

SUMMARY OF SUBMISSIONS

This summary of submissions reflects the outcome of the conference held on 12 September 2017.

A Revised plain language exposure draft – *Restaurant Industry Award 2017* has been prepared and should be read with the revised summary of submissions. Tracked and un-tracked versions of the Revised plain language exposure draft – *Restaurant Industry Award 2017* are published on the Commission’s website.

ITEM	STATUS at 13/9/17	PARTY	DOCUMENT	CLAUSE (PLED)	SUMMARY OF ISSUE	NOTES
3	Full Bench to determine	Business SA	Sub-14/06/17 Para 16.1	Cl. 7	Facilitative provisions for flexible working practices Table 1 is inaccurate and should refer to clause 24.4(a) facilitative provision relating to time off instead of payment for overtime.	Reference not updated. Entire subclause intended to be facilitative.
5	Full Bench to determine	Business SA	Sub-14/06/17 Para 16.3	Cl. 7	Table is inaccurate and should refer to clause 26.8(a) facilitative provision relating to taking annual leave in advance.	Reference not updated. Entire subclause intended to be facilitative. [2015] FWCFCB 3406 at PN [411].
6	Full Bench to determine	Business SA	Sub-14/06/17 Para 16.4	Cl. 7	Table 1 is inaccurate and should refer to clause 26.9(c) facilitative provision relating to cashing out annual leave.	Reference not updated. Entire subclause intended to be facilitative. [2015] FWCFCB 3406 at PN [266].
13	Full Bench to determine	United Voice	Sub-08/06/17 Paras 36 – 39	Cl. 16.5	Current break clause places a deterrent cost on non-compliance when employees aren’t given a break. It is unfair for the draft breaks clause to place an onus on the worker	DC: The expression “is not allowed” does not imply that an employee must ask for a break.

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					to ask for a break (before the penalty rate is paid) rather than the current onus on the employer to give the employee a break because of the difference in power between employee/employer in the industry. Words 'is not allowed' should be replaced with 'is not given'.	For further discussion.
11	Clause 15.1(e) updated – issue resolved. Further submissions required regarding drafter's question.	Business SA	Sub-14/06/17 Para 19	Cl. 15(e)	Ordinary hours of work Draft clause 15.1(e) should be replaced with the wording of the current clause 31.2(d) to not alter the legal effect of the current provision.	Clause 15.1 updated. DC: Accepted. For “work” (where twice occurring) in clause 15.1(e) there is substituted “ordinary hours”. While this change reflects the original clause, it leaves unclear what the position is if overtime is worked immediately after finishing ordinary hours on one day or immediately before working ordinary hours on the next day. Is the effective minimum break reduced by the amount of overtime worked?
22	Further submissions required regarding interpretation	United Voice	Sub-08/06/17 Paras 48 – 50	Cl. 24.6	Allowance for distance work question The ‘ordinary rate of pay’ may include applicable penalties if the travel occurs at the appropriate time.	DC: Noted. For further discussion.

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	of “ordinary rate of pay”				The clause should be amended to clarify the ‘period of engagement’ is the period of engagement on distance work.	
		Business SA	Sub-14/06/17 Para 21		Allowances Reserves position regarding allowance for distance work.	
4	Resolved	Business SA	Sub-14/06/17 Para 16.2	Cl. 7	Table 1 should refer to clause 27.4(c) which allows an employer and an individual employee to change the remuneration method for work on public holidays.	Table 1 updated. Amendment made to PLED published on 22 August 2017. DC: Agreed.
7	Resolved	ABI and NSWBC	Sub-09/06/17 Para 4.1	Cl. 10.9	Part-time employment The clause is better located as a new cl.10.7 because it relates to written agreements or variations to a part-time employees pattern of work.	10.9 moved to 10.7. Clauses renumbered accordingly. Amendment made to PLED published on 22 August 2017. DC: Accepted.
10	Resolved	Business SA	Sub-14/06/17 Para 18	Cl. 13.4	Ordinary hours of work The wording of the second sentence in current clause 15.1 should be retained at clause 13.4 to provide clarity.	Clause updated. Amendment made to PLED published on 22 August 2017. DC: No objection to substituting “Where the law permits” for “If permitted under the law applying in the relevant place”.

