



BUSINESS SA

4 Yearly Review of Modern Awards – AM2014/300 and 301 Initial Submission

13 November 2014

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Introduction

Business SA is pleased to have this opportunity to make an initial submission in accordance with the Directions issued by the President on 6 November 2014. We seek to outline the nature of the changes sought in relation to these common issues and list the awards affected by the proposed changes.

Given the short time frame Business SA reserves its position to raise individual award issues at a later date during the award stages.

Public Holidays

PART DAY PUBLIC HOLIDAYS

Background

In April 2012 the South Australian Parliament passed the Statutes Amendment (Shop Trading and Holidays) Act 2012. This resulted in an amendment to the Holidays Act 1910 to include two additional part-day public holidays from 7.00pm to 12.00 midnight on 24 December (Christmas Eve) and 31 December (New Year's Eve).

The Statutes Amendment (Shop Trading and Holidays) Act 2012 does not provide for penalty rates; however the Act does acknowledge that part-day public holidays are public holidays under s. 115. Meaning of *public holiday*. The Act states:

'(1) The following are public holidays:

(a) Each of these days:

(i) 1 January (New Year's Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.'

Subsection (b) notes the ability of State or Territory legislation to legislate public holidays, including part-day public holidays. The role of the Fair Work Commission (the Commission) in part-day public holidays since the implementation of the legislation has been to assess and implement the consequences of part-day public holidays, as legislated by the South Australian Parliament. In preparation for the commencement of part-day public holidays in South Australia in 2012, Business SA constructively worked with the South Australian branches of the Shop, Distributive and Allied Employees' Association and United Voice to develop a model Modern Award schedule aimed at removing ambiguity and uncertainty in the application of Modern Award provisions on part-day public holidays. This included ensuring that employees did not inadvertently gain entitlements that were never intended for them to obtain.

In accordance with a decision by a Full Bench of the Fair Work Commission on 21 December 2012¹, a model schedule “Schedule X - 2012 Part-day public holidays” (the Schedule) was inserted in 113 Modern Awards on an interim basis to clarify the application of several Modern Award provisions on the two part-day public holidays.

In 2013, Business SA and the South Australian branches of the Shop, Distributive and Allied Employees’ Association and United Voice sought the retention of “Schedule X - 2012 Part-day public holidays”, subject to minor technical amendments, to ensure its continued operation during the 2013 Christmas and New Year part-day public holidays in South Australia.

During formal proceedings into the matter it was clear there was no formal opposition to the continuation of “Schedule X - 2012 Part-day public holidays” for the 2013 Christmas and New Year part-day public holidays. Accordingly, a Full Bench of the Fair Work Commission on 13 November 2013 made a decision², to retain the Schedule for 2013.

The matter has recently been decided by the Full Bench in AM2012/355, with the decision to adopt the interim solution of adjusting the Schedule in the relevant awards from inclusion of the year 2013 to 2014. In adopting the interim solution, the President has noted this will:

“permit the 4 yearly review to deal comprehensively with all of the public holiday issues, and allow a determination to be issued now to confirm the arrangements for December 2014.”³

Business SA is proposing the ongoing operation of the Schedule in 113 Modern Awards, as noted by Appendix A.

“ADDITIONAL” PUBLIC HOLIDAYS

During the 2012 Transitional Review of Public Holidays a number of proposals were made in regards to public holidays and their operation in the awards.⁴ The Australian Hotels Association (AHA) sought a variation to provide that where a public holiday fell on a weekend and an additional public holiday is declared or gazetted, the public holiday loading will only apply on the actual public holiday. This was in relation to the Hospitality Award, General Retail Award, Fast Food Award and Hair and Beauty Awards.

The AIRC found it unnecessary in 2008 to endorse the changes to modern awards to include within the awards days which are observed as public holidays but not gazetted as such. This was based on the NES providing for the number of public holidays employees are entitled to have during the course of a year.

