clause and looks forward to discussing the matter with interested parties.

22. Clause 24 – Overtime

22.1. Clause 24.3 – Overtime rate

Business SA submits clause 33.3 of the current award has not been reproduced in clause 24.3, or in clause 24 in general of the PLED. Business SA submits this change is substantive and that the clause must be replaced in the award.

23. Clause 25 – Penalty rates

23.1. Clause 25.2(c) – Table 6 – Penalty rates

Business SA submits the note accompanying Table 6 – Penalty rates in clause 25.2(c) is unnecessary. A plain interpretation of 7.00 am Monday tells the reader that the time is from midnight Sunday to 7.00 am Monday. This interpretation is further aided by Column 1 in Table 6. Rows two, three and four in Column 1. These rows detail the penalties applying in different time periods: from 7.00 am to 10.00 pm; from 10.00pm to midnight from 7.00 am to 10.00 pm and; from midnight to 7.00 am.

23.2. Clause 25.3 – Penalty rates not cumulative

Business SA submits the inclusion of a 'but for' statement in clause 25.3(a) could confuse readers and is less clear than the current award wording at 34.3. Business SA submits clause 23.5 could be clarified by merging paragraphs (a) and (b). To this end Business SA proposes the following wording:

25.3(a) Where more than one penalty would be payable for hours worked at a particular time the employer must pay the employee the higher of the penalties, but not more than one.

The above wording complies with Guideline [3.10] as it only deals with one topic.⁸

23.3. Clause 25.4(c) – Additional provisions for work on public holidays

Business SA notes clause 25.4(c) contains a facilitative provision not reflected in Table 1 – Facilitative provisions. This has been discussed earlier in this submission.

24. Clause 26 – Annual leave

24.1. Clause 26.4 – Temporary close-down

Business SA submits PLED clause 26.4 is unnecessarily long and repetitive and that the current provisions are clear and concise.

24.2 **Clause 26.2** Business SA reserves their position in regard to the Commission’s query on this matter.

25. Clause 29 – Public holidays

25.1. Clause 29.2 – Substitution of public holidays by agreement

Business SA submits the legal effect of clause 29.2 of the PLED has been significantly altered compared to clause 38.1 of the current award. The current award allows an employer to agree with the majority of employees ‘in the relevant enterprise or section of the enterprise’ (emphasis added) to substitute an alternative day for a public holiday prescribed by the NES. Clause 29.2 of the PLED instead allows agreement between the employer and a majority of the employees at a workplace.

Business SA submits clause 29.2 reflect current clause 38.1 by including reference to the section of the enterprise or workplace.

Conclusion

Business SA thanks the Commission for the opportunity to provide these submissions.

⁸ Plain language drafting guidelines. [Reference property].