



STATEMENT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Plain language re-drafting – Hospitality Industry (General) Award 2010 (AM2016/15, AM2014/272)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 25 OCTOBER 2017

4 yearly review of modern awards – plain language project – Hospitality Industry (General) Award 2010 – plain language re-drafting of award-specific clauses.

[1] This Statement sets out the next steps in the plain language re-drafting of the *Hospitality Industry (General) Award 2010*¹, following the conference held on 12 September 2017.

[2] A plain language exposure draft of the *Hospitality Industry (General) Award 2017*² was published on 27 April 2017. Submissions and reply submissions were received in relation to the published draft.

[3] A further plain language exposure draft,³ containing certain agreed terms, was published on 22 August 2017. A Statement⁴ was issued on the same date inviting interested parties to file further information in respect of matters raised by the drafter in response to the initial submissions. A Summary of Submissions was published on 8 September 2017.

[4] A conference was convened on 12 September 2017 (the September conference) and the following organisations attended:

- Australian Hotels Association (AHA);
- Accommodation Association of Australia;
- Motor Inn, Motel and Accommodation Association;
- United Voice;
- ABI and New South Wales Business Chamber (ABI);
- Business SA; and
- Clubs SA.

[5] Some 95 issues were raised in relation to the plain language exposure draft. At the September conference the parties were asked to confirm the status of the items listed in the Summary of Submissions.

[6] A revised Summary of Submissions reflecting the status of each item raised and a separate document detailing each outstanding issue have been published today along with this Statement. The status of each issue is set out below:

(i) Withdrawn

[7] Items 1, 2, 3, 4 (in part), 16, 18, 21, 31, 32A, 33 (in part), 36, 38, 44, 57, 66, 67, 72, 74, 78, 79, 80, 87, 92 and 94 of the Summary of Submissions⁵ have been withdrawn.

(ii) Resolved

[8] Items 5, 6, 8 (in part), 9, 10, 11, 13, 23, 24, 25, 26, 27, 32, 37, 38A, 42, 45, 50, 52, 54, 55, 58, 62, 64, 65, 68 (in part), 70, 75, 76, 81, 82, 83, 88, 88A, 89 and 90 of the Summary of Submissions⁶ have been resolved, either as a result of a party’s submissions being accepted or by the adoption of a proposal advanced by the drafter. We agree with the manner in which they have been resolved.

(iii) Outstanding items

[9] Items 4 (in part), 7, 8, 12, 14, 15, 17, 19, 20, 22, 28, 29, 30, 33 (in part), 34, 35, 39, 40, 41, 43, 46, 47, 48, 49, 51, 53, 56, 59, 60, 61, 63, 67A, 68 (in part), 69, 71, 73, 77, 84, 85, 86, 91, 93 and 95 of the Summary of Submissions⁷ are outstanding.

[10] Item 8 relates to Table 1 in clause 7 of the plain language exposure draft. Clause 7.1 notes that the award contains facilitative provisions which allow agreement between an employer and an individual employee, or the majority of employees, as to how specific award provisions are to apply at the workplace. The elements of item 8 that relate to missing information have been resolved by adding the reference those facilitative clauses in Table 1. The award clauses that have facilitative provisions are set out in Table 1, as follows:

Table 1—Facilitative provisions

Clause	Provision	Agreement between an employer and:
15.2(B) & (C)	Catering in remote locations	the majority of employees
15.3(a)	Make-up time (introduction of system of make-up time)	the majority of employees
15.3(b)	Make-up time (agreement to take make-up time)	an individual employee
23.1	<u>Weekly or fortnightly pay periods</u>	<u>an individual employee</u>
23.2	<u>Payment of wages</u>	<u>the majority of employees</u>
28.5	Time off instead of payment for overtime	an individual employee

Clause	Provision	Agreement between an employer and:
29.4(c)	<u>Additional provisions for work on public holidays</u>	<u>an individual employee</u>
30.9	Annual leave in advance	an individual employee
30.10	Cashing out of annual leave	an individual employee
34.2	<u>Substitution of public holidays by agreement</u>	<u>the majority of employees</u>

[11] The elements of item 8 that remain unresolved relate to time off instead of payment for overtime, annual leave in advance and cashing out of annual leave. Business SA submitted that, as a matter of consistency, each of the facilitative provisions in Table 1 should provide the ‘pinpoint reference’ to the facilitative provision within the relevant clause. The Plain Language Full Bench determined a similar issue in the decision⁸ issued on 24 October 2017 regarding the plain language exposure draft of the *restaurant Industry Award 2017* (Restaurant Industry plain language exposure draft). The Full Bench’s reasoning is set out at paragraphs [10] to [15] and its decision is set out at paragraph [16], as follows:

‘We are not inclined to make the changes proposed by Business SA. It seems to us that in respect of each of the three matters set out above (at paragraph [12]) it is the entire subclause which is intended to be facilitative. This view is consistent with the decisions which determined some of the substantive provisions contained in these award terms.’⁹

[12] In view of the above decision Business SA is asked to confirm whether it wishes to press Item 8.

[13] Items 47, 48 and 49 concern clause 24 of the plain language exposure draft. Clause 24 deals with annualised salary arrangements. The comparable provision in the current award is at clause 27.1. United Voice has applied to vary aspects of clause 27.1. The application has been referred to the Annualised Salary Full Bench for determination, in the context of a broader review of all annualised salary terms in modern awards.¹⁰ At the September conference it was generally agreed that the plain language redrafting of clause 27.1 of the current award should be deferred until the Annualised Salaries Full Bench has determined the matters before it.¹¹

(iv) Further information requested

[14] During the September conference¹² further information was sought in relation to items 4, 35, 62 and 91 of the Summary of Submissions.¹³

Clause 2—Definitions

[15] Item 4 relates to clause 2 of the plain language exposure draft. The AHA has raised a concern regarding the definition of “appropriate level of training” and the exclusion of casino gaming employees from the definition. United Voice had reserved its position on the matter.