The Commission found in the 2012 transitional review that the issue of the number and standardisation of public holidays across Australia may well be a legitimate issue, however it one for the States, Territories and/or Commonwealth to legislate on. In that regard, the Commission did not

¹ [2012] FWAFB 10738

² [2013] FWCFB 8938

³ [2014] FWCFB 7830, paragraph 11.

⁴ [2013] FWCFB 2168

find that “coherent reasons” had been established to vary the additional public holidays in that review.⁵ Whilst the Commission acknowledged this issue remains, they found it outside of their jurisdictional limits.

The proposal by AHA was intended to address additional public holidays and the payment of penalties for awards operating in an environment where there is seven days a week trading. The proposal was based on a number of reasons. Business SA would respectfully suggest that there is a place for the Commission to review this issue in the current 4 yearly review, guided by the MAO. Under Section 134 the MAO states:

‘(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and*
- (b) the need to encourage collective bargaining; and*
- (c) the need to promote social inclusion through increased workforce participation; and*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (da) the need to provide additional remuneration for:*
 - (i) employees working overtime; or*
 - (ii) employees working unsocial, irregular or unpredictable hours; or*
 - (iii) employees working on weekends or public holidays; or*
 - (iv) employees working shifts; and*
- (e) the principle of equal remuneration for work of equal or comparable value; and*
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.’*

Subsections (d), (e), (f) and (g) are of particular import in the clarity of penalty rates applicable in the case of “additional” public holidays. Business SA would support revisiting this issue in the 4 yearly modern award review, as outlined in the AHA’s submission earlier this year.⁶

⁵ Ibid, paragraphs 112-113.

⁶ Submission in relation to: *Australian Hotels Association outline of position on 4 Yearly Review of Modern Awards in response to FWC Issues Paper [AM2014/1]*, page 3.

Award Flexibility

Background

The general object of the FW Act 2009 (the Act) is to provide ‘a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians’.⁷

Section 144(1) provides that each modern award must include a ‘flexibility term’ enabling an employee and his or her employer to agree on an individual flexibility arrangement (IFA) varying the effect of the award in relation to the employee and the employer. The stated objective of such arrangements is ‘to meet the genuine needs of the employee and employer’. An IFA has effect in relation to the employee and the employer as if the relevant modern award was varied by the flexibility arrangement. For the purposes of the FW Act the IFA is taken to be a term of the modern award.⁸

Subsections 144 (4) and (5) deal with the requirements pertaining to flexibility terms:

“Requirements for flexibility terms

(4) The flexibility term must:

(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and

(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and

(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.”

⁷ FW Act 2009, Division 2, Section 3.

⁸ Ibid, s.144(2)

Terms that must be included in each modern award are coverage terms, flexibility terms, terms about settling disputes, ordinary hours of work, base and full rates of pay for pieceworkers and automatic variation of allowances.⁹

A term that **may** be included in a modern award, under section 139 of the Act:

*'(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities.'*¹⁰

IFAs provide flexibility in the workplace, for the benefit of productivity and employment. The MAO provides a framework for their operation and underpins the need for workplaces to best utilise the possible benefits of IFAs in the workplace by the end users, as highlighted in the issue below.

Non-Monetary Benefits in IFAs

How an employee is better off overall in making an IFA does not necessarily equate to the employee benefiting in monetary terms only. The Explanatory Memorandum to the Fair Work Bill 2008 spells out that an employee's personal circumstances can also be taken into account when measuring whether the employee is better off, as explained below:

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- *Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;*
- *Josh genuinely agreed to the arrangement;*
- *the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.*¹¹ *[Emphasis added]*

⁹ Ibid, ss.143-149.

¹⁰ Ibid, s.139.

