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Technical and Drafting Issues Related to Sub-Group 4A, 4B and 4C Exposure Drafts

June 2016

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Executive Summary

Business SA is pleased to provide this submission on the sub-group 4A, 4B and 4C exposure drafts in response to the Fair Work Commission's (the Commission/FWC) directions of 10 May 2016: [2016] FWC 2924. This submission will address drafting and technical issues, as well as, questions posed by the Commission. We have an interest in the modern award exposure drafts listed below: *

- *Building and Construction General On-site Award 2016*
- *Children's Services Award 2016*
- *Electrical, Electronic and Communications Contracting Award 2016*
- *Joinery and Building Trades Award 2016*
- *Plumbing and Fire Sprinklers Award 2016*
- *Social, Community, Home Care and Disability Services Industry 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 will be impacted by any changes to the award system
- In the current economic environment South Australian employers need certainty that their interests will be represented when changes to the award are considered
- South Australian employers and employees will benefit from a well-considered modern award review enabling both parties to better understand their rights and responsibilities

***Note:** Unless otherwise stated, all clauses refer to their relevant exposure draft.

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Contents

1. *Building and Construction General On-site Award 2016* ... 4
1.1 Technical and Drafting Issues ... 4
1.2 Fair Work Commission Requests for Clarification ... 4
2. *Children's Services Award 2016* ... 7
2.1 Technical and Drafting Issues ... 7
2.2 Fair Work Commission Requests for Clarification ... 7
3. *Electrical, Electronic and Communications Contracting Award 2016* ... 9
3.1 Technical and Drafting Issues ... 9
3.2 Fair Work Commission Requests for Clarification ... 10
4. *Joinery and Building Trades Award 2016* ... 13
4.1 Technical and Drafting Issues ... 13
4.2 Fair Work Commission Requests for Clarification ... 13
5. *Plumbing and Fire Sprinklers Award 2016* ... 15
5.1 Technical and Drafting Issues ... 15
5.2 Fair Work Commission Requests for Clarification ... 15
6. *Social, Community, Home Care and Disability Services Award 2016* ... 18
6.1 Technical and Drafting Issues ... 18
6.2 Fair Work Commission Requests for Clarification ... 20
Conclusion ... **22**
Additional Information ... **22**

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and Industry South Australia

1. *Building and Construction General On-site Award 2016*

1.1 Technical and Drafting Issues

1.1.1 Clause 4.3(c) – Coverage – Metal and engineering construction

This subclause currently contains two sub-sub clauses (i) and (ii).[1] The Exposure Draft has included the current (ii) as a dot point of the exposure draft's 4.3(c)(i). This is an inappropriate combination and Business SA submits this be amended to reflect the current numbering.

1.1.2 Clause 7.2 – Facilitative provisions

The table at clause 7.2 references clause 23.14(a) as being decided by an agreement between the majority of employees (and the employer) when the award clause does not specify a majority requirement.

1.1.3 Clause 19.1(b) – Minimum wages – General

Clause 19.1(b) states that 'the ordinary hourly rate for an employee's classification is set out in clause 2.' Business SA submits this should be amended to read 'the *definition of* the ordinary hourly rate for an employee's classification is set out in clause 2.' (*changes emphasised*).

1.2 Fair Work Commission Requests for Clarification

1.2.1 *No examples have been included in this exposure draft. Parties are asked to submit examples that clarify the operation of particular provisions.*

Business SA has stated its position regarding this matter previously. Examples are more appropriately included in an annotated version of the award,

1.2.2 Clause 2 – Definitions – Adult apprentice

Clause 2 defines an adult apprentice as "a person of 21 years of age or over at the time of entering into a contract of training in a specified trade"

This definition of "adult apprentice" is different to the definition provided in clause 14.1(e).

Business SA submits there is no material difference between the definitions. We submit the definitions should, however, use the same wording to avoid confusion. A single definition in the body of the award may be more appropriate to avoid possible confusion in future.

1.2.3 Clause 12.2 – Casual employment – Entitlements

Clause 12.2 states a casual employee is entitled to all of the applicable rates and conditions of employment prescribed by this award, excluding annual leave, paid personal/carer's leave, paid community service leave, notice of termination and redundancy benefits.

Parties are asked if the provisions in clause 23 – Inclement weather apply to casual employees how these provisions are to be applied, given that the provisions are based on a four-week accrual period.

Business SA is seeking member feedback regarding the interaction of these clauses.

1.2.4 Clause 12.5 – Casual employment – Casual hourly rate

Under clause 12.5, a casual employee must be paid a casual loading of 25% for ordinary hours as provided for in this award.

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[1] *Building and Construction General On-site Award 2010* cl 4.10(c).

Parties are asked whether the casual hourly rate should be calculated by adding 25% to the hourly rate specified in clause 19.1, or calculated in accordance with either 19.3(a) or 19.3(b), or on any other basis.

Business SA submits casual employees would be paid the 25% loading on the relevant ordinary rate defined in clause 2. It does appear this matter has been referred to the Part-Time and Casual Full Bench.

1.2.5 **Clause 19.10 – National training wage**

Clause 19.10(a) states the provisions of Schedule E – National Training Wage will apply in respect of traineeships, except that the following minimum wage rates will apply instead of those within clause E.5.1 of Schedule E.

