Business SA Submission

Modern Award Review – Award Stage – Group 3AB Exposure Drafts

Date: 15 April 2016

BusinessSA

South Australia's Chamber of Commerce and Industry

Executive Summary

Business SA is pleased to have this opportunity to make a submission in response to the Fair Work Commission's (the Commission/FWC) statement of 21 October 2015 [2015] FWC 7253. This submission will address the drafting and technical issues in Exposure Drafts for the Group Three awards. We have an interest in the modern awards listed below.*

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:

- SA businesses will be impacted by any changes to the award system
- In the current economic environment SA employers need certainty that the award system is not going to change unnecessarily
- SA employers and employees will benefit from a well-considered modern award review enabling both parties to better understand their rights and responsibilities

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

Contents

1.0 Banking, Finance and Insurance Award 2015

1.1 Drafting and Technical Errors

1.1.1 Clause 3.1 The reference to banking, finance and insurance industry at clause 3.1 should have the words "as defined" added to them.

1.1.2 Clause 3.2 Coverage contains the definition of Banking Finance and Insurance Industry. An exact replica of this has also been placed in Schedule H Definitions. BSA suggests 3.2 be deleted to avoid the possibility of one changing and the other not at some stage in the future.

1.1.3 Current Award clause 4.3 Exclusions includes the exclusion of call centres under the contract call centres award. Exposure Draft clause 3 takes this exclusion out of the list of what the award does not cover (at 3.4) and confusingly places it in a separate subclause (3.3). Business SA suggest the exclusion of this class of workers is returned to the list of other exclusions.

1.1.4 Clause 5 Facilitative Provisions does not contain reference to clause 9.3(a) regarding individual agreement to payment of wages on a monthly basis; and clause 13.5 (a) Time off instead of payment for overtime by individual agreement.

1.1.5 Clause 6.4 (d) Casual Employment, contains a substantive change. The word **attribute** - meaning a quality or characteristic that someone or something has[1] found at current award clause 10.3 (c), has been replaced with the word **entitlements** - meaning the right to do or have something.[2] This replacement has changed the meaning of the clause and led to the question in the exposure draft noted in point 5 below.

1.2 Request for Clarification from Fair Work Commission

1.2.1 Clause 6.4(d) Casual Employment - Casual Loading

[1] *Macquarie Essential Dictionary*, 5th Ed 2010, 47.
[2] Macquarie Essential Dictionary, 5th Ed 2010, 273.

Clause 6.4(c) sets that casual employees will be paid the minimum hourly rate and a casual loading of 25%. Clause 6.4(d) states that this loading is paid instead of annual leave, personal/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment.

Parties are asked to clarify whether clause 6.4(d) means casual employees are not entitled to overtime, penalty rates and allowances.

The current award at 10.3(c) uses the words 'The casual loading is paid instead of …… other **attributes** of full time or part time employees' rather than 'other **entitlements**' as reworded in the exposure draft.

Business SA submits that the rewording has led to the need for clarification and that the original wording should be retained.

1.2.2 7.1 (b) Span of Hours

Clause 7.1(a) sets the ordinary hours of work to be 7.00 am to 7.00 pm Monday to Friday, and 8.00 am to 12 noon Saturday. Clause 7.1(b) allows an employer to increase the span of ordinary hours of work up to 9.00 pm, though only once a week and with advance notice.

Parties are asked to clarify whether the extension of the span of ordinary hours to up to 9.00 pm one night per week can apply on a Saturday.

Business SA submits that this was not the intention of this provision and this is supported by Business SA members surveyed who state that application of the late night provisions to Saturdays is 'inappropriate' and is not used on Saturdays. Examples of the actual intent are referenced in Clause 22.8 (a) (ED 7.7 (b)) which clearly states shift work provisions do not apply to 'employees who, in accordance with this clause *(7 Ordinary Hours of Work and Rostering)* work ordinary hours up to 9.00pm on any one night between Monday to Friday inclusive' and Clause 7.2 which defines week: '**Week** will mean any five consecutive days to be worked Monday to Friday, or five and a half consecutive days, Monday to Saturday.'

If necessary, Business SA submits, the words "Monday to Friday" could be added to clause 7.1 (b) to clarify this matter.

1.2.3 Clause 7.7 (d) Shift work Penalties

Clause 7.7(d) sets shiftwork penalties: for early morning shifts, 112% of minimum of hourly rate; afternoon shifts, 120% of minimum hourly rate; and night shift, 125% of minimum hourly rate.

Parties are asked whether the shift work penalty payable on a Saturday is sufficiently clear.

Business SA submits that Saturday morning is defined as part of the span of ordinary hours and the shift work provisions apply.

1.2.4 Clause 9.4 School Based Apprentices

Clause 9 sets out minimum wages under the award. Sub-clause 9.4 directs readers to Schedule D – School Based Apprentices.

There are no apprentice provisions contained in the award. Should the school based apprentices schedule be deleted?

Business SA submits these provisions be deleted, as instructed by our members.

2.0 Business Equipment Award 2015

2.1 Drafting and Technical Errors

2.1.1 Clause 9.2(b)(i) – Technical 'Steam'

Subclause (i) is incorrectly labelled "Technical steam". This should be "Technical stream".

2.1.2 Clause 10.1 – Exemption for employees in the technical stream

Dot point (e) should read "Clause 11.2(d) – Representation Allowance" and not "Clause 11.2(c)"

2.1.3 Clause 11.3 (d)(ii) – Expense Related allowances – Technical and clerical streams – Area Allowance

The wording "and such will be in full satisfaction of the employer's obligation under this clause." has been deleted. Business SA considers this wording necessary for the operation of the Clause and submits that it be reinserted.

2.1.4 Clause 12.7 – Casual Employees

The reference to "24.1(a)" should read "12.1(a)".

2.2 Request for Clarification from Fair Work Commission

2.2.1 Clause 7.2(a)(i) – Flexibility in relation to ordinary hour of work – day workers

This clause allows employers and employees to agree to alter the spread of hours (6.30am to 6.30pm) by up to one hour at either end of the spread.

The Fair Work Commission has requested parties clarify the operation of clause 7.2(a)(i), whether the spread of hours can only be altered at one end, or altered simultaneously at each end by up to one or two hours in total.

The spread of hours can be altered simultaneously at each end by up to one or two hours in total.

The definition of "either" in the Macquarie Dictionary[3] provides two definitions:

1. "*one or the other of two*"
2. "*each of the two, the one and the other*"

The intent of the clause is to provide flexibility in the workplace. The phase "at either end" is not restricted. If the intent of the clause was to provide a restriction to one end of the span, the wording of the clause would read "*altered by only one hour in total, at either end*." Without this clarification, it is Business SA's view that the intent is for the clause to be varied at both ends.

2.2.2 Clause 7.8 – Special provisions for country employees

This clause alters ordinary hours of work and rostering for 'country employees'.

The FWC has asked the parties whether a definition should be provided for 'country employees'? Does the definition in clause 17.6 apply?

Business SA believes the terms 'country employee' and 'country territory/area' be both defined. It is our view that the definition in 17.6 should apply to cl 7.8 but should not apply to cl 11.3(b). These terms should also be inserted into Schedule 3 of the Award.

2.2.3 Clause 9.2(b) – Junior Rates

Junior rates are provided for in the technical and clerical streams.

The parties are asked to clarify whether junior rates apply to employees in the Commercial Travellers Stream.

Business SA has consulted members on this matter and have been informed by members that junior employees are not employed in the commercial traveller's stream due to the nature of the work.

2.2.4 Clause 9.7 – School based apprentices

This clause refers to school-based apprentices. Directing to Schedule E which sets out conditions for these apprentices.

[3] Macquarie Essential Dictionary, 5th Ed 2010 p263

Parties are asked to confirm whether this schedule is required as there are no provisions for apprentices under this award.

It is Business SA's view that this schedule is not necessary and would support its deletion.

2.2.5 Clause 10.2 – Exemption for employees in the clerical stream

These exemptions apply where an employee in the Clerical stream receives a salary which exceeds their prescribed rate in clause 9.2 by 10%.

Parties are asked to confirm that all clauses apart from those listed in Clause 10.2 do not apply to these exempt Clerical employees.

Business SA confirms that Clerical employees do not receive the provision of the award with the exception of the clauses listed in 10.2.

2.2.6 Clause 11.3(b)(i) – Expense related allowances – Technical and Clerical Streams – Motor vehicle allowance – employee provided vehicle

This subclause sets different allowances for employees where they provide/use their own motor vehicle depending on whether they are in non-country or country territories.