¹¹ Fair Work Bill 2008 Explanatory Memorandum, pp. 137-138

The Explanatory Memorandum goes on to explain in what circumstances non-monetary benefits are less likely to satisfy BOOT for the purposes of the IFA:

Because the value that a particular employee may place on a non-monetary benefit is important, it is less likely that an employee would be better off overall where the employer has initiated a request to agree an individual flexibility arrangement under which the employee gives up a monetary benefit in exchange for a non-monetary benefit. Similarly, it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged.¹²

As illustrated in the Explanatory Memorandum above, it is clear that non-monetary benefits may be taken into account for the purposes of BOOT where the non-financial benefits have been requested by the employee.

The issue of non monetary benefits was raised in the 2012 Transitional Review. The decision handed down by the Full Bench reflected:

'The uncertainty referred to relates to the treatment of what are described as 'non-monetary benefits' in the application of the BOOT. In this context reference was made to the apparent inconsistencies between the illustrative example on p.137 of the Explanatory Memorandum to the Fair Work Bill 2009; the FWO Best Practice Guide 3: 'Use of individual flexibility arrangements'; and the Bupa decision.

We have already referred to the Bupa decision in the context of dealing with VECCI's application to expand the scope of the model flexibility term to include the expression 'preferred hours option' (see paragraphs [126]-[136] of this decision).

We acknowledge that there is a degree of tension between the illustrative example in the Explanatory Memorandum, the FWO Best Practice Guide and the Bupa decision (albeit that the Bupa decision dealt with the NDT, not the BOOT). But we are not persuaded that it is appropriate for us, in these proceedings, to address that issue.

Observations about the application of the BOOT and the matters which can be taken into account in making such an assessment are best made in the context of a particular case, rather than in the abstract. Any reconsideration of the Bupa decision should be in an appropriate context, such as an application to approve an enterprise agreement, and any party seeking such a reconsideration should make application to have the matter referred to a Full Bench, pursuant to s.615A of the FW Act.

We do, however, think that the model flexibility term should be amended to make it clear that the reference to 'the employee being better off overall' in clause 7.3(b), refers to when the IFA is made.¹³

Whilst it was not appropriate to deal with non-monetary benefits in the Transitional Review, it remains an issue of ambiguity for employers and employees. We would respectfully request that it be dealt with as a common issue in the current 4 yearly review.

¹² Fair Work Bill 2008 Explanatory Memorandum, p 138

¹³ [2013] FWCFB 2170, paragraphs155-159.