Parties are asked whether clause 19.10(a) should include an additional clause reference to rates in clause E.5.2 of Schedule E. It may be unclear whether clause 19.10 has any application to part-time and school-based trainees as their rates of pay are set out in E.5.2 (not E.5.1).

Business SA is seeking member feedback regarding the interaction of these clauses.

1.2.6 **Clause 23.9 – Inclement weather**

Clause 23 contains provisions relating to inclement weather. Payments arising from clause 23 operate in 'periods'. Clause 23.9 declares the starting date for these periods; stating:

> "The first period will be deemed to commence on the first Monday after 28 December 2009 and subsequent periods will commence at four weekly periods thereafter, provided that a calendar that was being used immediately before 15 July 2013 may still apply."

Parties are asked whether clause 23.9 is obsolete.

Business SA submits clause 23.9 is not obsolete. The provision on which clause 23.9 is related commences at clause 23.7, 23.8 makes reference to the 4-week period which is further explained at 23.9.

In reviewing this clause in our comments above regarding casual employees and in responding to this query, Business SA would suggest renumbering this clause would be useful; specifically, 23.5 and 23.6.

1.2.7 **Clause 28.4 – Payment for working overtime**

All time worked beyond an employee's ordinary time of work, (including time worked for accrual purposes) Monday to Friday, must be paid at the rate of 150% of the ordinary hourly rate for the first two hours and 200% thereafter, by operation of clause 28.4.

Parties are asked whether the words 'beyond an employee's ordinary time of work' in clause 28.4 should be amended to 'outside an employee's ordinary time of work' or 'outside or in addition to an employee's ordinary time of work'. This may clarify the application of overtime to casual employees.

Business SA submits the phrase used in clause 28.4 should be 'outside the employee's ordinary hours of work'. In the exposure draft, incidences of 'ordinary time hourly rate' have been replaced with 'ordinary hourly rate'. At clause 17.2(m) the exposure draft has amended the words 'ordinary time hours' to read 'ordinary hours'.

1.2.8 **Clause 41.2 – Wages**

Clause 41.2(a) contains a table detailing the weekly minimum wage rate for forepersons and supervisors. The wage rates listed are adjusted and/or limited by specific monetary thresholds with no method of calculation provided.

Parties are asked whether the award should clarify the method of adjustment of these amounts. The amounts have historically been adjusted in accordance with changes to the standard rate.

Business SA submits all awards should clearly state the method of calculation of any flat dollar amounts referred to in that award. Therefore, in reference to the Commission's above question, Business SA submits this award should clarify the method of adjustment of the amounts in cl 41.2(a).

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2. *Children's Services Award 2016*

2.1 Technical and Drafting Issues

2.1.1 Clause 2 – Definitions – Children's services and early childhood education industry

Business SA submits the definition of 'children's services and early childhood education industry' in clause 2 be amended to direct readers to the definition in clause 4.2. Whenever a term is defined in the definitions clause and again elsewhere in the award, there is a risk one definition may be changed in future drafts without any corresponding definitions also changing. This would create an inconsistency. The definition in clause 2 should be significantly amended to simply refer readers to clause 4.2. This will ensure the term is defined only once in the award whilst ensuring the definition is read in its proper context.

Business SA submits the definition of 'children's services and early childhood education industry' in clause 2 be amended to:

> '**children's services and early childhood education industry**' means *the children's services and early childhood education industry as defined in clause 4.2*'

2.1.2 Clause 17.3(d) – Expense related allowances – Use of vehicle allowance

Business SA notes this clause has changed between the current award and the exposure draft. Previously this clause operated "Where an employer requests…"[2], the draft changes this to "If an employer requires...". This changes the operation of the clause. Previously an express request for the employee to use their own vehicle in performance of their duties was required before the allowance was paid. The request requirement has been removed in this draft. While Business SA agrees with the structure of cl 17.3(d), we submit the original wording of the clause be maintained.

2.2 Fair Work Commission Requests for Clarification

2.2.1 Clause 13.9(g) – Hours of work – out-of-school hours care, preschools and kindergartens

Clause 13.9 sets the hours of work for out-of-school hours care service, preschool and kindergarten employees. Subclause (g) states:

> "Where a person employed as at the date of making this award is employed on a contract which provides payment of salary during non-term times or is employed under an award-based transitional instrument or Division 2B State award which provides for such payments the provisions of this clause will not have the effect that their contract of employment is changed as a result of this award coming into operation."

***Parties are asked to advise whether the reference to award based transitional instruments and Division 2B State awards in clause 13.9(g) is still necessary*.**

Business SA submits reference to award based transitional instruments and Division 2B State awards are no longer necessary. Subclause (g), quoted above, operates to ensure those employees do not have their contract of employment changed and suffer a decrease in pay. Clause 1.4 protects employees from a reduction and provides a remedy.

2.2.2 Clause 16.7(d) – Higher duties

Clause 16.7 operates to ensure, in specified conditions, employees who perform work carrying a rate higher than their ordinary classification are paid as such for time worked at that higher rate. Subclause (d) provides:

[2] *Children's Services Award 2010* cl 15.7.

