



BUSINESS SA

Award Stage: Submissions in Reply, Exposure Drafts – Groups 2A & 2B

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BusinessSA

South Australia's Chamber of
Commerce and Industry

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Introduction

Business SA is pleased to have this opportunity to respond to submissions on the Exposure Drafts in Award stage – Groups 2A and 2B. We refer to our submission *Award Stage – Groups 2A & 2B Exposure Drafts* of 28 January 2015, and we do not seek to duplicate our responses on matters of technical or drafting issues in regards to Group 2A and 2B. We intend to respond to parties' submissions on the following exposure drafts:

Sub-group A

- Aquaculture Industry Award 2010
- Graphic Arts, Printing and Publishing Award 2010
- Storage Services and Wholesale Award 2010
- Seafood Processing Award 2010

Sub-group B

- Health Professionals and Support Services Award 2010
- Pharmacy Industry Award 2010

Hourly Rates

Business SA and other parties have made note of the discrepancies in hourly rates tables regarding rounding rules and methodology. The Fair Work Ombudsman (FWO) online tool “PayCheck Plus” provides employers and employees with a consistent method of calculating rates of pay. The method used in PayCheck Plus is consistent with Business SA’s understanding of how rates of pay have been calculated historically. In order to provide consistency Business SA proposes the following clause is inserted into Group 2A & 2B Awards:

Insert:

“Clause XX - Calculation of hourly rates

The minimum hourly rate, where it appears in this award, is calculated by dividing the specified minimum weekly rate by 38 and rounding to the nearest cent. Calculations such as penalties and casual rates utilising an hourly rate will be calculated by dividing the specified minimum weekly rate by 38 and providing a rate to the 6th decimal place, applying the appropriate loading/penalty and then rounding to the nearest cent.”

Minimum and Ordinary rates

There appears to be confusion about the utilisation of the terms ‘minimum hourly rates and ‘ordinary hourly rates’ throughout the Exposure drafts. We refer to FWCFB 9412, where the Full Bench outlines:

The exposure drafts have been prepared using the following principles:

- *Where an award does not contain any allowances or loadings payable for all purposes, the term ‘minimum weekly/hourly rate’ has been used throughout (e.g. draft Wool Storage, Sampling and Testing Award 2014)*
- *Where an award contains an allowance or loading that is payable for all purposes, the term ‘ordinary hourly rate’ has been used to express penalties and loadings (e.g. “overtime is payable at 200% of the ordinary hourly rate” in draft Premixed Concrete Award 2014)¹*

A number of submissions go into specific detail regarding the confusion of the interchange of these terms. Business SA will not refer to the specific details of instances where this has taken place, but make note here that a general review would be useful to ensure that a consistent approach be undertaken.

¹ FWCFB 9412, paragraph 44.

Group 2A

Aquaculture Industry

Coverage

A number of parties have expressed concern that the wording “related operations” in clause 3.1 is too broad and extends the coverage of the award. Business SA supports the submissions that the wording is too broad and supports the wording proposed by the Australian Industry Group (AiG).

Ordinary Hours of Work – Day workers

The Australian Workers’ Union (AWU) has submitted that the wording on Clause 8.2(c) contains a typographical error. Business SA does not support the AWU that this clause contains a typographical error.

Higher Duties

AWU have expressed concern that the wording of Clause 10.7 requires employees to perform all duties of the higher position in order to be entitled to the higher duties rates. Business SA does not support these submissions by the AWU, and we are concerned the AWU proposal would lead to the payment of the higher duties entitlement in circumstances where an employee only performs a very minor task from a higher duty. Business SA does not believe this is the intention of the clause.

Graphic Arts, Printing and Publishing Industry Award 2010

Facilitative Provisions

Business SA supports the submissions of Australian Business Industrial (ABI) and NSW Business Chamber (NSWBC) that the table in Clause 5.4 has omitted one of the existing facilitative provisions. The existing Clause 8.4 of the Award includes reference to Clause 12.3 as one of the facilitative provisions. Business SA further submits that the reference should be Part Time Employment subclause 6.3(c)(ii).