Who we are

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

Appendix A

Award title	Award ID	Schedule
<i>Aboriginal Community Controlled Health Services Award 2010</i>	MA000115	Schedule E
<i>Aged Care Award 2010</i>	MA000018	Schedule E
<i>Air Pilots Award 2010</i>	MA000046	Schedule F
<i>Aircraft Cabin Crew Award 2010</i>	MA000047	Schedule E
<i>Airline Operations—Ground Staff Award 2010</i>	MA000048	Schedule F
<i>Airport Employees Award 2010</i>	MA000049	Schedule F
<i>Ambulance and Patient Transport Industry Award 2010</i>	MA000098	Schedule C
<i>Amusement, Events and Recreation Award 2010</i>	MA000080	Schedule F
<i>Animal Care and Veterinary Services Award 2010</i>	MA000118	Schedule E
<i>Aquaculture Industry Award 2010</i>	MA000114	Schedule F
<i>Architects Award 2010</i>	MA000079	Schedule C
<i>Asphalt Industry Award 2010</i>	MA000054	Schedule E
<i>Banking, Finance and Insurance Award 2010</i>	MA000019	Schedule F
<i>Book Industry Award 2010</i>	MA000078	Schedule B
<i>Broadcasting and Recorded Entertainment Award 2010</i>	MA000091	Schedule K
<i>Building and Construction General On-site Award 2010</i>	MA000020	Schedule E
<i>Business Equipment Award 2010</i>	MA000021	Schedule F
<i>Car Parking Award 2010</i>	MA000095	Schedule E
<i>Cement and Lime Award 2010</i>	MA000055	Schedule F
<i>Cemetery Industry Award 2010</i>	MA000070	Schedule F
<i>Children's Services Award 2010</i>	MA000120	Schedule E
<i>Cleaning Services Award 2010</i>	MA000022	Schedule H
<i>Clerks—Private Sector Award 2010</i>	MA000002	Schedule E
<i>Commercial Sales Award 2010</i>	MA000083	Schedule D
<i>Concrete Products Award 2010</i>	MA000056	Schedule E
<i>Contract Call Centre Award 2010</i>	MA000023	Schedule E
<i>Corrections and Detention (Private Sector) Award 2010</i>	MA000110	Schedule F
<i>Dredging Industry Award 2010</i>	MA000085	Schedule B
<i>Dry Cleaning and Laundry Industry Award 2010</i>	MA000096	Schedule G
<i>Educational Services (Post-Secondary Education) Award 2010</i>	MA000075	Schedule G
<i>Educational Services (Schools) General Staff Award 2010</i>	MA000076	Schedule F
<i>Educational Services (Teachers) Award 2010</i>	MA000077	Schedule C
<i>Electrical, Electronic and Communications Contracting Award 2010</i>	MA000025	Schedule F
<i>Electrical Power Industry Award 2010</i>	MA000088	Schedule F
<i>Fire Fighting Industry Award 2010</i>	MA000111	Schedule C
<i>Fitness Industry Award 2010</i>	MA000094	Schedule E
<i>Food, Beverage and Tobacco Manufacturing Award 2010</i>	MA000073	Schedule F

<i>Funeral Industry Award 2010</i>	MA000105	Schedule F
<i>Gardening and Landscaping Services Award 2010</i>	MA000101	Schedule F
<i>Gas Industry Award 2010</i>	MA000061	Schedule F
<i>General Retail Industry Award 2010</i>	MA000004	Schedule F
<i>Graphic Arts, Printing and Publishing Award 2010</i>	MA000026	Schedule G
<i>Hair and Beauty Industry Award 2010</i>	MA000005	Schedule F
<i>Health Professionals and Support Services Award 2010</i>	MA000027	Schedule F
<i>Higher Education Industry—Academic Staff—Award 2010</i>	MA000006	Schedule B
<i>Higher Education Industry—General Staff—Award 2010</i>	MA000007	Schedule H
<i>Horse and Greyhound Training Award 2010</i>	MA000008	Schedule D
<i>Horticulture Award 2010</i>	MA000028	Schedule E
<i>Hospitality Industry (General) Award 2010</i>	MA000009	Schedule H
<i>Hydrocarbons Field Geologists Award 2010</i>	MA000064	Schedule D
<i>Hydrocarbons Industry (Upstream) Award 2010</i>	MA000062	Schedule F
<i>Joinery and Building Trades Award 2010</i>	MA000029	Schedule F
<i>Journalists Published Media Award 2010</i>	MA000067	Schedule C
<i>Labour Market Assistance Industry Award 2010</i>	MA000099	Schedule E
<i>Legal Services Award 2010</i>	MA000116	Schedule E
<i>Live Performance Award 2010</i>	MA000081	Schedule F
<i>Local Government Industry Award 2010</i>	MA000112	Schedule F
<i>Mannequins and Models Award 2010</i>	MA000117	Schedule C
<i>Manufacturing and Associated Industries and Occupations Award 2010</i>	MA000010	Schedule F
<i>Marine Tourism and Charter Vessels Award 2010</i>	MA000093	Schedule E
<i>Marine Towing Award 2010</i>	MA000050	Schedule B
<i>Maritime Offshore Oil and Gas Award 2010</i>	MA000086	Schedule C
<i>Market and Social Research Award 2010</i>	MA000030	Schedule E
<i>Meat Industry Award 2010</i>	MA000059	Schedule F
<i>Medical Practitioners Award 2010</i>	MA000031	Schedule B
<i>Mining Industry Award 2010</i>	MA000011	Schedule F
<i>Miscellaneous Award 2010</i>	MA000104	Schedule F
<i>Mobile Crane Hiring Award 2010</i>	MA000032	Schedule E
<i>Nursery Award 2010</i>	MA000033	Schedule E
<i>Nurses Award 2010</i>	MA000034	Schedule C
<i>Oil Refining and Manufacturing Award 2010</i>	MA000072	Schedule F
<i>Passenger Vehicle Transportation Award 2010</i>	MA000063	Schedule E
<i>Pastoral Award 2010</i>	MA000035	Schedule D
<i>Pest Control Industry Award 2010</i>	MA000097	Schedule E
<i>Pharmaceutical Industry Award 2010</i>	MA000069	Schedule E
<i>Pharmacy Industry Award 2010</i>	MA000012	Schedule E
<i>Plumbing and Fire Sprinklers Award 2010</i>	MA000036	Schedule F
<i>Ports, Harbours and Enclosed Water Vessels Award 2010</i>	MA000052	Schedule B
<i>Poultry Processing Award 2010</i>	MA000074	Schedule E