Parties are asked whether a definition should be provided for 'country territory' for the purpose of clause 11.3(b)(i)

Business SA is of the opinion that the award would benefit from defining the term 'country'. We are consulting members to determine the best way of doing so.

2.2.7 Clause 11.4(c)(iii) – Expenses and accommodation reimbursement - State Workers Compensation Scheme

This clause deems employees "on duty" when they are travelling for their employer's business for all purposes of this award and relevant State workers compensation legislation.

Parties to consider whether the wording "and for the purposes of all relevant State workers' compensation legislation" should be maintained in the award.

Business SA is of the opinion that the wording "and for the purposes of all relevant State workers' compensation legislation" should be removed from the Award. Whilst the wording does not currently contradict South Australian legislation, Modern Awards are not the appropriate place for worker's compensation obligations. Worker's Compensation is a state based jurisdiction. This clause provides the potential for contradictions as each state has different legislation.

2.2.8 Clause 14.1 - Day work outside the spread of hours

Clause 14.1 entitles an employee to an additional allowance where they work outside the spread of ordinary hours.

Parties are asked to consider whether it would be more appropriate to amend these penalties so that they are expressed as a percentage of the employee's ordinary hourly rate.

It is Business SA's opinion that the additional allowance should not be varied to reflect a percentage and that a change to a percentage could be a substantive change to the award.

Currently, the flat dollar amount per hour applies to all classifications and therefore constitutes a difference percentage for each classification. For example, the allowance for Sunday work is $16.70 per hour. This is equivalent to 94% of the Level 1 Technician Rate of pay, however it is 74% of the Technical Steam Level 6 Rate.

If a single percentage rate was set for all Levels of the Awards, this would significantly change the current penalty rates.

Parties are asked to clarify the interaction between clause 13.1 and 15.1(a). Both appear to provide for work 'outside the spread of hour'.

The question proposed by the FWC is regarding the interaction between 13.1 and 15.1(a). As Clause 13.1 relates to Superannuation and is clearly a typographical error, this question has been answered on the basis that the question proposed by the FWC was for an explanation between **"14.1"** and 15.1(a).

It is Business SA's view that Clauses 14.1 and 15.1 deal with separate scenarios. Clause 14.1 relates only when day workers are required to work a percentage of their

ordinary hours outside of the ordinary spread of hours but are not part of a regular shift system and therefore not a shift worker. Clause 15.1 only relates to shift workers.

2.2.9 Clause 15 – Special provisions for shift workers

Parties are asked whether the award should include a definition for a shift worker to clarify circumstances when shift allowances apply.

It is Business SA's view that the scenario where shift work provisions are applicable is already clear. However, Business SA is agreeable inserting a definition if a significant number of parties indicate a preference to have one included.

2.2.10 Clause 17.6 – Country Employees

This clause grants 'country employees' extra annual leave entitlements, with up to seven consecutive extra annual leave days where an employee is required to be away from their usual place of residence for more than two nights in any one week.

Parties are asked whether a definition should be provided to 'country areas' for the purposes of clause 17.6.

Business SA acknowledges there is a lack of clear definition within the Award and that a definition would provide clarity. We are currently consulting members on the definition of country and metro and will report back the FWC at a later conference.

3.0 Clerks – Private Sector Award 2015

3.1 Drafting and Technical Errors

3.1.1 Clause 8.2(b) Altering Span of Hours – the word "by" should read "be".

3.2 Request for Clarification from Fair Work Commission

3.2.1 Clause 6.3 (d) Casual employment

Provides Casual employees with an entitlement to a minimum payment of three hours' work at the appropriate rate.

Parties are asked whether clause 6.3(d) should specify the minimum payment applies 'for each engagement'.

Clause 6.3(d) provides Casual employees with an entitlement to a minimum payment of three hours' work at the appropriate rate. The FWC asked where this clause should be amended to specify the minimum payment applies 'for each engagement'. It is the intention of this clause to provide 3 hour's minimum payment if a worker is engaged to work. If a worker is sent home early, ie due to lack of work, then the employee will still receive three hour's payment. Business SA believe it is appropriate to insert the wording "for each engagement" into this clause in order to provide clarity.

3.2.2 Clause 9.1(a) Unpaid meal break

Unpaid meal break states that **subject to** the provisions of clause 14—Shift work of this award, a meal period must be allowed to each employee: (i) of between 30 and 60 minutes; and (ii) taken not later than five hours after starting work and after the resumption of work from a previous meal break.

Parties are asked to clarify whether clause 9.1(a) applies to shift workers.

'Subject to' is defined in the Macquarie Dictionary as 'dependent or conditional upon'. Clause 9.1(a) is therefore 'conditional upon' the provisions of clause 14 which provides alternative conditions for shift worker meal breaks. Business SA therefore submits that 9.1(a) does not apply to shift workers.

3.2.3 Clause 13.4 Rest period after working overtime – (b) Where the employee does not get a 10-hour rest

(i) The following conditions apply to an employee (other than a casual employee) who works so much overtime that the employee has not had at least 10 consecutive hours off duty between the end of the employee's ordinary hours of work on one day and the start of the employee's ordinary hours of work on the next day:

- the employee must be released from duty after that overtime is finished until the employee has had 10 consecutive hours off duty, and
- there will be no loss of pay for ordinary hours of work time which occur during this absence.

Parties are asked to consider whether the words "end of the employee's ordinary hours" in clause 13.3(b)(i) should be "end of overtime".

Business SA submits this change is unnecessary. Both the current clause and the exposure draft require the employee to have 10 hours off duty between finishing one period of ordinary time and before recommencing the next period of ordinary time work.

3.2.4 Clause 14.1Shift work - Definitions

This clause provides definitions for (a) afternoon shift, (b) night shift, and (c) permanent night shift.

Parties are asked whether the award should include a definition for a shiftworker to clarify circumstances when shift allowances apply.

Business SA submits a simple definition of a shift worker would help, for example to avoid the possibility of an employer paying shift worker rates instead of overtime for a one off occasion. Business SA recommends the following definition of shift work from the *Mining Industry Award 2010*:

*"**Shiftworker** means an employee for the time being engaged to work in a system of shifts, being afternoon shifts, night shifts or both, or a continuous shiftworker"*[4]

[4] Clause 3 *Mining Industry Award 2010*.

3.2.5 Clause 14.2 Altering Span of Hours

Currently, the span of hours can be altered by clause 8.2(b), which states:

"The span of hours may [be] altered by up to one hour at either end, by agreement between an employer and the majority of employees concerned or in appropriate circumstances, between the employer and an individual employee."

The FWC sought feedback on whether the span of hours can be increased by one hour at both ends.

It is Business SA's view that the hours can be varied by an hour at both ends. The definition of "either" in the Macquarie Dictionary[5] provides two definitions:

1. "*one or the other of two*"
2. "*each of the two, the one and the other*"

The intent of the clause is to provide flexibility in the workplace. The phase "at either end" is not restricted. If the intent of the clause was to provide a restriction to one end of the span, the wording of the clause would read "*altered by only one hour in total, at either end*." Without this clarification, it is Business SA's view that the intent is for the clause to be varied at both ends.

[5] Macquarie Essential Dictionary, 5th Ed 2010 p263

4.0 Commercial Sales Award 2015

4.1 Drafting and Technical Errors

Business SA has read the exposure draft and has not found any technical or drafting errors. However, we reserve our rights to make submissions if errors are found in future drafts.

4.2 Request for Clarification from Fair Work Commission

4.2.1 Clause 8 – Breaks

Clause 8 requires employers provide employees reasonable time to have regular and normal meals on each day of that employee's employment.

Parties are to provide clarification as to the meaning of 'regular and normal meals', including whether the meal breaks are paid or unpaid.

Business SA submits that 'regular and normal meals' does not require specific definition and should be interpreted broadly. Work under the *Commercial Sales Award* is characterised, in part, by uncertain hours and unpredictable travel times. It is not possible to set a specific time or duration for meal breaks which will be appropriate for workers in this industry. Instead 'regular and normal meals' should be a flexible clause, allowing employers and employees to determine optimal meal breaks in each workplace. Such flexibility will benefit employers and employees. As clause 8 gives no positive indication that the 'regular and normal meal' break is paid it should be assumed to be unpaid.

