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Business SA Submission

4 yearly review of
modern awards – *Clerks
Private Sector Award*
2010– Plain Language
Exposure Draft

28 February 2017

Introduction

On 4 November 2016, the Full Bench of the Fair Work Commission (Commission) released a decision¹ relating to the plain language drafting for the *Clerks – Private Sector Award 2010*.² This decision identified outstanding and substantive issues arising from the 2014 Award Review and outlined the process by which this award would be re-drafted in plain language. Business SA has been involved in the drafting of the Plain Language Guidelines³ and drafting of common and standard clauses arising from the Pharmacy Industry Award Plain Language Pilot⁴.

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.

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¹ [\[2016\] FWCFB 7967](#).

² [AM2014/219](#).

³ [2016] FWCFB 7968.

⁴ [AM2016/15](#).

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

Submissions

1. Clause 4 - Coverage
 - 1.1. **Clause 4.2 includes reference at (i) to the Children’s Services Award 2016.** Business SA notes that whilst an application had been made by CCSA to amend the coverage clause to exclude this award, this submission was formally withdrawn on 30 September 2016.⁶
 - 1.2. Clause 4.3 rewords the coverage provisions relating to on-hire employees. Business SA submits that the second part of the current provision *“if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This subclause operates subject to the exclusions from coverage in this award”*, **has been removed.** Business SA submits that this change is substantive and may lead to unexpected consequences.
2. Clause 7 – Facilitative provisions for flexible working practices
 - 2.1. Business SA notes at Clause 7.2 Table 1, clauses 13.6 and 13.10 are referred to twice in the 3 February 2017 Plain Language Exposure Draft (PLED). This appears to be a drafting error.
 - 2.2. Business SA notes that clause 27.1 is referred to in Table 1 as the facilitative clause. However, clause 27.1(b) contains the actual facilitative provision. Business SA submits the specific clause be listed in the Table 1.
 - 2.3. Business SA notes that clause 30 is referred to in Table 1 but that is 30.1 which houses the actual facilitative provision.
3. Clause 9 – Full time employment
 - 3.1. **Business SA notes the word ‘Each’ in the introduction of this clause.** Given clauses 9.1 and 9.2 are separated by an ‘or’, the word ‘each’ in the introduction should be replaced by the word ‘either’.
4. Clause 10 – Part time employment
 - 4.1. Parties are asked, by the plain language drafter, to “confirm whether the re-drafted clauses accurately reflect the intention of current modern award clause 11.4”. **Business SA** submits that the intention of the current award is accurately reflected.
5. Clause 11 – Casual Employment
 - 5.1. Business SA submits that clause 11.1 requires a minor amendment to make clear that a casual employee under this award is one specifically engaged as a casual employee and who is not a part-time or full-time employee. The same issue has been raised by Business SA and the interested parties in submissions in the Pharmacy Industry Award plain language pilot project.
6. Clause 13 – Hours of Work
 - 6.1. Business SA submits subclause 13.2 should clarify (by cross reference) that this reflects the provisions at 9.2 which allow for a full-time week of less than 38 hours in a particular workplace.
 - 6.2. Business SA submits clause 13.7(a) be amended for accuracy. Business SA submits clause 13.7(a) explicitly refer to clause 13.7(b), as that is the clause which applies if each of the elements of 13.7(a) applies. The following wording is provided: **‘(a) Clause 13.7(b) applies if each of the following applies:’**
 - 6.3. Business SA confirms that the redrafted clause 13.7 accurately reflects the intention of the current modern award clause 25.1(b).
 - 6.4. Business SA submits the legal effect of clause 13.6 has changed in the plain language exposure draft.

⁶ [CCSA letter 30/9/16](#)

- 6.4.1. Clause 25.2 of the current award⁷ allows the span of hours to be altered by agreement between the employer and the majority of employees concerned. This terminology was carried forward into the exposure draft.⁸
- 6.4.2. The plain language exposure draft at clause 13.6(a) changes the wording to **'the majority of employees at the workplace covered by this award'**.
- 6.4.3. Where the current award and previous exposure draft only required agreement with the majority of employees concerned (i.e. those affected by the alteration), the plain language exposure draft requires agreement with the majority of workers covered by this award at the workplace. This suggests agreement is required with employees who would not be affected by any alteration to the spread of hours.
- 6.4.4. Business SA submits the plain language exposure draft increases the population of employees with whom agreement is required for the spread of ordinary hours to be altered.
7. Clause 14 – Rostered Days Off
- 7.1. Business SA notes clause 8.5(c) of the exposure draft is a copy of the wording in clause 25.4(d) of the current award. These clauses have not been properly reflected in clause 14.6(d) of the PLED.
- 7.1.1. Current award clause 25.4(d) and exposure draft clause 8.5 provides the following: No payments or penalty payments are to be made to employees working under this substitute banked rostered day off. However, the employer will maintain a record of the number of rostered days banked and will apply the average pay system during the weeks when an employee elects to take a banked rostered day off.
- 7.1.2. The emphasised wording above is not reflected in plain language exposure draft at clause 14.6.
- 7.1.3. Business SA submits this is a substantive change and that provisions reflecting the above-emphasised wording be inserted into the PLED.
8. Clause 15 – Breaks (employees not engaged on shifts)
- 8.1. Business SA submits the effect of clause 26.2(a) in the current award is not properly reflected in the note below clause 15.4 of the PLED, potentially changing the legal effect of the clause.
- 8.1.1. Clause 26.2(a) states, where an employee is entitled to two 10 minute rest breaks, the first rest break should occur before the usual meal interval and the second rest break should occur after the usual meal interval. This suggested pattern is qualified by the **wording 'if suitable to business operations'**.
- 8.1.2. The note **in the PLED states 'Where suitable to business requirements, the employer will arrange...'** (emphasis added).
- 8.1.3. Business SA submits that by **changing from 'should' to 'will' the award is no longer suggesting a** pattern of taking breaks, rather it is mandating it. While there is still consideration of suitability to business requirements, the employer is now under stricter terms to arrange for the first rest break to occur before the meal break and the second rest break to occur afterwards.
9. Clause 16 – Minimum wages and allowances
- 9.1. Business SA submits Table 4 – Junior rates in clause 16.4 – Junior employees could be amended.