> "Where an employee is appointed to act as the Director of a Centre or a Supervising Officer pursuant to the relevant childcare regulations, they will be paid for the entire period at the rate applicable for a Director or Supervising Officer"

The term 'Supervising Officer' (which appears in clause 16.7(d)) is not contained within Schedule A–Classification Structure. Parties are asked to comment on whether this should be amended to 'Authorised Supervisor' (which appears under Level 4 at A.1.6).
Business SA is seeking member feedback on whether this amendment should be made.

3. *Electrical, Electronic and Communications Contracting Award 2016*

3.1 Technical and Drafting Issues

3.1.1 Clause 7.2 – Facilitative provisions for flexible working practices table

Business SA notes reference to a facilitative provision at cl 16.6(a)(ii) is misleading. Clause 16.6(a)(ii) does not refer to potential agreements between an employer and employees regarding payment of wages. Business SA submits the table at cl 7.2 should refer to cl 16.6(b)(i) which provides:

> 'Wages may be paid fortnightly by agreement between the employer and the majority of employees. Agreement in this respect may also be reached between the employer and an individual employee.'

3.1.2 Clause 10.3 – Part-time employment

Business SA submits this clause could be clarified by stating part-time employees are paid the ordinary hourly rate for <u>their</u> relevant classification rather than <u>the</u> relevant classification. Casual employees are required to be paid their classification: cl 11.2. The amended clause 10.3 would read:

> 'For each ordinary hour work, a part-time employee will be paid no less than the ordinary hourly rate for *their* relevant classification plus any applicable allowances.'

3.1.3 Clause 17.2(f)(ii) – Rate for ordering materials

Business SA submits the word 'only' be inserted into the first bullet point of this clause to better reflect the language of the current award. The current award states: 'This amount will **only** be paid when four or more days in a pay period are spent on such duties.'[3] (emphasis added). Reinsertion of the word 'only' ensures the limitation placed on the original clause is repeated in the exposure draft. Business SA's proposed wording for the first bullet point would be: '**$15.30** per week must *only* be paid when four or more days in a pay period are spent on such duties;' (*change emphasised*).

3.1.4 Clause 17.3(b)(ii) – Towers allowance

Business SA submits clause 17.3(b)(ii) be inserted into the facilitative provisions table at clause 7.2 of this draft. Clause 17.3(b)(ii) allows the towers allowance to be paid for:

> "any similarly constructed building or a building not covered by clause 17.3(a)(ii) which exceeds 15 metres in height may be covered by this subclause, or by clause 17.3(a) **by agreement** or where no agreement is reached, by determination of the Fair Work Commission."

As this sub-clause allows the towers allowance clause to operate differently by agreement, Business SA submits clause 17.3(b)(ii) appear in the facilitative provisions table.

3.1.5 Clause 17.6(b)(i) – Regular return home

Business SA submits clause 17.6(b)(i) more closely reflect the current award. The current award starts "Except as hereinafter provided".[4] This clearly demonstrates to the reader that the regular return home entitlement is not payable to an employee receiving the living away from home allowance prescribed by cl 17.6(a).[5] The exposure draft makes no upfront reference to cl 17.6(b)(ii).

[3] *Electrical, Electronic and Communications Contracting Award 2010* cl 17.2(g)(ii).
[4] *Electrical, Electronic and Communications Contracting Award 2010* cl 17.6(b)(i).
[5] *Electrical, Electronic and Communications Contracting Award 2010* cl 17.6(b)(ii).

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As the regular return home entitlement is directly influenced by cl 17.6(b)(ii), Business SA submits reference to cl 17.6(b)(ii) be reinserted in cl 17.6(b)(i). Possible wording could be: "*Except as provided in clause 17.6(b)(ii),* an employee on distant work will, where practicable, be allowed to return home for the weekend…" (*addition emphasised*).

3.2 Fair Work Commission Requests for Clarification

3.2.1 Clause 10.5(b) – Part-time employment – public holidays

Clause 10.5(b) states that where a part-time employee works on a public holiday they must be paid at additional rates set out in clause 15.15(b)(ii).

Clause 13.15(b) appears to apply to shiftworkers on other than continuous work only. Is the clause reference in 10.5(b) correct? Should it instead refer to clause 13.15 and 19.4(b)?
Business SA submits the Commission's proposal is correct. Clause 10.5(b) should refer to clauses 13.15 and 19.4(b) to properly link a part-time worker's pay rate for holiday work.

3.2.2 Clause 11.4 – Casual employment

Clause 11.4 states that clause 19 – Overtime and clause 13.13 (shift allowances) apply to casual employees.

Parties are asked to clarify whether clause 11.4 correctly refers to clause 13.13. For example, is the provision intended to provide that shift provisions apply to casual workers, or is it to specify that overtime provisions apply to casual workers, which may include the overtime provisions for shiftworkers (which are actually in provision 13.16)?
Business SA submits clause 13.13 shift provisions are intended to apply to casual employees. The current award expressly states the provisions of clause 26–Overtime and clause 24.13 (shift allowances) apply to casual employees.[6] The current award does not expressly state casual employees are entitled to the clause 24.15–Overtime on shiftwork provisions.

3.2.3 Clause 12.10 – Apprentices – wage progression

Clause 12.10 sets out the apprenticeship period of 4 years. This period may be varied with approval of the apprenticeship authority, subject to granted credits counting as part of the apprenticeship for wage progression purposes under clause 16.2.

Parties are asked to confirm whether the reference to clause 16.2 in clause 12.10 should instead be to clause 16.4–Apprentice minimum wages.
Business SA agrees with the Commission; reference should be to clause 16.4.