4.2.2 Clause 10.2(a) – Allowances

Clauses 10.2(a) and (b) provide allowances for employees who are required to be away from home. 10.2(a) provides an allowance where the employee is required to be away from home or headquarters for any weekend.

Parties are asked to clarify the use of the term 'headquarters' in clause 10.2(a). Can 'home or headquarters' be replaced with 'their usual place of residence'?

Business SA is unsure of the relevance of the term 'headquarters' in this context. If employees ordinarily work from headquarters (interpreted as the office) on weekends this allowance may be justified for any extra inconvenience associated with working away from the office.

Regarding changes to the clause, 'home' can be replaced with usual place of residence, however it is not appropriate to make the same change for 'headquarters'. 'Headquarters' refers to a place of business and should not interpreted the same as place of residence.

4.2.3 Clause 10.2(b) - Allowances

Clause 10.2(b) provides an allowance where the employee is required to remain away from their usual place of residence for two or more consecutive nights in any one week

Commission asked whether the amount in 10.2(b) is additional to the allowance in 10.2(a)?

The word 'additional' in clause 10.2(b) indicates these allowances are cumulative. If the clause 10.2(b) allowance is in addition to the clause 10.2(a) allowance, an employee working away from home over an entire weekend may be granted an additional allowance of $99.98. This seems appropriate where an employee is required to live away from home for two or more nights where that period includes a weekend period.

4.2.4 Clause 16.3 – Public Holidays

Under this clause, employees soliciting orders at the request of the employer will be paid at 250% of the minimum hourly rate for a minimum of three hours. Alternatively, the employee can be granted two and a half days' leave with pay rather than the 250% for a public holiday worked in soliciting orders.

Parties are asked whether only work 'in soliciting orders' is carried out on public holidays.

Business SA is consulting members to determine what work they carry out on public holidays.

The Commission has asked parties to clarify if the "two and a half day's leave" in clause 16.3 is in addition to a paid day for the public holiday.

Two and a half days leave in addition to a paid day for the public holiday is inappropriate. If the entitlement allowed in clause 16.3 is in addition to a paid day for the public holiday the worker will receive 100% of their minimum hourly rate for that day's work, plus 250% worth of leave – effectively receiving 350%. Business SA cannot see the rationale of providing 350% penalty in this circumstance where the normal public holiday penalty is 250%.

Given the worker is already receiving 100% of their minimum hourly rate for work on the public holiday, only one and a half days worth of leave should be granted in lieu of the 250% public holiday penalty. This balances the upfront public holiday penalty rate with leave entitlements.

5.0 Educational Services (Post-Secondary Education) Award 2015

5.1 Drafting and Technical Errors

5.1.1 ***Clause 5 Facilitative Provisions*** Business SA proposes that clauses 8.1 (d)(iii) Rostered Days Off system, and 15.4 (a) Time off in lieu of overtime, be added to the table of facilitative provisions.

5.1.2 ***Clause 9.3 Breaks*****,** allows a penalty to be paid for all employees who work through their normal meal break until they are provided a break. This provision lay under the heading 'All Employees' in the current award but has been placed out of that heading and may possibly be read as applying only to non-shift workers. Business SA proposes this clause be moved under the All Employees provisions at 9.4 becoming the new 9.4.

5.1.3 ***Clause 10.1 Minimum Wages (c) Teachers and/or Tutor/instructors.*** Business SA submits, to ensure clarity, that note 2 should read "**As provided in clause 10.2** the daily rate is paid where the engagement is for 5 Hours or more" and note 3 should read "**As provided in clause 10.2** the hourly rate is paid where the engagement is for less than 5 hours".

5.1.4 **11.2 Expense Related Allowances (c) Meal Allowance – General Staff**
The provisions of this clause automatically provide employees who work overtime on a Sunday with two payments within the first 5 hours worked, an unintentional outcome. This merging of provisions of meal allowance for work after ordinary time with work on a Sunday occurred first in the May 2009 Award Modernisation Exposure Draft. Prior to award modernisation the second payment for overtime worked after 5 hours only applied to overtime worked after ordinary hours AP772762 - Children's Services (Victoria) Post Secondary (TAFE) Interim Award 1999 clause 19.4.1. Clause 19.4.2 of this pre reform award provides a second meal allowance for overtime on a Sunday after 9 hours. Business SA proposes that the second meal allowance at 11.2(c) (ii) be paid after nine hours for overtime worked on Sunday.

5.1.5 **Clause 15.3** is a proposed new provision clarifying that penalty rates are not cumulative. Business SA supports the insertion of this provision in the interests of

achieving the modern awards objective, taking into account the need to ensure a simple, easy to understand modern award.

5.1.6 Clause 16.3 Payment of annual leave. The exposure draft adds an unnecessary note to this subclause, the intent of which is already provided by s 16 and 90 of the legislation. Business SA submits this note not be added to the revised award.

5.2 Request for Clarification from Fair Work Commission

5.2.1 Clause 9.4 Breaks - All Employees

Clause 9.4 sets out break entitlements for all employees under this award. All employees are entitled to two 10 minute rest breaks each day;[6] and an employee who works more than four hours overtime on a Saturday will be allowed a 10 minute rest break.[7]

Parties are asked to clarify if the breaks in clause 9.4 (a) and (b) are paid.
The AP772762 - Children's Services (Victoria) Post Secondary (TAFE) Interim Award 1999 seems to have been relied on in the drafting of this clause and provided for two paid rest intervals of ten minutes. Business SA sought further clarification from members on this matter. Respondents indicated that the breaks in clause 9.4(a) and (b) should be unpaid.

5.2.2 Clause 9.4(c) Breaks – All Employees

Clause 9.4(c) provides an employee working overtime with a 20 minute meal break, without deduction of pay, after each four hours of overtime worked.

Parties are also asked to clarify if clause 9.4(c) only applies to overtime on a Monday to Friday and/or overtime immediately following ordinary hours.
Reading of the clause would lead to the conclusion this paid break during overtime would apply to all overtime worked. A meal allowance is not applicable to Sunday overtime until 5 hours is worked which is somewhat disjointed. Business SA is seeking further clarification from members on this matter.

[6] Clause 9.4(a).
[7] Clause 9.4(b).

5.2.3 Clause 10.1(c) Minimum Wages – Teachers and tutor/instructors

The rounding rules provided in 10.1(a) of the exposure draft provide that an employee's weekly rate is determined by dividing the annual salary by 313, multiplying that amount by 6, and rounding to the nearest $0.10.

Parties are asked to confirm whether there should be rounding rules for annual and weekly rates in clause 10.1(c) as per 10.1(a) in this exposure draft and clause 14.1 in current award.

Business SA submits only Clause 14.1 in the current award and 10.1(a) in this exposure draft provides for rounding rules for weekly rates. Rounding the annual rate would have a flow on effect. The rounding rule is to the nearest $0.10. Clause10.1(c) is based on clause 14.3 of the current award which does not provide calculated weekly or hourly rates. The calculation of the hourly rates is stipulated by ED clause 10.2 and is based on the weekly applicable rate. Rounding the weekly rate at 10.1(c) would therefore also have a flow on effect and would not be supported by Business SA.

5.2.4 Clause 10.1– Annual Wage Review Application

Parties are asked if the award should specify whether any Annual Wage Review increase is applied to the annual or weekly rate of pay in clauses 10.1(a), (c) and (d).

The current award only provides for an annual wage rate in clause 10.1 (a) and (c) and to date the Annual Wage Review increase has been applied to that. Clause 10.1(d) has both annual and weekly rates which are both increased in the Annual Wage Review.

The current award clause 14.2 states that Casual Rates are 'increased by the same percentage applied to the weekly rates in 14.1'. 14.1 does not provide for a percentage increase as the weekly rates are calculated from the annual rate. There is therefore some confusion already. Business SA is seeking further clarification from members.

5.2.5 Clause 11.2 Expense related allowances – Living away from home

Clause 11.2(d)(iii) entitles an employee, required to live away from home in the course of the employer's business, to payment at ordinary rates for all time spent in travelling between the employee's usual place of employment and the temporary location, provided this time does not exceed 24 hours.

Parties are asked whether the "ordinary rates of pay" in clause 11.2(d)(iii) is the minimum rate or can it include penalties? Does ordinary time rate include penalties or is it the minimum hourly rate?