⁷ Clerks – Private Sector Award 2010.

⁸ Clerks – Private Sector Award 2015 exposure draft revised 11 October 2016, clause 14.2.

- 9.1.1. Clause 16.4 states a junior employee must be paid the percentage, specified in column 2 of Table 4, of the applicable minimum rate in Table 3. Column 2 of Table 4 is titled ‘% of weekly rates’. This is inaccurate as a junior employee may be engaged as a part-time or a casual employee. In such cases the junior employee would be paid the appropriate percentage of the hourly rate, rather than of the weekly rate.
- 9.1.2. Business SA submits **column 2 of Table 4 be amended to ‘% of minimum rate’**. This will allow the percentage to apply to the appropriate minimum rate, be it the minimum weekly rate or the minimum hourly rate. A similar approach has been taken in the plain language pilot of the *Pharmacy Award*.⁹
10. Clause 19 – Vehicle allowance
- 10.1. Business SA submits clause 19.6(a) changes the legal effect of the award when compared to the current award.
- 10.1.1. Clause 19.4 of the current award only applies where an employee is required by the employer to use their motor vehicle in the performance of their duties. Clause 19.6 of the PLED provides the vehicle allowance where an employee is required to use their own vehicle.
- 10.1.2. It is no longer specified that the employee must be required by their employer to use their motor vehicle in performing their duties. Under the PLED an employee could unilaterally decide they needed to use their own motor vehicle in performing their duties and claim the allowance. The employer no longer determines when the vehicle allowance will be payable.
- 10.1.3. We note clause 11.3(d) of the 11 October 2016 exposure draft used the following wording: ‘**An employee required by the employer to use the employee’s motor vehicle in the performance of duties...**’ Business SA submits this language be retained. Whilst in keeping with the plain language guidelines regarding active language, express reference must be made to the employer requiring the employee to use their motor vehicle.
11. Clause 19.7 - Living away from home allowance
- 11.1 Business SA submits clause 19.7(a)(i) should read:
“(i) the employee is required by the employer to temporarily to work away from their usual place of residence.”
- 11.1.1 The current Award and ED contain the wording “**required by the employer**” and it is Business SA’s view that the wording should be retained for clarity.
- 11.1.2 Wording in Clause 19.7(b)(i) of the PLED also **states “required by the employer” and therefore, to ensure consistency within the clause, this wording should be contained in 19.7(a)(i).**
12. Clause 23 – Rest period after working overtime (employees not engaged on shifts)
- 12.1. Clause 23.4 – Business SA submits that where an employee resumes or continues work without having at least 10 consecutive hours off duty, the resumption of work should only be when the instructed by the employer. Clause 13.4(b)(ii) of the ED and 27.3(c) of the current award both require the resumption of work to be on instruction by the employer.
13. Clause 27 – Ordinary hours of work and rostering for shift work
- 13.1. Business SA submits that the PLED has changed the legal effect of clause 27.1(b).

⁹ Exposure draft – Pharmacy Industry Award 2016, 20 January 2017, clause 16.2.

- 13.1.1. The removal of the requirement of majority agreement between the employer and employees is a significant change from the current award.
 - 13.1.2. **By removing the word “majority” it can be interpreted that an employer must have agreement of all employees, which is different to majority. In the both the current award (cl 28.3(a)) and the ED (cl 14.3(b)) majority agreement is required.**
 - 13.1.3. Business SA submits the **word “majority” should be retained.**
14. Clause 32 – Transport reimbursement for shift work
- 14.1. Business SA submits clause 32(b) of the PLED changes the legal effect of the clause by providing an additional entitlement not contained in the current Award. In the current Award, Clause 19.1 of the current award only provides payment from the place of employment to the place of residence. Travel in the other direction is not paid. This change increases the liability on employers and the original intent of the Award should be retained.
15. Schedule A – Classification Structure and Definitions
- 15.1. Business SA notes the **wording “characteristics” has been replaced with “competencies” throughout this clause.** There is potential for this change to have unintended effects on the classification of employees.
 - 15.2. In clause A.2.1 – the wording **“the less experienced employees’ work may be subject to checking at all stages” has been removed. It is Business SA’s view that this wording should be retained.** The additional wording allows for a more experienced employee to closely check the work of another employee without creating an issue of authority or unreasonable actions.
16. Schedule I – Definitions
- 16.1. In Schedule I – Definitions Business SA notes the definition of clerical work has been removed.
 - 16.1.1. Business SA submits **the definition of “clerical work” contained in the ED** and current Award should be replicated in the PLED. The definition provides a summary of the typical tasks in the clerical industry without going through the Classification structure contained in Schedule A.

Conclusion

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