3.2.4 Clause 13.9 – Rest break

Clause 13.9 entitles employees to a paid rest break of 10 minutes each day between the time of commencing work and the usual meal break.

Does clause 13.9 only apply to day workers?
Business SA is consulting members on this matter.

[6] *Electrical, Electronic and Communications Contracting Award 2010* cl 10.3(d).

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3.2.5 **Clause 13.10(c)(iii) and clause 13.11(c)(iii) – Crib Break**

Clauses 13.10(c)(iii)/13.11(c)(iii) entitle continuous shiftworkers/non-continuous shiftworkers to a paid 20 minute 'crib break' each shift.

Can 'crib time' in clause 13.10 and 13.11 be replaced with 'rest break'? As a consequence, the definition of 'crib time' in clause 2 would also be deleted.

Business SA respectfully disagrees with the Commission's suggestion. Business SA submits that if a change is to be made to reflect the wording of clause 14.1(b), the wording in 13.10 and 13.11 be replaced with 'paid meal break'. Given **crib time** is defined to "take the place of any meal break during overtime or shiftwork"[7] the crib periods in clauses 13.10 and 13.11 appear intended to serve as meal breaks.

The wording suggested above allows the clause 2 definition of 'crib time' to be deleted.

3.2.6 **Clause 13.11(c)(ii), 13.11(c)(iii) – Crib Time Discretion**

Clause 13.11(c)(ii) states the ordinary hours of work for a non-continuous shiftworker must be worked continuously, except for crib time at the discretion of the employer. Clause 13.11(c)(iii) states an employee must not be required to work for more than five hours without a crib break.

Is the timing of the crib time in clause 13.11(c)(ii) which is at the discretion of the employer? If so, parties are asked to comment on whether 'except for crib time at the discretion of the employer' could be deleted from 13.11(c)(ii) and 13.11(c)(iii) amended to read:

> ***'(iii) The timing of crib time is at the discretion of the employer, provided that an employee must not be required to work for more than five hours without a break for crib time.'***

Please also note the question to parties at clause 13.10 in relation to replacing references to 'crib time' with 'rest break'

Business SA submits the amendment proposed by the Commission clarifies the possible ambiguity without materially changing the operation of the clause.

3.2.7 **Clause 14.1 – Breaks and Meal Breaks**

Clause 14.1(b) entitles a shiftworker to a paid 20 minute meal break each shift. Clause 14.1(c) gives the employer discretion as to the timing of the meal break, provided an employee is not required to work more than six hours without a meal break.

Should clause 14.1(c) be amended to '<u>The timing of</u> meal breaks will be at the discretion of the employer?

It is also noted that clause 14.1(c) appears to be inconsistent with 13.11(c)(iii) in relation to the timeframe for a meal break to be taken by shiftworkers working on other than continuous shiftwork.

Regarding the first question, Business SA supports the Commission's proposed amendment.

Business SA recognises the inconsistency mentioned in the second question and submits the inconsistency will be remedied by amending clause 14.1(c) to make clear which elements do not apply to shiftworkers. Business SA suggests the following amendment:

14.1(c): '[the timing of] meal breaks will be at the discretion of the employer. Provided that an employee (other than a shiftworker) must not be compelled…'

[7] Clause 2.2.

3.2.8 **Clause 15.4 – Payment for lost time due to inclement weather**

Clause 15 sets out how work is to be performed during inclement weather, including payment for ordinary time lost during such weather conditions. 15.4(b) states an employee will not be entitled to payment for time lost through inclement weather … "unless the provisions of this clause have been observed."

What provisions of clause 15 need to be observed to satisfy the requirement in clause 15.4(b)? Should 'the provisions of this clause' be amended to 'the provisions of clause 15.2'?

Business SA supports the Commission's amendment.

3.2.9 **Clause 16.4 – Apprentice minimum wages**

Clause 16.4(a)(iii) details how an apprentice's minimum wage is determined in conjunction with the various allowances set out in the award. Clause 16.4(a)(iv) states how to calculate an apprentice's weekly all-purpose rate.

How do 16.4(a)(iii) and 16.4(a)(iv) interact?

Business SA submits clause 16.4(a)(iii) details the allowances which may be payable to an apprentice while clause 16.4(a)(iv) details how the weekly all-purpose rate is calculated for apprentices. Business SA is seeking member feedback regarding the interaction of these clauses in practice.

3.2.10 **Clause 17.1(b) – Special allowances**

Clause 17.1(b)(i) makes clear special allowances are not cumulative. Where more than one special allowance is payable to an employee, the employer must only pay the highest rate for the applicable special allowances.

Parties are asked to clarify which special allowances are not cumulative. For example, if an employee is entitled to both the first aid allowance and the multi storey allowance, are they entitled only to payment for the higher of those two allowances? Is it just the 'special allowances–work related allowances' in clause 17.4 of the current award that are not cumulative?

Business SA is seeking member feedback regarding their interpretation of clause 17.1(b).