The Australian Manufacturing Workers’ Union (AMWU) have submitted that in Clause 5.5(c) the word “Agreement” should be replaced with “Such an agreement” at “Agreement under this clause binds...” and that at Clause 5.6(b) “such” should be reinserted at “binds all such employees” to emphasise it can be workers in part of an enterprise. Business SA supports the insertion of the suggested wording.

Abandonment of Employment

Business SA supports the AMWU submission to moving Clause 8 – Abandonment of Employment closer to Clause 33 – Termination of Employment.

Casual Employment

The Australian Federation of Employers and Industries (AFEI) have submitted that in Clause 6.4(c)(ii) the word ‘or’ was omitted between the paragraphs (ii) and (iii). Business SA supports the insertion of the word ‘or’ which is currently contained in Clause 12.4(b)(ii) of the existing modern award.

Wage Rates, Allowances and Classifications

The AMWU has submitted inserting the word 'minimum' into heading "casual hourly rate \$" in Clause 9.2 - Table A. Business SA supports this insertion.

AFEI have submitted that the casual hourly rates column in the table should be either deleted or include a clear signpost that the rates are inclusive of the casual loading provided in Clause 6.4. Business SA supports the addition of further wording to clarify that the casual loading is included but not the deletion of the table.

Payment of Wages

AFEI have submitted there is a typographical error in Clause 19.5 – Payment of Wages and the second 'is' should be replaced with 'are'. Business SA supports this submission.

Ordinary Hours of work, rostering and special provisions for shift work employees

A number of parties have raised concern with subclause 21.7(e). The wording in the exposure draft is the same as the existing award. Business SA agrees with the AMWU and the AFEI that the wording in this clause is unclear. Business SA submits that the clause should read:

*'(e) If an **employer** is required to change the employee's working hours in the case of an emergency beyond the control of the employer without receiving 48 hours notice, the employee will be paid double time for all time worked until the expiration of the 48 hours after the employee commenced the new hours'*

Meal Breaks

Business SA supports ABI and NSWBC that the current wording in Clause 22.3 contains a typographical error and that the clause should read "one-half extra" in accordance with Clause 16.33 of the Graphic Arts - General - Award 2000 [AP782505].

Time provisions for refreshment

Clause 23: Business SA supports the view of the Printing Industry Association, ABI and NSWBC that changing the wording to contain in 'short break' rather than a 'pause to acquire a refreshment' would imply an actual stoppage of work, distinguished from a 'pause' that does not impact on productivity that currently offered in the modern award.

Shift Allowance, afternoon and night shift

Clause 24.2: Business SA supports the Printing Industry Association that this clause applies to 'employees other than non-daily and regional daily newspaper offices'.

Weekend work – other than in regional daily newspaper office

AFEI have submitted that the wording in Clause 24.5(b) may lead to confusion on the calculation of the penalty rate for such casuals. Business SA supports AFEI's submissions that the wording in the existing award provides a clearer explanation.

Time of instead of overtime

AFEI submitted that Clause 25.9 removes the current words, 'with the consent of the employer' and replaces it with 'at a time or times agreed by the employer'. Business SA agrees that the new words suggest the employer only has capacity to agree on the timing of when time in lieu is taken as opposed to whether such treatment of overtime can occur at all. The wording from the original award should be reinserted into the revised award.

Definitions

Schedule I.1.1: AFEI submitted that the definition of 'hourly rate' in clause 3.1 is potentially inconsistent with other parts of the current award, such as Clause 38, which provides that personal/carer's leave is provided for in the NES and for which payment is made at the 'base rate of pay'. Business SA agrees that the definition of 'hourly rate' is inconsistent and could lead to ambiguity.

Storage Services and Wholesale Award 2010

Business SA does not support the cash out of personal leave and compassionate leave as submitted by the Shop Distributive and Allied Employees Association (SDA). Employees are only allowed to cash out under s100 and s101 of FW Act if it is contained in the Award or agreed to in an enterprise agreement. By retaining the exposure draft words it is clear to parties that the award does not allow for cashing out.

Clause 5 – Facilitative Provisions

Business SA agrees with the submissions that the travel allowance is not a facilitative provision, rather that this allowance provides a right to additional payments in circumstances where the employer utilises its unilateral right to require work to be performed at another location.