This award does not contain any allowances or loadings payable for all purposes, hence the use of 'ordinary rate of pay' should be replaced by the words 'minimum rate'. Where no all purpose allowances are payable under an award, the term 'minimum hourly rate' should be used.[8] Business SA suggest that any reference to 'ordinary rate of pay' be deleted and submits that 'minimum hourly rate' be defined in Schedule 1 Definitions if the parties agree to continue its use and define it as including penalties. Business SA has contacted members on this matter. Respondents all indicated that the employee's minimum hourly rate should be used here and that it would not be appropriate to include penalties.

5.2.6 Clause 14.1(c) Penalty rates – Public holiday work

Under this award, an employer and the majority of employees can agree to substitute a public holiday with another day.[9] Clause 14.1(c)(ii) provides a four hour minimum engagement for employees working on a public holiday.

Parties are asked to clarify whether the minimum payment of four hours applies to a substituted day.

Business SA submits clause 14.1(c)(iii) clarifies this matter. Clause 14.1(c)(iii) clearly states that public holiday penalties are only payable for either the public holiday or the substitute day, provided both were worked by the employee. The employee is able to select which of those days the penalty applies to. By reason of this Business SA submits that the minimum payment of four hours only applies to the day selected by the employee to attract the penalty. Business SA members consulted on this matter agreed with our view.

[8] [2014] FWCFB 9412, [45].
[9] Clause 20.2.

5.2.7 Clause 15.5(d) Overtime – teaching staff and general staff

Clauses 15.5(a) allows employees who work overtime and do not work annualised hours to be entitled to accrue time off instead of overtime payment. Each hour of overtime equates to one hour's time off. Clause 15.5(d) sets out that where an employee's employment is terminated, they must be paid out any accrued time off hours.

Parties are asked to clarify whether the rate payable in clause 15.5(d) is at overtime rates or the minimum hourly rate?

Business SA consulted members for clarification here. Respondents unanimously stated the payment would be at the minimum hourly rate.

5.2.8 *Schedule I - Definitions.*

Schedule I provides the following definitions of 'teacher' and 'tutor/instructor':

- **teacher** means an employee engaged to teach students where a teaching qualification is mandatory or required by the employer, and where the work required involves teaching a course of study or units of work recognised within or pursuant to the Australian Qualifications Framework or accredited by a relevant state or territory authority and which is neither the work of an academic teacher nor a tutor/instructor
- **tutor/instructor** means an employee engaged in providing tutoring/instruction to students where the course is not accredited and where the employer may not require a teaching qualification and which is neither the work of an academic nor a teacher

Parties are asked to clarify whether an employee who does not hold a teaching qualification and is teaching a course or units which are accredited falls within the definition of a teacher or tutor/instructor.

Business SA sought clarification from members as to the existence of this issue as the definitions do not contemplate this circumstance. Our members stated that their teachers must have qualifications either in their field or at least a Training and Assessment Certificate IV (TAE IV) qualification. Alternatively, tutors/instructors were considered a person who does not yet hold a TAE IV qualification or is supporting a specialist TAE IV where that tutor can only provide a complementary level of contribution.

Members explicitly stated that there are too many under-skilled TAFE teachers earning an income above their skill or capability level. Business SA submits that employees without adequate teaching qualifications should be employed as a tutor/instructor.

6.0 Fitness Industry Award 2015

6.1 Drafting and Technical Errors

Business SA has read the exposure draft and has not found any technical or drafting errors. However, we reserve our rights to make submissions if errors are found in future drafts.

6.2 Request for Clarification from Fair Work Commission

6.2.1 Clause 8. Ordinary hours of work and rostering

Clauses 8.1-8.3 set out the limits of ordinary working hours. With hours to be worked between 5.00 am and 11.00 pm Monday to Friday and 6.00 am to 9.00 pm on Saturday and Sunday. These ordinary hours must not exceed an average of 38 hours per week over a four week period and full-time or part-time employment must not exceed 10 hours on any one day.

If overtime is payable to casual employees, should clause 8.3 be amended to include casuals?

It is Business SA's view that overtime is not currently paid to casual employees. The hours of work clause referred to by Clause 14.2 – Overtime specifically refers to part-time and full-time employees only. Any variation to this clause to include casual would be a substantive change.

6.2.2 Clause 14.3 Break between shifts

An employee is entitled to a minimum 10-hour break between shifts. An employee required by the employer to resume work without having a break of at least 10 hours between rostered shifts must be paid at the rate of 200% of the minimum hourly rate for all time worked until they have had a break from work of at least 10 hours.

Parties to clarify whether the 10-hour break is between the end of overtime on one day/shift and the beginning of ordinary hours on the next day/shift?

The wording of the clause refers to a minimum break between "rostered shifts". It is Business SA's view that, whilst a shift is not defined in the Fitness Industry Award, it

is commonly seen as a regular system of work. If overtime was rostered, then the 10-hour break should occur from the conclusion of the rostered overtime. If the overtime was un-rostered then the 10 hour break should commence from the conclusion of the rostered hours.

If a 10-hour break is enforced from the conclusion of un-rostered, ad hoc overtime, this may result in unmanageable staff shortages at the commencement of the next shift. In the circumstances where a set number of staff are required for safety reasons, such as at a swim centre, or staff are required for a set appointment with a client, an un-rostered 10-hour break is not viable.

7.0 Gardening and Landscaping Services Award 2016

7.1 Drafting and Technical Errors

7.1.1 Clauses 8.4(c), (e) – Rostered Days Off: Public Holidays

Clauses 8.4(c) and (e) refer to a 'gazetted public holiday'. For reasons of clarity it is suggested that 'gazetted public holiday' be substituted to 'a public holiday according to the *National Employment Standards*.[10]

7.1.2 Clause 10.5(e)(iii) – Reduction of Payment

Unclear application of this section regarding government assistance. Will an apprentice's payment be reduced once the employer has informed the apprentice of their eligibility for government assistance in writing, or must the apprentice first be granted that assistance before payment is reduced? It is possible that an employer may face underpayment of wages claim if payment is reduced for an apprentice whose application for government assistance is rejected.

7.1.3 Clause 10.5(h) – Reimbursement of Course Fees and Materials

This clause provides for reimbursement to be withheld where the apprentice has unsatisfactory progress. Unsatisfactory progress can be construed too broadly and should be defined to give clarity to employers and employees regarding this provision's application.

Business SA suggests the following definition: Reimbursement under clause 10.5(f) is not payable *where the RTO considers the apprentice's progress unsatisfactory*.

7.2 Request for Clarification from Fair Work Commission

7.2.1 Clause 10.2(b) Wages and Allowances – Juniors

The junior rates provided in clause 10.2(a) are expressed as a percentage of the adult rate, dependant on the junior employee's age. The results of this calculation are currently to be rounded to the nearest $0.10 for weekly employees and to the nearest ¼ of one cent for hourly employees.

[10] *Fair Work Act 2009* s 115.

Parties are asked whether the second part of clause 10.2(b) should be deleted. Rounding to the nearest quarter of one cent is inconsistent with other awards and may cause unnecessary complexity.

Business SA agrees with the Commission. The complexity added by calculating an hourly junior employee's wages to the nearest quarter of one cent seems excessive. Business SA suggests the following change to make it easier for employers and employees to determine what is owed under the award:

"The wage payable to a junior will, in the case of a weekly employee, be calculated to the nearest $0.10, and in the case of an hourly employee, *be calculated to the nearest cent*."

Business SA also consulted members regarding the Commission's request for clarification and put this alternative clause to members. Members agreed with the Commission that the current system is unnecessarily complex. Members also supported Business SA's proposed change.

7.2.2 Clause 11.3(a)(ii) Wages and Allowances – Leading Hand

The leading hand allowance grants a leading hand employee an additional sum per week depending on the number of other employees that leading hand is in charge of.

Parties are asked to comment on whether the wording in clause 11.3(a)(ii) means the leading hands allowance is payable for all purposes. The corresponding provision in AP782197CRV – Gardening, Nurseries and Greenkeeping (Northern Territory) Award 1998 provides that this allowance is payable for all purposes.

Business SA believes the leading hand allowance in clause 11.3(a) is paid for all purposes. This allowance is stated to be an all purpose allowance in clause 11.2. An all purpose allowance for a leading hand would also be consistent with the *Horticulture Award 2010*[11] and the *Manufacturing and Associated Industries and Occupations Award 2010*.[12]

[11] Clause 11.2(b).
[12] Clause 32.1(a).

7.2.3 Clause 11.4(e)(iii) Expense related allowances – Travel time

Clause 11.4 lists the expense related allowances under this award. Travel time allowance[13] intends to reimburse an employee where they are required to travel to and from a job away from their normal place of work, where travel time is longer than they would normally spend travelling.