Business SA Chamber of Commerce and Industry South Australia

4. *Joinery and Building Trades Award 2016*

4.1 Technical and Drafting Issues

4.1.1 Clause 11.4 – Casual Employment

Business SA notes clause 11.4 states a casual employee must be paid the ordinary hourly rate per hour prescribed in clause 19–Minimum wages for the employee's classification plus a casual loading of 25%. Clause 19.1 does not list ordinary hourly rates of pay; it lists minimum hourly rates of pay. This could confuse readers searching for the ordinary hourly rate of pay.

4.1.2 Clause 20.4(ii) – Tool allowance

Business SA submits clause 20.4(ii) be slightly rewritten. Sub-clause (ii) operates to excuse the employer from paying the tool allowance under certain conditions, this operation should be stated at the start of the sub-clause. Business SA submits the following amendment:

> 20.4(ii): *The tool allowance is not payable* where an employer provides an employee with all the tools reasonably required to perform all the functions of the employee's employment ~~then no tool allowance is payable~~. In these cases: [clause continues]

This amendment will not change the applicability of the tool allowance.

4.2 Fair Work Commission Requests for Clarification

4.2.1 Clause 13.16 – Apprentices

Clause 13.16 deems a person, engaged as an apprentice as at 1 January 2010, to be an apprentice for all purposes of this award until the completion or cancellation of their apprenticeship training agreement.

Parties are asked whether clause 13.16 is still required.

Business SA submits clause 13.16 should no longer be required. Given a standard apprenticeship lasts four years it is unlikely there would be persons engaged as apprentices at 1 January 2010 still undertaking that same apprenticeship.

4.2.2 Clause 18.2(b) – Rest periods–day workers

Clause 18.2(a) entitles an employee to a paid rest period of 10 minutes between 9.30am and 11.30am on each day of work. Clause 18.2(b) entitles employees engaged on glass and glazing work to a further rest period of ten minutes in the afternoon.

Parties are asked to draw their attention to [2016] FWC 2217 and to clarify whether 18.2(b) is a paid rest period?

Based on the Fair Work Commission's recommendation,[8] Business SA submits the additional break in clause 18.2 is unpaid unless continuous shiftwork is being performed and this break is replaced with a crib break.

4.2.3 Clause 20.6(a) – Special rates–scaffolding allowance

Clause 20.6(a) entitles a tradesperson who holds a scaffolding certificate or rigging certificate issued by the relevant State or Territory authority and who is required to act on that certificate while engaged on work requiring a certified person to a payment of "**3.2%** per hour extra" (emphasis in original).

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[8] [2016] FWC 2217, [14].

Parties are asked to confirm whether the scaffolding allowance is based on the employee's rate of pay <u>or</u> the standard rate.

Business SA submits the scaffolding allowance is based on the standard rate. The *Building and Construction General On-site Award 2010* contains an allowance payable under the same circumstances. Under that award the tradesperson is paid "an additional 3.2% of the hourly **standard rate** per hour."[9] (**emphasis added**).

[9] *Building and Construction General On-site Award 2010* cl 22.3(m)(i).

Business SA Chamber of Commerce and Industry South Australia

5. *Plumbing and Fire Sprinklers Award 2016*

5.1 Technical and Drafting Issues

5.1.1 Clause 2 – Definitions–plumbing

Business SA submits the definition of 'plumbing' in clause 2 be rewritten to simply direct the reader to the definition of plumbing in cl 4.2(a). Business SA is concerned whenever a term is defined in the definitions clause and again elsewhere in the award. There is a risk one definition may be changed in future drafts without any corresponding definitions also changing, creating inconsistency. This approach is already used for the clause 2 definition of 'adult apprentice'.

Business SA submits the definition of plumbing in clause 2 be amended to read:

'**plumbing** *is defined in clause 4.2(a)*'

This will ensure only one definition of plumbing is presented in the award, and the single definition will be read in context.

5.1.2 Clause 2 – Definitions–fire sprinkler fitting

Business SA makes the same submission as above at 5.1.1. The definition of 'fire sprinkler fitting in clause 2 should be amended to read:

'**fire sprinkler fitting** *is defined in clause 4.2(b)*'

5.1.3 Clause 8.1 – Types of employment

Business SA submits the categories of employment in this award are unclear regarding full-time and part time weekly hire employees. Clause 8.1(b) states employees may be employed as weekly hire employees. Clause 10 discusses weekly hire employment and clause 11 details part-time employment. Strict separation of these clauses implies part-time employment is a fourth category of employment.

If clause 8.1(b) intends to include part-time employees within the weekly hire employees category clauses 10 and 11 should be merged. Business SA submits the contents of clause 11 be made subclauses of clause 10. This clearly indicates part-time employment is an element of the weekly hire employment category.

The amendment could simply change cl 11.1 to 10.3, 11.2 to 10.4 and so on.

5.1.4 Clause 9, 18.1 – Daily hire employees–Minimum hourly wage

Business SA submits the method for calculating a daily hire employee's minimum hourly wage is unclear and should be clarified.

5.1.5 Clause 18.1 – Minimum wages–General

Business SA submits this clause be amended to indicate the minimum weekly rate is only payable to a full-time weekly hire employee.

5.2 Fair Work Commission Requests for Clarification

5.2.1 Clause 7.2 – Facilitative provisions for flexible working practices

Clause 7.2 contains a table of award provisions able to be modified by agreement. Agreements are either made between the employer and an employee, an employer and a majority of employees, or an employer and the employees.