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14	Resolved	ABI and NSWBC	Sub-09/06/17 Para 6.3	Cl. 16.7	More onerous wording in cl.16.7(c) “the employer must seek to ensure the breaks are spread evenly across the shift” should be inserted into the Exposure Draft.	Clause 16.7 updated to include words “make all reasonable efforts”. Amendment made to PLED published on 22 August 2017. DC: The suggested wording of “an even mix of work time and breaks” is inappropriate. No objection to substituting “make all reasonable efforts” for “seek” in clause 16.7(c).
23	Resolved	Business SA	Sub-14/06/17 Para 22	Cl. 26	Overtime rate Current clause 33.3 must be reproduced in this award because it is not present in the draft clause 24.3 or in general clause 24.	DC: The issue could be addressed by inserting a new subclause after clause 26.3 as follows “In computing overtime payments, overtime worked on any day stands alone from overtime worked on any other day.” For further discussion. PLED updated.
24	Resolved	ABI and NSWBC	Sub-09/06/17 Para 10.1	Cl. 27	Penalty Rates Suggests the wording “Introductory to Level 2” be adopted as heading of Column 3 in Table 6 to avoid confusion.	Column 3 heading of Table 6 updated. Amendment made to PLED published on 22 August 2017. DC: No objection to the suggested change.

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25	Resolved	Business SA	Sub-14/06/17 Para 23.1	Cl. 27.2(c)	Penalty rates The note accompanying Table 6 in clause 25.2(c) is unnecessary.	Clause updated. Amendment made to PLED published on 22 August 2017. DC: Agreed. Note deleted.
26	Resolved	Business SA	Sub-14/06/17 Para 23.2	Cl. 27.3	Penalty rates not cumulative The ‘but for’ statement should be reworded to “Where more than one penalty would be payable for hours worked at a particular time the employer must pay the employee the higher of the penalties, but not more than one.”	Clause 27.3 updated. Amendment made to PLED published on 22 August 2017. DC: Accepted. Clause to be reworded with the addition of a comma after “time”.
28	Resolved – add the words “paid annual” before “leave” in cl.28.4(a)(ii)	Business SA	Sub-14/06/17 Para 24.1	Cl. 28.4	Annual leave – Temporary close-down provisions Draft provisions are unnecessarily long and repetitive. Current provisions are clear and concise.	DC: Request that BSA provides details of their comment. For further discussion. PLED updated.
29	Resolved	Business SA	Sub-14/06/17 Para 25.1	Cl. 32.2	Public holidays Clause should include a reference to the section of the enterprise or workplace to be similar to the current provision.	Clause 32.2 updated. Amendment made to PLED published on 22 August 2017. DC: Agreed. Insert “, or section of a workplace,” after “workplace”.

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30	Resolved	ABI and NSWBC	Sub-09/06/17 Para 12.1 – 12.2	Schedule A A.3.8(c)	Classification Structure and Definitions “Cooks” should be reinserted at Sched A.3.8(c)	A.3.8(c) updated. Amendment made to PLED published on 22 August 2017. DC: Given A.3.7, “other cooks and kitchen employees” to be substituted for “kitchen employees” in A.3.8(c).
31	Resolved	ABI and NSWBC	Sub-09/06/17 Para 12.1 – 12.2	Schedule A A.5.3	The re-ordering of the indicative tasks list at Sched A.5.3 should be amended to reflect the current Award requirements where A.5.3(g), (h) and (i) an employee ‘may’ perform these tasks.	A.5.3 updated. Amendment made to PLED published on 22 August 2017. The issue at para 12.2 may be dealt with by inserting a line before paragraph (e) as follows: “and who may perform indicative tasks such as”.
27	Resolved Parties agree that “7 days a week” reflects the intention of the modern award. Parties may make separate application to	United Voice	Sub-08/06/17 Paras 51 – 54	Cl. 28.2	Annual leave question Reference to “7 hours a shift” should not read “7 days a week” due to suspected drafting error dating to Award Modernisation. The intended wording of (the then LHMU) would have been: “For the purpose of the additional week of leave provided by the NES, a shift worker is a seven day shift worker is regularly rostered to work on Sundays and public	DC: Noted. Clause 28.2 provisionally updated. Amendment made to PLED published on 22 August 2017. For further discussion.