Parties are asked to clarify the rate of pay for 'travel time' in clause 11.4(e)(iii).

This clause appears to read clearly already. The travel time rate of pay should be the employee's ordinary rate. Under this clause travel time is not excluded from the worker's ordinary hours consequently the employee should be paid their ordinary rate. Business SA consulted members regarding this. Members were clear that no payment should be made for travelling between home and the depot or vice versa.

[13] Clause 11.4(e)(iii).

8.0 Horticulture Award 2016

8.1 Drafting and Technical Errors

8.1.1 Clause 3.2 – Horticulture Industry

Clause 3.2 contains a definition of the horticulture industry for the purpose of the award. This has definition is already contained in Schedule G – Definitions. Business SA proposes that the phrase "as defined in Schedule A" be added to clause 3.2 to read:

"**3.2 Horticulture industry** *as defined in Schedule A* means:" (italics added).

This will avoid the risk that one definition of horticulture industry changes in the future without the other changing.

8.2 Request for Clarification from Fair Work Commission

8.2.1 Clause 9.2 – Rest Break

Currently employees are entitled to a paid rest break of 10 minutes each morning.

Parties are asked whether employees working afternoon or night shift are entitled to a paid rest break. Clause 9.2(a) below states that the paid rest break is to be taken in the morning.

Business SA submits that clause 9.2(a) is not intended to only apply to employees working in the morning. This interpretation is contrary to the meal break set out in clause 9.1(a) which is provided "each day". It is unclear why employees working afternoon or night shifts would be entitled to a 30-minute break but not also a 10-minute break. Business SA has consulted members on this matter and they give their employees paid rest breaks on afternoon or night shifts as appropriate.

Business SA submits that clause 9.2(a) be reworded to: "Employees will be allowed a paid rest break of 10 minutes each *day*".

8.2.2 Clause 10.2 – Pieceworkers

Full-time, part-time and casual employees may enter into an agreement with their employer to be paid a piecework rate and become a pieceworker. Pieceworkers must be paid such that an average competent pieceworker can earn at least 15% more per hour than the minimum hourly rate for that worker's type of employment and classification.

Parties are asked whether an example should be made to demonstrate how this clause operates. Parties are asked to clarify how to calculate the amount a pieceworker should be paid when they take annual leave and personal/carer's leave.

Business SA consulted members on this matter. Respondents noted that the number of hours worked by a pieceworker should be recorded and that annual leave and personal/carer's leave entitlements be based on the worker's standard rate.

Therefore, Business SA submits that pieceworkers should be paid their standard rate and annual leave loading when taking annual leave. Personal/carer's leave should be determined by the same method, though paid without the annual leave loading. Given casual piecework employees will have the casual loading included in their piecework rate under clause 10.2(c) these employees are not be entitled to annual leave or personal/carer's leave.

8.2.3 Clause 10.3(b) – Juniors

The junior rates provided in clause 10.3(a) are expressed as a percentage of the adult rate, dependant on the junior employee's age. The results of this calculation are currently to be rounded to the nearest $0.10 for weekly employees and to the nearest ¼ of one cent for hourly employees.

Parties are asked whether the second part of clause 10.3(b) should be deleted. Rounding to the nearest quarter of one cent is inconsistent with other awards and may cause unnecessary complexity.

Business SA has consulted members and they agree with the Commission, rounding to the nearest quarter of one cent is unnecessarily complex. This system is not consistent with other awards and should be changed to:

"The wage payable to a junior will, in the case of a weekly employee, be calculated to the nearest $0.10, and in the case of an hourly employee, *be calculated to the nearest cent*."

This change would align clause 10.3(b) with 10.1(a), where adult employee minimum wages are rounded to the nearest $0.10 for weekly wage and to the nearest cent for hourly rate.

8.2.4 Clause 11.2 Wage related allowances – All-purpose allowances

Within this draft the leading hand allowances are: the leading hand allowance, the wet work allowance, and the first aid allowance. These allowances are included in the rate of pay for any entitled employee and are included when calculating any penalties or loadings.

Should the reimbursement allowances for tools and equipment and travelling be described as "all purpose"?

Allowances for tools and equipment and for travelling should not apply for all purposes. These reimbursements are one off payments cannot be factored into a worker's ordinary rate of pay. Therefore, the above allowances are unable to be properly factored into annual leave and other entitlements.

9.0 Legal Services Award 2015

9.1 Drafting and Technical Errors

Business SA has read the exposure draft and has not found any technical or drafting errors. However, we reserve our rights to make submissions if errors are found in future drafts.

9.2 Request for Clarification from Fair Work Commission

9.2.1 Clause 13.4(c)(ii) and (iii) Shiftwork – Calculating shift penalties

Shift workers are entitled to penalties for Saturday, Sunday and public holiday work. Clause 13.4(c) details conditions for these penalties.

- Where a worker starts between 11.00 pm and midnight on a Sunday or public holiday will not be entitled to the Sunday or public holiday rate for that first hour;[14]
- The shiftworker will be entitled to the Sunday or public holiday rate where their shift starts before midnight on the day before the Sunday or public holiday and extends into the Sunday or public holiday;[15] and
- Where falling partly on a public holiday, the shift which has the major portion falling on the public holiday will be regarded as the public holiday shift.[16]

Parties are asked to clarify the interaction between 13.4(c)(ii) and 13.4(c)(iii) as they appear inconsistent.

Business SA submits that these clauses are inconsistent. The pre-reform award[17] appears to have the same ambiguity, giving three scenarios regarding public holidays/Sundays:

- Where a shift starts between 11pm and midnight **on** the public holiday/Sunday, the shiftworker is **not entitled** to the public holiday or Sunday rate for the shift[18]

[14] Clause 13.4(c)(i).
[15] Clause 13.4(c)(ii).
[16] Clause 13.4(c)(iii).
[17] *Victorian Legal, Professional, Clerical and Administrative Employees Award 2004.*
[18] *Victorian Legal, Professional, Clerical and Administrative Employees Award 2004* cl 27.7.4(c).

- Where a shift starts before midnight **the day before** the public holiday/Sunday and the shift extends into the public holiday/Sunday, the shiftworker **is entitled** to the appropriate penalty rate[19]
- Where the **shift falls partly on** a public holiday/Sunday, the shift with the major portion falling on the public holiday/Sunday will be regarded as the holiday shift and **will entitle** the worker to a penalty[20]

Clause 27.7.4(c) of the pre-reform award and clause 13.4(c)(ii) of the exposure draft appear to be the problem here. It is unclear whether the shiftworker is entitled to an entire shift's worth of pay at the penalty rate even if their shift ended at 1am on the public holiday/Sunday. They should only be entitled to the penalty rate for periods actually falling on the public holiday/Sunday.

Business SA suggests clause 13.4(c)(iii) be deleted and 13.4(c)(ii) be amended as follows:

> Where a shift starts before midnight on the day before a Sunday or public holiday and extends into the Sunday or public holiday, the employee will be *paid the Sunday or public holiday rate for those hours which extended into the Sunday or public holiday*. (Changes emphasised).

[19] *Victorian Legal, Professional, Clerical and Administrative Employees Award 2004* cl 27.7.4(c).
[20] *Victorian Legal, Professional, Clerical and Administrative Employees Award 2004* cl 27.7.4(d).

10.0 Nursery Award 2016

10.1 Drafting and Technical Errors

10.1.1 Clause 3.2 'Nursery Industry Means',

Nursery Industry is defined in both clause 3.2 and Schedule H Definitions. To avoid any unintentional changes to one and not the other, Business SA submits that the provision in clause 3.2 be removed and replaced with a reference to the definition in Schedule H.

10.1.2 Schedule H Ordinary Hourly Rate definition

This is a new definition related to all-purpose payments only. Business SA submits the words "specified as being included in the employee's ordinary hourly rate or" be removed to avoid any possible confusion.

10.1.3 Clause 5.2 Facilitative Provisions

Business SA submits the following provisions be listed in the facilitative provisions table in this clause:

6.5 (d) Casual Employees, casual employees may agree to be paid weekly or fortnightly.

F6.1 National Training Wage - Trainee to receive 25% loading in lieu of leave provisions.

10.1.4 Clause 6.5 Casual Employees

Business SA submits the words 'by the hour be re inserted in subclause (a) after the words 'engaged and paid', for the sake of clarity.