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Parties are asked whether clause 15.5–Early start should specify 'a majority of employees'?
Business SA submits the change is not necessary. Clause 15.3 states the agreement is between "the employer and its employees", the same wording is used in the current award.[10]

5.2.2 Clause 13.14(d)(ii) – Employment as an adult apprentice

Clause 13.14(d)(ii) states "Adult apprentices will not be employed at the expense of other apprentices."

Parties are asked whether clause 13.14(d)(ii) is permitted in an award
Business SA submits clause 13.14(d)(ii) is not permitted in an award as it is a discriminatory term. Modern awards must not include a discriminatory term.[11] Such terms include:

> "terms which discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, **age**, physical or mental disability…" (**emphasis added**).

This draft defines an adult apprentice as a person of 21 years of age or over at the time of entering into a training agreement or apprenticeship contract to a trade within the scope of this award.[12] By stating adult apprentices will not be employed at the expense of other apprentices clause 13.14(d)(ii) appears to discriminate for reasons of age. Therefore this term is not allowed in an award.

5.2.3 Clause 16.6 – Overtime meal breaks

This clause entitles an employee to a paid 20 minute meal break after four hours of work on a Saturday, Sunday or public holiday. An employee is entitled to an additional 30 minute paid meal break after working a further four hours.

Clause 16.6–Overtime meal breaks has been moved from the overtime clause. Parties are asked if this clause and clause 16.5–Overtime rest breaks would be better placed together in clause 21–Overtime.
Business SA supports returning the overtime–meal breaks clause back to the general overtime clause in line with the current award. Business SA also supports moving the overtime–rest breaks clause into the general overtime clause. It is preferable conditions and entitlements arising out of overtime work all be detailed within the general overtime clause.

5.2.4 Clause 18.8(a) – Payment of wages

Clause 18.8(a) states an employee's wages, allowances and other monies must be paid in cash, or by cheque, bank cheque, bank or similar transfer, or any combination of these.

Parties are asked whether the payment of wages should specify that payment by electronic means is an acceptable payment of wages method.
Business SA supports this addition.

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[10] *Plumbing and Fire Sprinklers Award 2010* cl 29.4.
[11] *Fair Work Act 2000* (Cth) s 153(1).
[12] Clause 13.14(a).

5.2.5 **Clause 20.3(f) – Wage-related allowances–Industry disability allowance**

This clause states “Adult fire sprinkler fitter employees will receive the following additional weekly allowances for all purposes: [industry disability allowance and space, height and dirt money allowance].”

Parties are asked whether the allowance in clause 20.3(f) is only payable to adults

Business SA submits the cl 20.3(f) allowance is not payable to adult fire sprinkler fitter employees only. Apprentices are also entitled to this allowance.[13]

5.2.6 **Schedule B.3 – All-purpose rates of pay–Fire sprinkler fitting**

This table sets out which allowances and adjustments fire sprinkler fitting employees and apprentices may be entitled to. The potential allowances and adjustments listed are the ‘Fire sprinkler fitting trade allowance’, the ‘Industry disability allowance and space, height and dirt money allowance, and the ‘Fire sprinkler fitters adjustment’.

Parties are asked to confirm the inclusion of the Fire sprinkler fitting trade allowance in the above table for apprentices and adult apprentices. Clauses 18.2(b)(iii), 18.2(c)(iii) and 18.3(a)(iii) do not refer to this allowance.

Business SA submits references to the fire sprinkler fitting trade allowance in the table for apprentices and adult apprentices are appropriate, however more accurate reference must be made. Clause 20.3(e) sets the conditions for this allowance. Clause 20.3(e)(ii) states the allowance must be paid to employees in a classification at or exceeding ‘Sprinkler fitting tradesperson Level 1.’ Employees below this classification instead receive the plumbing trade allowance on an incidence basis, calculated hourly.[14]

Clause 20.3(e)(iv) demonstrates how the fire sprinkler fitting trade allowance applies to apprentices and adult apprentices. To clarify the ambiguity highlighted by the Commission, Business SA submits reference to this clause be made in the Schedule B.3 table where appropriate.

[13] Clause 18.2(b)(iii), 18.2(c)(iii).

[14] Clause 20.3(e)(iv).

6. *Social, Community, Home Care and Disability Services Award 2016*

6.1 Technical and Drafting Issues

6.1.1 **Clause 2 – Definitions**

Business SA is concerned definitions are repeated in this award between clause 2 and clause 4.2-4.5. The specific definitions repeated are 'crisis assistance and supported housing sector', 'family day care scheme sector', 'home care sector' and 'social and community services sector'. Business SA submits that where two definitions are present in an award, there is a risk one may change and not the other creating confusion and inconsistency. To avoid this risk Business SA submits the definitions in clause 2 be significantly amended.

Business SA submits each definition noted above be amended to direct the reader to the full definition in clause 4.2-4.5. The amendments could appear as follows:
'**crisis assistance and supported housing sector** *is defined in clause 4.2*
(…)
family day care scheme sector *is defined in clause 4.5*
(…)
home care sector *is defined in clause 4.4*
(…)
social and community services sector *is defined in clause 4.3*'

These amendments will ensure the above phrases are only defined once in the award, and when read these phrases will be read in context.

6.1.2 **Clause 2 – Definitions–Sleepover**

Business SA notes the term 'sleepover' is defined both in clause 2 and in clause 14.5(a). Business SA submits the clause 2 sleepover definition content be amended to only direct the reader to clause 14.5(a).