Spread of Hours

Business SA supports AiG's submission that the spread of hours contained in Clause 8.1 be amended to 6pm to align with Clause 15.1 – Shiftwork. This will avoid confusion on what rate of pay should be paid between 5.30pm and 6pm.

Breaks

Business SA supports the submissions of ABI and NSWBC that Clause 9.2 of the Exposure drafts changes the existing entitlement and that the wording of clause 23.1(a) of the current Award be retained.

Higher Duties

Business SA supports AFEI submissions to amend the Clause 13 of the Exposure draft to refer to 'full-time' and 'part-time' employees. This does not change the operation of the term and is more consistent with the language of the award.

Business SA does not support the AWU's submissions that Clause 13 Higher Duties applies to all employees. AWU's proposed change significantly varies the operation of this Clause from the existing Modern Award.

Span of hours for shift workers

Business SA supports the views that the span of hours contained in Clause 15.1 can be extended by one hour at each end of the daily span.

Overtime

Business SA opposes the the AWU's proposed amendment to Clause 16.1(a). Business SA does not believe there is a conflict between clause 16.1(a) and 16.1(b). Furthermore, the proposed wording suggested by the AWU is a significant change to the existing Award provisions.

Business SA supports the AWU submissions that Clause 16.1(b) Overtime and penalty rates - Payment for overtime contains a typographical error.

AWU - Clause 16.6 Call back: in response to the question asked at page 20 of the exposure draft, we submit that the "appropriate rate" must reflect the overtime rate, hence it should be paid at the rate of 150% of the ordinary hourly rate for the first two hours and 200% of the ordinary hourly rate thereafter.

Business SA does not support the proposed amendment by the SDA to Clause 16.1 of the Exposure draft. It is Business SAA's view that the reference at Clause 16.1(c) guides readers to Clause 6.3(f) for details on when part-time employees are paid overtime.

Redundancy

Business SA does not oppose the submission by the SDA to remove the definition of "small business employer" in Clause 23.2 as this definition is already contained in the definitions Schedule.

Seafood Processing Award 2010

Coverage

Business SA agrees with the AMWU submission that the definition of the term 'Seafood Processing' should not be repeated in Schedule F, but should simply refer to definition in clause 3.2.

Business SA, does however, oppose the submission by the AMWU to clarify clauses 3.3 and 3.3(a), as it is goes to the more substantial matters of the coverage of the Award. It is our view that this would constitute a significant change that will impact on employers not currently covered by the Award. Such an application for variation should include significant evidence from the AMWU that such a change is necessary.

Clause 6.3 – Part time employment

Business SA supports the submissions by AiG that Clause 6.3(a)(i) deviates from the current Clause 1.7, as it is not confined to "the terms of this award". Its application therefore could be interpreted as extending to over-award pay and entitlements. This is a substantive change which could impose additional costs on employers and therefore, should not be adopted.

Ordinary Hours of Work and Rostering

Business SA opposes the proposal of the AMWU to vary Clause 8.2 (c) and Clause 13.4. The insertion of the wording “but may not be altered to increase the spread of hours beyond 12 hours a day,” constitutes a significant change to the operation of the Award as it may prevent the spread of hours beyond 12 hours.

Business SA supports the variation sought by AiG to insert the words “up to 38 per week” into Clause 8.5. This will clarify that casual employees are not required to work 38 hours per week.

Non-rotating shift

Business SA supports the submissions by ABI and NSWBC that the heading contained in Clause 13.5(b) is not appropriate and should be reconsidered.

Clause 15.11

Business SA does not oppose the AMWU’s proposed variation to the Title of clause 15.11 to read “Payment of leave on termination”.

Schedule A

Business SA supports the proposal by AiG to amend the table at Schedule A.1.3 to include penalty rates payable to shift-workers on Saturdays.

Group 2B

Health Professionals and Support Services Award 2010

It has been noted in early conferences regarding this award that the technical and drafting issues evident in the Exposure draft are intrinsically related to some of the variations proposed to date. These proposals are currently under discussion between the interested parties, and so this submission will deal with only those technical or drafting issues that are outside of these.