10.1.4 Clause 17.3 Payment for period of Annual Leave

Business SA submits the new 'NOTE' added to this subclause be deleted. It is unnecessary, the provisions of this subclause meet the requirements of the Act without the 'NOTE'.

10.1.5 Clause 21.3 Public Holidays

Business SA submits the words 'subject to clause 21.2' be added for clarity.

10.2 Request for Clarification from Fair Work Commission

10.2.1 Clause 3.3 Definitions

Clause 3.3 excludes the general retail industry; the wine industry; silviculture and afforestation; and sugar farming, sugar cane growing, sugar milling, sugar refining, sugar distilleries or sugar terminals from the definition of nursery industry.

Parties are asked whether coverage in clause 3.3 should be expressed by reference to the coverage of the Wine, Silviculture and Sugar Awards.

Business SA has no objection to the use of definitions of the Wine, Sugar and Silviculture industries being based non the relevant industry awards in order to exclude these industries from being covered by this award.

10.2.2 Clause 13.1 – All purpose allowances

This award provides that allowances paid for all purposes to be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment.

Parties are asked whether all of the allowances in this award apply for all purposes. They appear to be described as that in the current award, however, it may be difficult to calculate an all purpose meal allowance or an all purpose reimbursement.

Business SA does not object to the specification of all-purpose allowances in this exposure draft. Only the first aid allowance can properly apply for all purposes and be calculated into a worker's ordinary rate of pay. Reimbursement allowances for meals, tools and equipment, and travelling are one off payments and, as such, are unable to be applied for all purposes.

11.0 Pastoral Award 2016

11.1 Drafting and Technical Errors

11.1.1 Clause 3.1 – Definition of Wine Industry

The definition of wine industry has changed between the current award and the exposure draft. The draft does not include 'the planting of wine grape vines' as part of the wine industry. This change has also created an inconsistency with the definition of wine industry under the *Wine Industry Award 2010*.[21]

11.1.2 Clause 14.7 – Transfer of Business

This clause is due to be removed following the decision in [2015] FWCFB 3023.

11.2 Request for Clarification from Fair Work Commission

11.2.1 Clause 3.3(a) – Coverage

Clause 3.3(a) provides that the *Pastoral Award 2016* does not apply to the wine industry.

Parties are asked whether the wine industry should be defined by reference to the Wine Industry Award 2016 or by reference to the definition in Schedule G?

Business SA supports the definition of wine industry according to the *Wine Industry Award 2016*.[22] This is the most appropriate mechanism to ensure the definition remains up to date.

11.2.2 Part 2 – General Employment Conditions

Parties are asked to consider whether the award should clarify the application of the various parts of the award.

Business SA is unsure on the intent of this question and seeks further clarification from the FWC.

[21] *Wine Industry Award 2010* clause 3.1.
[22] *Wine Industry Award 2010* clause 3.1.

11.2.3 Clause 6.5(c)(i) – Casual Pieceworkers

Clause 6.5(c)(i) states that Shearers, Crutchers and Woolpressers will be engaged as casual pieceworkers and paid in accordance with the piecework rates prescribed in the award.

Clause 40.1 of this exposure draft (clause 45.1(1) of the current award) provides for Shearers to be engaged by the day and clause 40.5 (clause 45.4(g) of the current award) provides for Woolpressers to be engaged on a time work basis. Parties are asked to comment on whether this is inconsistent with clause 6.5(c)(i).

The exposure draft does appear to be inconsistent between cl 6.5(c)(i) and clauses 40.1 and 40.5. Currently cl 6.5(c)(i) deems Shearers, Crutchers and Woolpressers to be casual pieceworkers while daily-hire casual Shearers and Woolpressers are contemplated in clauses 40.1 and 40.5.

To resolve this inconsistency and provide flexibility for employees and employers, Business SA proposes the following amendment to clause 6.5(c)(i):

> 'Casual Shearers, Crutchers and Woolpressers engaged as pieceworkers will be paid the piecework rates prescribed by this award.'

11.2.4 Clause 10.1(a)(iii) – All Purpose Allowances

All purpose allowances are included in the rate of pay of an employee entitled to that allowance, when calculating any penalties or loadings or payment while they are on annual leave. Under this award the following allowances are paid for all purposes: leading hand, first aid, travelling.[23]

Clause 17.4 of the current award defines the Travelling allowance as an 'all purpose allowance'. Parties are asked to confirm whether this is correct.

It is Business SA's view that the travel allowance has been incorrectly categorised as an all purpose allowance. A worker's ordinary hourly rate is that worker's minimum hourly rate in addition to any all purpose penalties; this rate forms the basis of annual leave payment calculations.[24] Business SA believes the travelling allowance, an allowance paid in situations where the employee is required to travel from one place

[23] Clause 10.1(a).
[24] [2014] FWCFB 9412, [44]-[45].

to another for the purpose of work,[25] cannot appropriately form part of the worker's ordinary hourly rate.

11.2.5 Clause 10.2(c) – Overtime Meal Allowance

A worker's overtime meal allowance is provided in clauses 10.2(c)(i) and (ii). These set out that an employee will be paid $12.65 for the first and any subsequent meal where that employee is required to work more than 1.5 hours overtime after working ordinary hours.[26] Alternatively, a worker is entitled to $12.65 for the first and any subsequent meal where they are required to work overtime for more than two hours and were not notified the previous day that they would be required to work overtime.[27]

Parties are asked to clarify the interaction between clauses 10.2(c)(i) and (ii). Does clause 10.2(c)(i) only apply when an employee has been notified that they are required to work overtime?

The current clauses appear to operate in substantially the same way, save for a notice requirement.

Clause 10.2(c)(i) grants the overtime meal allowance once the employee has worked overtime for more than 1.5 hours. While clause 10.2(c)(ii) entitles the employee to the allowance once they have worked over 2 hours overtime without having been notified they would need to work overtime before leaving work the previous day. The allowance due is the same in both circumstances and this does not need to be paid in either case if the employer provides a suitable meal.

The critical difference appears to be whether the employee was given notice they'd be required to work overtime before leaving work the previous day. If given notice cl 10.2(c)(i) will apply. Member feedback has informed Business SA's response on this matter.

11.2.6 Clause 23.2(b) – Farm and livestock hand 2 (FHL2)

[25] Clause 10.1(d)(i).
[26] Clause 10.2(c)(i).
[27] Clause 10.2(c)(ii).

Farm and livestock hands (level 2) under this award include feedlot employees (grade 1) with more than three months' experience in the industry who:

- possesses understanding of industry QA programs; and
- carry out workplace OH&S procedures

'QA Programs' are not currently defined in the award, should a definition be included in the award?

Assuming "QA Programs" stands for 'quality assurance programs' no definition is necessary. "QA Programs" should simply be rewritten to 'quality assurance programs'.

If "QA Programs" does not stand for 'quality assurance programs' a definition should be provided.

Should 'OH&S procedures' be changed throughout the award to WH&S procedures in line with current legislation?

Business SA supports the inclusion of the wording "WH&S procedures".

11.2.7 Clause 24.3 – With Keep Rate

Under this clause if keep is provided then the minimum wage will be less $120.94 per week. Keep is defined in the exposure draft as:

- **keep** is …good and sufficient living accommodation and good and sufficient rations of sufficient quantity; sound, well-cooked and properly served by the cook or the cook's offsider; but it will not include accommodation under a roof or cooking when circumstances render such accommodation or cooking impractical.[28]

Would the alternative wording below provide greater clarity in relation to how penalty and overtime rates interact with 'with keep' wages by expressing the 'with keep' amount as a deduction (rather than part of the minimum wage)? (see also clause 27.5)

[28] *Pastoral Award 2016 exposure draft*, schedule G.

"If keep is provided then the employer may deduct an amount of $120.94 per week from the employee's total weekly wages."

This change seems appropriate. It provides clarity without changing the operation of clause 24.3.

11.2.8 Clause 25.3(b) – Special Allowances

Clause 25 provides a range of special allowances. Specifically it provides: a horse and saddle allowance for station hands;[29] an allowance for dogs;[30] and an allowance for working in connection with spraying/jetting sheep or in swabbing sheep.[31]

Parties are asked whether the allowances in clause 25 only apply to the Broadacre Farming and Livestock Operations stream. These allowances were found in the pre reform Pastoral Industry Award 1998 [AP792378] at clause 37.

The allowances in clause 25 should only apply to the Broadacre Farming and Livestock Operations stream.