Business SA proposes wording of the same effect as above at 6.1.1 for the sleepover definition.

6.1.4 **Clause 16.1 – Minimum Wages–social and community services employees and crisis accommodation employees**

Business SA submits the preamble before the wage table be amended to reflect the employer's obligation to pay their employee the minimum wage appropriate for that employee's classification.

Additionally, Business SA notes this preamble currently speaks in both plural and singular terms: "An employer must pay the employee**s** the following minimum wage**s** for ordinary hours worked by **the** employee". Business SA submits this preamble should be written entirely in singular form, as the employer owes this obligation to each individual employee.

Based on these submissions the preamble for clause 16.1 could be rewritten to:
"An employer must pay *an employee* the following minimum *wage* for ordinary hours worked by *that* employee *for their classification*." (*changes emphasised*).

6.1.5 **Clause 16.2 – Minimum wages–family day care employees**

Business SA repeats its submission at 6.1.4 in relation to this clause.

Business SA Chamber of Commerce and Industry South Australia

6.1.6 **Clause 16.3 – Minimum wages–home care employees**
Business SA repeats its submission at 6.1.4 in relation to this clause.

6.1.7 **Clause 17.2(b) – First aid allowance–casual and part-time employees**
Business SA notes the wording of this clause has changed between the current award and this exposure draft. Originally the clause read "…will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work…"[15] (emphasis added). This has been changed in the exposure draft to "…will apply to eligible part-time and casual employees pro rata on the basis that the ordinary weekly hours of work…" (change emphasised).

Business SA submits this change is unnecessary and has made the clause less clear. This change should be reversed and the current award's wording retained.

6.1.8 **Clause 17.2(e)(ii) – Board and lodging**
Both the current award[16] and this exposure draft provide an allowance where an employee buys their meals at "ruling cafeteria rates". This term is not written in plain English and is difficult to interpret. Business SA submits a definition should be agreed between relevant parties and inserted into clause 2 – Definitions or 17.2(e)(ii) – Board and lodging.

6.1.9 **Clause 20.1 – Saturday and Sunday work**
Business SA notes the wording has changed between the current award and this exposure draft. Previously, the award said: "Employees whose ordinary working hours include work on a Saturday and/or Sunday will be paid for ordinary hours worked between midnight on …"[17] (emphasis added). The exposure draft states:

"**20.1 Saturday and Sunday Work**

(a) Saturday

Employees whose ordinary working hours include work on a Saturday will be paid 150% of the minimum hourly rate.

(b) Sunday

Employees whose ordinary working hours include work on a Sunday will be paid 200% of the minimum hourly rate."

Business SA submits the words 'for those hours worked' be added at the end of each sub clauses a) and b).

6.1.10 **Schedule F.2.1(b) – Adjustment of expense-related allowances**
The applicable consumer price index figure for the deductions for board and lodging allowance has changed between the current award and this exposure draft. Previously this deduction was adjusted by the "Weighted average eight capital cities – CPI" while currently the adjustment is based on "All groups". While Business SA recognises the same figure is actually being used, this headline change has made the adjustment figure less clear and could lead to confusion. Consequently, Business SA submits this change should be reversed.

[15] *Social, Community, Home Care and Disability Services Award 2010* cl 20.4(b).
[16] *Social, Community, Home Care and Disability Services Award 2010* cl 20.8(b).
[17] *Social, Community, Home Care and Disability Services Award 2010*cl 26.

6.2 Fair Work Commission Requests for Clarification

6.2.1 Clause 11.3 – Casual employment – Minimum engagement

Clause 11.3 sets out the minimum engagement periods for casual employees. Social and community services employees (except when undertaking disability services work) have a 3 hour minimum engagement. Home care employees have a 1 hour minimum engagement. All other employees have a 2 hour minimum engagement.

Parties are asked to clarify whether the minimum engagement period for a social and community services employee who is undertaking disability services work is covered by clause 11.3(c).

Business SA submits social and community services employees who are undertaking disability services work are covered by clause 11.3(c). Both the current award[18] and the exposure draft exclude casual social and community services employees undertaking disability services work from the 3 hour minimum engagement. That class of employees fall into the catch-all "all other employees" 2 hour minimum engagement category. Providing a 2 hour minimum engagement for casual employees undertaking disability services is also consistent with the previous *Disabilities Services Award*.[19]

6.2.2 Clause 12.4(a) – Progression

Clause 12.4(a) sets out conditions for an employee's progression from one pay point to the next. For every 12 months' continuous employment the employee will be eligible for progression from one pay point to the next within a level, provided the employee has demonstrated competency and satisfactory performance over a minimum period of 12 months at each level within the level.

Parties are asked to clarify what 'each level within the level' refers to. Should clause 12.4(a) refer to 'each pay point within the level'?

Business SA agrees with the Commission's proposed amendment.

6.2.3 Clause 14.3(d) – Rosters

Subclause (d) sets out how an employer can communicate rostering arrangements and changes to rosters. Subclause (d) allows communication by telephone, direct contact, mail, email or facsimile.

Parties are asked to comment on whether 'mail' and 'facsimile' should remain as methods of communicating roster changes.