<i>Premixed Concrete Award 2010</i>	MA000057	Schedule E
<i>Professional Diving Industry (Industrial) Award 2010</i>	MA000108	Schedule C
<i>Professional Diving Industry (Recreational) Award 2010</i>	MA000109	Schedule C
<i>Quarrying Award 2010</i>	MA000037	Schedule F
<i>Racing Clubs Events Award 2010</i>	MA000013	Schedule E
<i>Racing Industry Ground Maintenance Award 2010</i>	MA000014	Schedule E
<i>Real Estate Industry Award 2010</i>	MA000106	Schedule F
<i>Registered and Licensed Clubs Award 2010</i>	MA000058	Schedule G
<i>Restaurant Industry Award 2010</i>	MA000119	Schedule F
<i>Road Transport and Distribution Award 2010</i>	MA000038	Schedule F
<i>Road Transport (Long Distance Operations) Award 2010</i>	MA000039	Schedule D
<i>Salt Industry Award 2010</i>	MA000107	Schedule F
<i>Seafood Processing Award 2010</i>	MA000068	Schedule E
<i>Seagoing Industry Award 2010</i>	MA000122	Schedule C
<i>Security Services Industry Award 2010</i>	MA000016	Schedule E
<i>Silviculture Award 2010</i>	MA000040	Schedule D
<i>Social, Community, Home Care and Disability Services Industry Award 2010</i>	MA000100	Schedule H
<i>Sporting Organisations Award 2010</i>	MA000082	Schedule E
<i>State Government Agencies Administration Award 2010</i>	MA000121	Schedule E
<i>Stevedoring Industry Award 2010</i>	MA000053	Schedule F
<i>Storage Services and Wholesale Award 2010</i>	MA000084	Schedule E
<i>Supported Employment Services Award 2010</i>	MA000103	Schedule E
<i>Surveying Award 2010</i>	MA000066	Schedule E
<i>Telecommunications Services Award 2010</i>	MA000041	Schedule F
<i>Textile, Clothing, Footwear and Associated Industries Award 2010</i>	MA000017	Schedule H
<i>Transport (Cash in Transit) Award 2010</i>	MA000042	Schedule D
<i>Travelling Shows Award 2010</i>	MA000102	Schedule D
<i>Vehicle Manufacturing, Repair, Services and Retail Award 2010</i>	MA000089	Schedule G
<i>Waste Management Award 2010</i>	MA000043	Schedule E
<i>Water Industry Award 2010</i>	MA000113	Schedule F
<i>Wine Industry Award 2010</i>	MA000090	Schedule F
<i>Wool Storage, Sampling and Testing Award 2010</i>	MA000044	Schedule E