These allowances relate to costs or risks associated with the specific requirements of the Broadacre Farming and Livestock Operations stream. Clauses 41 and 42 of the exposure draft already contain special allowances for workers within the Shearing and Woolpressing stream. Additionally, the pre-reform award granted these allowances to station hands[32], with such employees specifically defined to exclude those engaged in shearing and crutching.[33] The pre-reform award demonstrates that clause 25.3(b) of the exposure draft should not apply beyond Part 5.

11.2.9 Clause 26.3 – Station Cooks

Under this award station cooks are categorised as farm and livestock hands level 1 (FLH1).[34] Where these station cooks are required to work more than their ordinary hours of work clause 26.3(a) provides penalties based on proportions of the 'appropriate weekly rate'.

[29] Clause 25.1.
[30] Clause 25.2.
[31] Clause 25.3.
[32] *Pastoral Industry Award 1998* clause 37.
[33] *Pastoral Industry Award 1998* clause 3.
[34] Clause 23.1(b).

Given that cooks are classified as an FL1, should the words 'appropriate weekly rate' in clause 18.3 be changed to the 'FL1 ordinary hourly rate'?
Clause 18.3 relates to payment for public holidays and there is no clause 18.3 in the current award.

If the Commission meant to say 26.3, this change is still contentious. Station cooks are classified in cl 23.1(b), therefore there is only one ordinary hourly rate - $17.29 (cl 24.1). However, the question suggests changing from a **weekly rate** to an **hourly rate**. Business SA does not support the inclusion of the wording "appropriate weekly rate" as this is a significant change to the Award.

Should these amounts also be expressed as percentages?
Business SA supports expressing these amounts as percentages. This will simplify operation of clause 26.3(a).

11.2.10 Clause 31.1 – Shiftwork Definitions

Clause 31.1 defines: afternoon shift, continuous work, non-continuous work, night shift, rostered shift, and permanent night shift.[35]

Parties are asked to comment on whether the award should include a definition of 'shiftworker' in order to clarify which employees are shiftworkers (for the purposes of shift loading) and which employees are dayworkers (working outside the spread of ordinary hours).
Business SA believes that a definition of 'day shift' needs to be implemented to avoid the confusion highlighted by the Fair Work Ombudsman. Given continuous work is contemplated in cl 31.1(b) and afternoon and night shifts are defined (cl 31.1(a) and 31.1(d)) it appears day shifts are required.

The approach of the *Horticultural Award 2010* could be adopted here. Under the *Horticultural Award* the 'day shift' is determined by the employer[36] and each day will have either a day and afternoon shift or a day, afternoon and night shift, again determined by the employer.[37]

[35] Clause 31.1(a)-(f).
[36] *Horticultural Award 2010* clause 22.2(f).
[37] *Horticultural Award 2010* clause 22.2(e).

Another approach could be to adopt a 'shiftworker' definition similar to that found in the *Mining Industry Award 2010*: "**shiftworker** means an employee for the time being engaged to work in a system of shifts, being afternoon shifts, night shifts or both, or a continuous shiftworker".[38]

11.2.11 Clause 34.1 – Payment for Public Holidays

Through clause 34.1 piggery attendants who are day workers and are required to work on public holidays will be paid 250% of the ordinary hourly rate for a minimum of three hours and up to the usual rostered hours. Any time worked in excess of the ordinary rostered hours will be paid at the overtime rate. The overtime rate is 150% of the ordinary hourly rate for the first two hours and 200% thereafter Monday to Saturday, with all overtime hours on Sunday paid at 200%.[39]

The overtime rates that apply for work in excess of rostered hours on a public holiday in accordance with clause 32.1 are less than that provided for ordinary hours on a public holiday. Is this correct?

This appears correct, the pre-reform award supports this. Previously those required to work on public holidays would be paid at a rate of 250% up to the usual rostered hours, with normal overtime rates applying beyond those ordinary hours.[40] The overtime rate was 150% for the first three hours, and 200% thereafter.[41]

11.2.12 Clause 40.3(b) – Lack of Amenities Allowance

Crutchers will be paid an allowance of $9.16 per day for the lack of amenities when crutching is performed other than at sheds.

This wage related allowance is currently adjusted in accordance with changes in the standard rate at the time of the annual wage review. Parties are asked to comment on whether this allowance should be expressed as 51.5% of the standard rate.

Business SA supports this change.

[38] *Mining Industry Award 2010* clause 3.1.
[39] Clause 32.2.
[40] *Pig Breeding and Raising (AWU) Award* clause 15.3.8.
[41] *Pig Breeding and Raising (AWU) Award* clause 14.1.

11.2.13 Payment for Public Holidays

Clause 46.1 sets out the range of rates for work conducted on public holidays. Including

Should clause 46.1(b) also apply to Woolpresser-shed hands?

The current clause appears appropriate.

Clause 39.1 lists the possible employment categories and there is no distinction between 'shed hand' and 'woolpresser-shed hand.' Additionally, clause 39.2 details general shed hands and woolpresser-shed hands as performing substantially the same functions.

For this reason clause 46.1(b) appears to appropriately cover woolpresser-shed hands already.

11.2.14 Schedule G – Definitions and Interpretation (keep)

Keep is where an employee is employed on the 'with keep' rate as prescribed in this award, 'keep' will mean good and sufficient living accommodation and good and sufficient rations of sufficient quantity; sound, well-cooked and properly served by the cook or the cook's offsider; but it will not include accommodation under a roof or cooking when circumstances render such accommodation or cooking impractical.[42]

Parties are asked to clarify if 'keep' only applies to farm and livestock hands in accordance with clause 24.3 or does the provision in clause 10.2(g) apply to other employees? If it applies to shearing operations, how does it interact with the definition 'found employees'?

Based on member consultation it is Business SA's view that 'keep' only applies to farm and livestock hands. The reference to 'keep' is specific to Part 5 – Broadacre Farming and Livestock Operations. Part 8 – Shearing operations does not have a reference to keep. The allowances in part are specific to that part unless otherwise stated.

11.2.15 Schedule G – Definitions and Interpretation (wine industry)

[42] *Pastoral Award 2016*, schedule G.

Wine industry means the industry of growing and processing wine grapes and includes:

(a) the preparation of land for the planting of wine grape vines, the pruning of wine grape vines, growing, treating, picking, harvesting and forwarding of wine grapes and other activities associated with a wine grape vineyard; and/or

(b) processing wine grapes, producing wine juice or grape spirit, the bottling, packaging, storage or dispatch of wine, brandy or other potable spirit, liqueurs, vinegar or grape juice and other activities associated with a winery or wine distillery including but not limited to cellar door sales, laboratory activities and making or repairing barrels, vats, casts and like articles; and/or

(c) packaging, storing and dispatching of wine or grape spirit from a warehouse facility or other place of storage associated with a winery or wine distillery.

Parties are asked to confirm whether this is the appropriate definition of wine industry for the purpose of clause 3.3(a). It is inconsistent with the definition in the Wine Industry Award 2016.

Business SA submits that this definition is inappropriate. See response in regards to cl 3.3(a) of this draft.

12.0 Ports, Harbours and Enclosed Water Vessels Award 2016

12.1 Drafting and Technical Errors

12.1.1 Clause 6.4(h) – Additional Hours

This clause contains reference to 'additional hours' without any reference or definition of what 'additional hours' are.

If the wording of this clause is kept, Business SA submits that a definition of 'additional hours' be placed in either Part 3 – Hours of Work, or in Schedule D – Definitions. This definition should also provide clarity to interpretation of clause 6.4(h).

12.2 Request for Clarification from Fair Work Commission

12.2.1 Clause 6.4(h) Part-time employees – Additional hours

Clause 6.4(h) provides that all time worked in excess of the hours as mutually arranged, excluding any additional hours, will be overtime.

Parties are asked to make submissions on how clause 6.4(h) applies. In particular, how does a part-time employee work additional hours that aren't overtime hours?

It appears that 'additional hours' are a remnant from previous awards. Pre-reform awards from New South Wales dealing with the harbour industry included reference to 'additional hours'.[43] These seemed to be an agreement with the relevant union for work-hours to be included in a worker's salary which could be called up on reasonable notice. The awards detailed that these hours were to be used to satisfy the employer's work demands/operational requirements.

The current Exposure Draft carries no reference to any such agreement, nor definition or application of 'additional hours' beyond clause 6.4(h). Business SA is seeking member feedback to determine whether the 'additional hours' system still operates in this industry.