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	change the wording to “7 hours a shift”.				holidays.”	
		ABI and NSWBC	Sub-09/06/17 Para 11.1		Additional Annual Leave for Shiftworkers “7 hours a shift” should amended to ‘7 days a week’.	
		Business SA	Sub-14/06/17 Para 24.2		Reserve position.	
		Business SA	Sub-05/09/17 Para 2		Submits current award clause 35.3 deals with matter in one sentence. PLED as ‘ostensibly’ dealing with the matter as it expands the legal obligations of the close-down clause. Submits PLED has changed what notice must be provided.	
18	In abeyance RIA 2010 clause has been referred to Annualised Salary Full Bench – AM2016/13 [2016] FWC 3520	ABI and NSWBC	Sub-09/06/17 Para 8.1	Cl.-23.2	Annualised Salary Arrangements The words ‘an agreement must be one that is genuinely made without coercion or duress’ should be removed because it changes the legal effect of the clause.	DC: Issue is opposed. For further discussion.
		United Voice	Reply sub-22/06/17 Para 27-28	Cl.-23.2	Disagrees with ABI and NSW’s submission.	

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19	In abeyance (as item 18)	United Voice	Sub-08/06/17 Para 42	Cl.-23.3	Annualised salary arrangements In the calculation of the annualised salary clause words ‘multiplied by 52’ should be retained to ensure the correct calculation.	DC: Clause 23.3 contains the words “over the year” which provides the same effect as “multiplied by 52”. For further discussion.
1	Withdrawn	United Voice	Sub-08/06/17 Paras 30 – 33	Cl. 2	Definitions – rostered day off Definition of ‘rostered day off’ changes the current entitlement to the detriment of employees because the time off provided by a ‘full’ day off is likely to be longer than the continuous 24 hour period identified in the draft. If definition of rostered day off is included, there should be reference to ‘full days off’ in order to be consistent with the current award’s rostering provisions.	DC: Clause 15.1(f) of the PLED provides that an employee must have a minimum of 8 full days off work in a 4 week period. This entitlement is unaffected by the definition of “rostered day off”. For further discussion.
2	Withdrawn	Business SA	Sub-14/06/17 Para 15.1	Cl. 2	Definitions – spread of hours Draft ‘spread of hours’ definition should retain the current award’s wording but with the word ‘duty’ replaced with ‘work’.	DC: The submission seeks to distinguish between “duty” and “work”. Ordinary hours, however, are referred to in terms of work and not hours on duty. For further discussion.
8	Withdrawn	United Voice	Sub-08/06/17 Paras 3 – 10	Cl.11	Casual employment The modified casual employee entitlement doesn’t reflect award-defined features of a casual worker’s	DC: If an employer is not engaging a person as a full-time or part-time employee, the employer must engage them as a