Clause 3.1 Coverage

AFEI and AiG have both noted that the coverage clause refers to Clause 11 as listing health professional employee classifications. We would support AFEI's submission that the point of reference be changed to Schedule B of the Exposure draft.

Pharmacy Industry Award 2010

Part-time employment

SDA note their concern with the removal of the word 'and' from the Clause 6.4(a) between provisions (i) and (ii) as both must be met for an employee to meet the definition of a part-time employee. Business SA do not have an objection to retaining 'and' between the provisions.

Part-time employment

The Pharmacy Guild note that the addition in Clause 6.4(d) of the wording 'no less than' in the Exposure draft establishes an over-award payment as the rate of pay rather than the minimum hourly rate. Business SA supports their submissions.

Rosters

SDA note the rewording in the Exposure draft changes the substantive provision of the Clause 6.4(f). In current Clause 12.8 – Rosters, the SDA maintains written notice must be given for both instances of altering a part-time roster, whether that is seven days' notice or 48 hours' notice in the case of an emergency. The word 'written' has been removed from the 48 hours' notice sub clause. Business SA would support the retainment of the current wording as the intention of the Exposure drafts is not to alter entitlements.

The Pharmacy Guild has noted that the existing provision allows for an employer to give the employee notice of a change in roster. The Exposure draft has removed the words 'by the employer to the employee'. Business SA would support the retainment of the existing wording.

Casual loading

The SDA are concerned that the substitution of the word 'actual' from the current modern award to 'minimum' in the Exposure draft has changed the entitlements of casuals in Clause 6.5(c)(i). It is their view that the word 'actual' be retained as it would include penalty rates as part of a casual's ordinary hourly rate.

It is the view of Business SA that the entitlement to penalty rates for casuals is not altered by this change of wording.

Ordinary hours of work and rostering

ABI and the NSWBC note the redrafting of Clause 8.2(f) suggests the provisions of clause 8.2 do not apply to casuals and part-time employees. We would support the redrafting of this clause to remove any potential ambiguity.

Rostering – permanent employees

ABI and NSWBC note the redrafting of sub-clauses (iii) and (iv) in Clause 8.3(a) have created unnecessary ambiguity. Business SA would support the redrafting of this clause to remove any potential confusion.

Annualised salary (Pharmacists only)

The SDA and the Health Services Union (HSA) note in Clause 10.4(a) that the substitution of the words ‘any or all’ in the annualised salary provisions from ‘may be inclusive of’ has made substantial changes to the meaning of the clause. Their position is that the annual salary must be in satisfaction of all provisions, not any.

Business SA acknowledges that this change of wording could cause confusion for end users when interpreting the requirements of an annualised salary. We would propose the retainment of the current clause, with the addition of ‘applicable provisions’, as follows:

‘The annual salary may be in satisfaction of the applicable provision of the award’

Meal allowance

The Commission has asked for parties to clarify if Clause 11.2(a)(iii) applies to both clause 11.2(a)(i) and 11.2(ii). The new wording in the Exposure draft has created potential ambiguity as to whether (iii) applies to the previous two sub-clauses. The current award clearly states that the provision applies to both of the reworded sub-clauses.

We would support the submission of ABI and NSWBC that the permanent change to a part-time employee’s roster creates new ordinary hours for the employee. Meal allowances would apply according to the conditions set out in clause 11.2(a).

Clause 13.2 Definition of overtime

The Commission has asked parties to consider whether the award should state when a casual employee is entitled to overtime. The previous sub-clause notes that:

- (a) Subject to clause 13.1
- (b) an employee other than a casual employee may be required to work reasonable overtime at the applicable overtime rate.

Sub-clause (b) goes on to state when an employee may refuse to work overtime. This clause suggests that only full- or part-time employees are able to access overtime. Business SA supports the view that any change in the wording would change the current entitlements of the award and will have a significant effect on the industry.

Schedule G: Definitions

Business SA supports the ABI and NSWBC in retaining the definition of a ‘default fund employee’ in the award, based on the decision FWCFB 10016.

Who we are

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.