[43] *New South Wales Port Corporations Award 1999* (AP781641) cl 13.6, 17.9.2.

12.2.2 Clause 8.1 - Breaks

Clause 8 sets out the breaks available under this award. These include a breakfast break,[44] a lunch break,[45] and a tea break.[46]

Parties should make submissions to clarify which of the breaks in clauses 8.2 to 8.4 are paid and which are unpaid.

Business SA submits that none of the breaks are paid.

Breakfast takes place one hour before the usual starting time and should not count as time worked.[47] Pre-reform awards also indicate the lunch break should not be paid as these awards excluded meal breaks from ordinary hours.[48] Where an employee was required to work through their meal break they were to be allowed a 20 minute crib break which counted as time worked.[49] Finally, the award allows an employer and employee to agree that instead of an hour long breakfast or tea break, the employee will instead have a 20 rest period without loss of pay.[50] These factors all indicate that none of the standard breaks are paid.

12.2.3 Clause 9.1 – Minimum Wages

Clause 9.1 sets the minimum wages for employees under this award. This clause contains classifications for Crane Driver (under 20 tonnes) and Crane Driver (over 20 tonnes).

Parties are asked to clarify payment for a crane driver at 20 tonnes. Parties are asked whether classification definitions should be inserted in this award.

Business SA is seeking member feedback regarding the appropriate pay rate for crane drivers at 20 tonnes. Regarding definitions, Business SA supports the Commission's suggestion to insert classification definitions into this award.

12.2.4 Clause 10.1 – Allowances

[44] Clause 8.2.
[45] Clause 8.3.
[46] Clause 8.4.
[47] Clause 8.2(a).
[48] *Port Services Award 1998* cl 6; *New South Wales Port Corporations Award 1999* cl 17.5.6.
[49] *Port Services Award 1998* cl 6.1.1.
[50] Clause 8.2(c), 8.4(c).

A number of allowances are prescribed in this award. Of note here are the uniform allowance,[51] compensation for loss of personal effects,[52] and waiting orders allowance.[53]

Parties are asked whether the allowances in clauses 10.1(e), (f) & (o) should be classed as expense related allowances and varied in line with the relevant CPI group?

Business SA agrees with this change. Historically, employees were reimbursed uniforms[54] and loss of personal effects.[55] Phone rental, installation and calls were also reimbursed when used for waiting orders.[56] Regarding classifications, the uniform allowance and compensation for loss of personal effects should be categorised as expense related allowances and waiting orders classified as a work related allowance.

12.2.5 Clause 10.1(j) – Allowances: Slipway

Junior employees called upon to work on slipways, cleaning, scraping, painting or overhauling launches, barges, punts or any other floating plant will be paid an allowance of $0.65 per hour.

This award does not provide for junior rates or a definition of junior. Should the allowance in clause 10.1(j) apply to all employees?

This seems a sensible change. It is assumed that most of this work is also conducted by employees not classified as juniors, it is unclear why only juniors will be paid this allowance. Further, the other wage-related allowances in this clause refer to 'any employee', 'an employee', 'employees' etc.

12.2.6 Clause 10.1(o) – Allowances: Waiting Orders

Clause 10.1(o) seeks to compensate workers required by their employer to telephone for orders. Employees are compensated for installation and annual rental of their

[51] Clause 10.1(e).
[52] Clause 10.1(f).
[53] Clause 10.1(o).
[54] *Victorian Port and Harbour Services Consolidated Operational Award (1998)* cl 18.12.1.
[55] *Victorian Port and Harbour Services Consolidated Operational Award (1998)* cl 18.7.
[56] *Motor Boats and Small Tugs (State) Award 2006* cl 13.

phone line. Additionally, off-duty employees required to ring for orders are reimbursed for each call.[57]

Parties are asked whether clause 10.1(o) should be updated to take into account mobile phones.

Business SA considers it appropriate to update this clause to to take into account mobile phones. However, where an employee does not have a fixed line it is clear their intention is to utilise a mobile service for all telephone communication. In such cases the employer should only have to reimburse the worker for calls necessarily incurred by the employee for ringing for such orders.

12.2.7 Clause 10.1(p)(iii) – Allowances: Towing

Employees are entitled to an allowance where they engage in towing.

Parties are asked whether references to "normal wage" in clause 10.1(p)(iii) should be to "ordinary hourly rate".

Business SA submits this change is not appropriate. Ordinary hourly rate should be understood to refer to an employee's minimum wage in addition to any all purpose allowances.[58] The all purpose allowances applicable to towing under this award are the towing allowance – towing or carrying explosives and the towing allowance – towing non self-propelled bunker barges.[59] Clause 10.1(p)(iii) does not apply for all purposes and should therefore not be paid at the 'ordinary hourly rate'.

12.2.8 Clause 10.2(i)(ii) – Allowances: Living away from Home

Employees required to live away from home are entitled to: "…proper meals, attendances, bedding and soap, and be supplied with clean bed linen and twice a week with clean towels whilst at sea."[60]

Parties are asked whether "attendances" can be replaced by an alternative word or term.

Business SA is unsure what is meant by the term "attendances" in this context. Two possible interpretations are:

[57] Clause 10.1(o)(i).
[58] [2014] FWCFB 9412, [45].
[59] Clause 10.1(a)(ii) and (iii).
[60] Clause 10.2(i)(ii).

1. **Attendances**: Residence or accommodation for an employee living away from home. This is the only requirement missing between subclause (i) and (iii); or
2. **Attendances**: Eating utensils to be provided by the employer. This would be consistent with clause 10.2(c)(i) which provides for eating utensils along with bedding, soap and towels.

12.2.9 Clause 12.2 – Overtime and Penalty Rates

The ordinary hours under this award are 6.00 am to 6.00 pm for up to 8 hours per day, Monday to Friday inclusive.[61] Clause 12.2 sets ordinary hours and overtime penalty rates, including for Saturday, Sunday and public holidays.

Parties are asked whether the span of ordinary hours in clause 7.2 should also be defined to clarify under what circumstances an employee can work 'ordinary hours' on a weekend.

Business SA is currently seeking advice from members on this matter.

12.2.10 Clause 13.2 – Shiftwork Rates

The shiftwork rates are provided in clause 13.2. Afternoon shiftworkers are paid 115% of the ordinary hourly rate, night shift are also paid 115% and permanent night shift are paid 130%.[62]

Parties are asked to make submissions on which rates apply to shift work on weekends. Issue of how the casual loading applies in relation to shiftwork and weekend penalties has been referred to AM2014/197.

The current Draft does not provide for shiftwork on weekends and therefore should not occur. Clause 7.2 limits ordinary hours of work to Monday to Friday, 6:00 am to 6:00 pm, with an 8 hour workday. Clause 13.2 applies shiftwork rates as a percentage of the ordinary hourly rate. Should clause 7.2 be amended to extend ordinary hours to weekends, the appropriate rate to apply would be 150% of the ordinary hourly rate for the first 8 hours of work. With an afternoon, night or permanent night shift attracting an additional rate through clause 13.2.

[61] Clause 7.2.
[62] Clause 13.2.

13.0 Sporting Organisations Award 2015

13.1 Drafting and Technical Errors

13.1.1 Clause 6.4(b)(ii): Full-time employment

Subclause (ii) contains a change from the previous award.

Previously a full-time employee was to be provided with their '**relevant** minimum wage.'[63] The draft has changed this, requiring full-time employees be provided with their 'minimum wage'.

13.1.2 Clause 10.1(b)(ii) – Junior employees

Will only employees aged 18 who have worked continuously for 12 months be paid the full adult rate for their classification? Does the same apply for 19 year olds who have worked for the same period but would otherwise be paid 90% of the adult rate?

13.2 Request for Clarification from Fair Work Commission

13.2.1 Clause 10.2(b) Minimum Wages – Clerical and administrative staff – Juniors

Junior employees are entitled to a percentage of the applicable adult weekly rate for Grade 1 or 2 clerical and administrative staff.

Parties are asked to clarify whether an employee under 21 years of age classified at Grade 3–6 is paid as an adult.

If a junior employee is conducting work equivalent to a Grade 3–6 clerical or administrative staff member, they should be paid their age equivalent percentage of the appropriate wage rate. This approach currently operates in the *Clerks – Private Sector Award*.[64]

[63] *Sporting Organisations Award 2010* cl 11.2.
[64] *Clerks – Private Sector Award 2010* cl 18.

Conclusion

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