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					<p>employment because of the catch-all phrasing used in draft. Reference to engagement and payment as a casual would be removed – variation would regularise behaviour that would currently contravene an award.</p> <p>Currently a casual employee must be engaged as such and paid a casual loading. Under this formulation, employment status is determined by reference to employee’s contract of employment and the award. New clause largely leaves employment status to discretion of employer.</p> <p>Requirement that casual employee not full-time or part-time implied and evidence by casual loading being described as ‘compensation for’ benefits of full-time and part-time employment. Employment must have award-defined features to be a casual employee. Referred to <i>Nardy House v Perry</i>.</p> <p>[2016] FWC 73 (appealed [2016] FWCFB 943, reasons [2016] FWCFB 1621)</p> <p>ED reduces casual employment to a catch-all type of employment for employees whose employer has not specifically offered them</p>	<p>casual employee.</p> <p>The casual payment requirement then applies as set out in clause 11.2. It is not open to an employer to engage an employee as a casual if having regard to the features of their employment they are covered by clause 9 or 10.</p> <p>For further discussion.</p>

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					employment under clauses 9 or 10.	
9	Withdrawn	Business SA	Sub-14/06/17 Para 17	Cl. 11.2	Casual employment The explanatory note about casual loading in clause 11.2 is inappropriate because it is previously mentioned. It could instead be moved into its own clause i.e, a new clause 11.3.	DC: The Note explains the reason for the loading. It is sufficient for the requirement to pay the loading to be in a substantive provision. For further discussion.
12	Withdrawn	United Voice	Sub-08/06/17 Paras 34 – 35	Cl. 16.3	Breaks Draft provision of timing of breaks does not correctly identify the time when breaks must be taken. Phrase ‘or later than the first 6 hours of work’ should be deleted from draft. Current award form is preferable.	DC: Clause 16.3 of the PLED is to the same effect as clause 32.1 of the current award. For further discussion.
15	Withdrawn	Business SA	Sub-14/06/17 Para 20	Cl. 18.1	Minimum rates Table 3 should have all relevant information for a particular classification in a particular classification level contained in a single row for clarity.	DC: The Table would look busy if every entry contains the dollar amounts. The dollar amounts are set out in relation to Levels.
16	Withdrawn	United Voice	Sub-08/06/17 Para 40 – 41	Cl. 18.3	Apprentice rates Current description of minimum wages for apprentices should be retained because it better explains the	DC: Having regard to the definition of “standard rate” in clause 2, the PLED is clear and simply expressed.

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					nature of entitlement.	
17	Withdrawn	ABI and NSWBC	Sub-09/06/17 Para 7.1	Cl. 22.4	Payment of Wages In cl. 22.4, the omitted words ‘if they so desire’ should be amended to ‘if desired’.	DC: Clause 22.4 gives an entitlement. It is inappropriate to add “if desired”. An employee may agree to waive the entitlement. For further discussion.
20	Withdrawn	United Voice	Sub-08/06/17 Paras 43 – 45	Cl. 23.3, Cl. 23.5 and Cl. 23.11	Annualised salary arrangements clause is a substantive variation to the Restaurant Award and reduces the protective power of the Award. The effect of the changes is to reduce the number of potential ways an employer may breach the Award if they did not pay an employee an amount sufficient to cover what the employee would have been entitled if all award overtime and penalty rate payment obligations had been complied with. The current award refers to a number of clauses where each breach is actionable while the draft wording means there is only one actionable breach.	DC: The point being made is not clear given that in each case the employer is required to make up the difference and keep records for that purpose. For further discussion. Withdrawn its concern. See Sub-05/09/17
21	Withdrawn	United Voice	Sub-08/06/17 Para 46 – 47	Cl. 24.5(a)	Special clothing allowance Provision should be amended to describe the entitlements provided by the current award rather than	DC: The submission does not state how the PLED does not properly describe the entitlements. For further discussion.

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					<p>condense a number of specific entitlements in the current award.</p> <p>Special clothing allowance clause should be amended as follows: “special clothing means any article of clothing that the employer requires the employee to wear or that it is necessary for the employee to wear including: dinner suit and evening dress; waterproof or protective clothing; coats, dresses caps, aprons, cuffs; and/or any other article of clothing; but does not include black and white clothing, shoes hosiery and socks.”</p>	<p>Withdrawn its concern. See Sub-05/09/17</p>