Business SA submits 'mail' and 'facsimile' should not be deleted from this clause. Retaining these words does not make the clause complex or difficult to understand, nor does removing them make the clause clearer. Methods of communication of roster changes between employer and employee should not be narrowed.

6.2.4 Clause 14.3(e) – Rosters

Clause 14.3(e) sets out that the employer does not have to display any roster of the ordinary hours of work for casual or relieving staff.

Should the term 'relieving staff' be defined?

Business SA submits the meaning of the term 'relieving staff' is understandable in the context of clause 14.3 – Rosters and does not need specific definition. However, if the Commission or other

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[18] *Social, Community, Home Care and Disability Services Award 2010* cl 10.4(c)(i).
[19] AN150046 *Disabilities Services Award 2006* (SA) cl 4.4.2.

parties wish to see this term defined, Business SA submits any definition should be placed in clause 2 – Definitions or clause 14.3.

6.2.5 **Clause 14.4 – Broken shifts**

The current award and this exposure draft allow an employer to engage an employee on a 'broken shift'. A 'broken shift' is defined in cl 14.4(b) to mean "a shift worked by an employee that includes one or more breaks (other than a meal break) and where the span of hours is not more than 12 hours."

Parties are asked whether time spent performing a sleepover in accordance with clause 14.5 would meet the definition of a shift for the purposes of payment for a broken shift.

Business SA submits a sleepover shift under clause 14.5 does not meet the definition of a clause 14.4(b) broken shift. The span of a sleepover is a continuous period of eight hours.[20] Clause 14.2(b) allows an employer and employee to agree to decrease the minimum break between shifts to 8 hours where a shift contains a sleepover. This demonstrates a sleepover is a break between shifts; not a break within a shift. Consequently, the sleeping period of a sleepover shift cannot meet the definition of a shift for the purposes of payment for a broken shift.

6.2.6 **Clause 14.7(b)(iii) – Excursions**

Clause 14.7 details provisions applying to employees who supervise clients in excursion activities involving overnight stays from home. Subclause (b)(iii) provides for "payment of sleepover allowance in accordance with the provision of clause 14.5."

Is an employee only entitled to the allowance in clause 14.5(e) or also to the other provisions in clause 14.5?

Business SA submits an employee is only entitled to the sleepover allowance in clause 14.5(e). Clause 14.7(b)(iii) states: "payment of sleepover allowance in accordance with the provision of clause 14.5" (emphasis added). The clause clearly states an employee is only entitled to the sleepover allowance, it makes no comment regarding other cl 14.5 entitlements. Additionally, the term "the provision" is used in singular form. Clause 14.7(b)(iii) does not refer to 'provisions' of 14.5. This is a second indication that cl 14.7(b)(iii) only entitles employees to the sleepover allowance.

While Business SA maintains this clause is already clear, if the Commission wishes for further clarity, the clause could be amended as follows:

'**14.7(b)(iii)** Payment of *the* sleepover allowance in accordance with ~~the provision of~~ *clause 14.5(c)*.' (*changes emphasised*)

6.2.7 **Clause 17.2(c) – Heat allowance**

This clause entitles employees to an allowance where work is conducted in extremely high temperatures. Subclause (c)(i) entitles employees to a paid 20 minute break when they have worked for over 2 hours in over 46°c. Subclause (c)(ii) obliges the employer to ascertain the temperature. Subclause (c)(iii) provides additional allowances, for employees employed at their current place of work prior to 8 August 1991 where the temperature is raised by artificial means. The employee is entitled to $0.44 per hour where the temperature is over 40°c or $0.53 per hour where the temperature exceeds 46°c.

[20] *Social, Community, Home Care and Disability Services Industry Award 2016* cl 14.5(c).

Parties are asked whether clause 17.2(c) is obsolete given the requirement to have commenced work for the workplace prior to 8 August 1991?
Business SA reserves the right to comment on this clause as the review process continues.

6.2.8 **Clause 19.1(a) – Overtime rates – Full-time employees**
Clause 19.1(a) provides overtime rates for full-time employees. Under this clause disability services, home care and family day care employees are entitled to 150% of the employee's minimum hourly rate in the first two hours of overtime with 200% thereafter. Alternatively, social and community services and crisis accommodation employees are entitled to 150% in the first three hours, with 200% thereafter.

Should the reference to 'Disability Services' in clause 19.1(a) be deleted as these employees are part of social and community services stream?
Business SA submits reference to 'Disability Services' in clause 19.1(a) may be relevant in that 'disability services' employees are referred to as receiving provisions other than those provided to the general social and community services stream at clauses 11.3(a) Casual Employment minimum hours and at 14.4 Broken Shifts.

6.2.9 **Clause 21.2 – Annual leave – Additional leave for certain shiftworkers**
This clause entitles shiftworkers who work more than four ordinary hours on 10 or more weekends to an additional week's annual leave.

Parties are asked to comment on whether the definition of shiftworker in clause 21.2 should specify a period of time over which the 10 or more weekends are to occur (e.g. '10 or more weekends over a period of 12 months').
Business SA agrees with the Commission that this clause should provide a period of time over which these 10 or more weekends are counted.
Business SA reserves the right to comment on this clause as the review process continues.

Conclusion

Business SA would like to thank the Fair Work Commission for the opportunity to comment on these exposure drafts.

Additional Information

Business SA's submissions on Group 3 exposure drafts can be found here.