During the course of the September conference¹⁴ the parties were invited to clarify their position.

[16] United Voice did not provide further information clarifying their position; however, Business SA provided a submission¹⁵ agreeing with AHA's submission¹⁶ regarding the exclusion of casino gaming employees from the definition of "appropriate level of training". AHA submitted that the definition should not exclude casino gaming employees, particularly when no other definition more directly defines the appropriate level of training for them.

[17] I note that the definition of 'appropriate level of training' for casino gaming employees is located in Schedule D to the current award (at clause D.3.1).

[18] The definition of 'appropriate level of training' in clause 2 of the plain language exposure draft was not intended to exclude casino gaming employees; rather, when read in conjunction with Note 2, the intention was to point the reader to the definition contained in Schedule A to the plain language exposure draft. The particular definition of 'appropriate level of training' for casino gaming employees was inadvertently excluded from clause A.3.1 of Schedule A to the plain language exposure draft.

[19] To address this issue it is *proposed* a re-drafted definition of 'appropriate level of training' for casino gaming employees will be inserted into clause A.3.1 of Schedule A to the plain language exposure draft, as follows:

'Appropriate level of training in relation to a casino gaming employee, means that the employee:

- has completed an appropriate training program accredited by the AQF; or
- has completed training to a level or standard imposed by a statutory gaming licensing authority; or
- has been assessed by a qualified skills assessor as having skills at least equivalent to those attained through training referred to in paragraph (a) or (b); or
- at 1 January 2010, had been doing the work of a particular classification for a period of at least 3 months.'

Clause 16—Breaks

[20] Item 35 concerns clause 16 of the plain language exposure draft. Items 34 and 35 raise the same concern, in essence, that the proposed wording substantively changes the current provisions and will alter the legal effect of the clause. The drafter proposed a solution to item 34 which would affect item 35 and also item 33. The details of the issues are listed in the revised Summary of Submissions.¹⁷

[21] At the September conference, Business SA accepted the variation proposed in respect of item 34, that the words "request in writing" be added at clause 16.2.¹⁸ At item 35 a variation had been previously proposed, which was simpler than the proposed variation at item 34. At the September conference interested parties were invited to file further submissions in relation to this issue. ABI submitted that they would accept the proposed variation at item 35.

[22] The three items are linked and the variations proposed do not clearly resolve all issues. The issue relating to the insertion of the word “rest” in item 33 was withdrawn, but part of the item remains outstanding, namely, the issues relating to clauses 16.4, 16.5 and 16.6. Items 34 and 35 have not been fully resolved. There are two conflicting options for redrafting the clause and it appears that both have been accepted by the parties.

[23] Issues relating to clause 16 of the plain language exposure draft will need to be considered together. Items 33, 34 and 35 remain outstanding until the clause can be considered in its entirety and each issue resolved.

Clause 28—Overtime

[24] Item 62 relates to clause 28 of the plain language exposure draft. Business SA contended that the provision should include wording which provides that an employer may require a non-casual employee to work reasonable overtime, as reflected in current award at clause 33.1.

[25] The provision in the current award is at clause 33.1:

33.1 Reasonable overtime

- (a) Subject to clause 33.1(b) an employer may require an employee other than a casual employee to work reasonable overtime at overtime rates.

[26] The comparable provision in the plain language exposure draft is at clause 28:

28. Overtime

NOTE: Under the [NES](#) (see section 62 of the [Act](#)) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.

28.1 Payment of overtime

- (a) An employer must pay a full-time employee at the overtime rate for any time worked in excess of their ordinary hours.

[27] It was *proposed* that a new clause 28.1 be inserted above the note, with subsequent clauses being reordered accordingly, as follows:

28. Overtime

28.1 An employer may require a full-time or part-time employee to work additional hours.

NOTE: Under the [NES](#) (see section 62 of the [Act](#)) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.

[28] At the September conference Business SA stated that the variation appeared to address their concern but would notify the Bench if they identified any issues.¹⁹ ABI later accepted the proposed wording and the movement of the note in clause 28.1.²⁰ Business SA later noted

that they could not identify any issue with the suggested wording nor with the new location of the note.²¹

[29] On the basis of the parties' further submissions in relation to this item, the item is resolved. The plain language exposure draft will be amended accordingly.

Schedule D—School-based apprentices

[30] Item 91 relates to Schedule D of the plain language exposure draft. AHA pressed the issue and offered to provide details of the terminology used across the States²². Further submissions were filed²³ in which the AHA states:

“The AHA proposes that as an alternative to including the numerous terms used to describe an apprentice training agreement in Schedule D, a new definition be inserted into clause 2 to define the term ‘Training Agreement’ in Schedule D.2 and D.6. The proposed definition is:

Training Agreement means the apprenticeship training arrangement, however termed, relevant to the State and Territory apprenticeship legislation entered into by an apprentice and an Employer.

The AHA wishes to note that clauses 12.6, 12.7 and 12.8 in the Exposure Draft of 22 August 2017 use the term ‘Training Contract’ and in line with the above, the AHA submits that the words ‘Training Contract’ be replaced with the words ‘Training Agreement’.”

[31] Interested parties are invited to consider the AHA's proposal. This item will be discussed at the next conference.

(v) *Identical terms to the Restaurant Industry plain language exposure draft*

The plain language exposure draft contains a number of provisions which are in identical terms to those in the Restaurant Industry Award plain language exposure draft. At the September conference it was decided to deal with certain issues in the same way in each award. For example, issues relating to annualised salary will be dealt with in the same way in each award as have been issues relating to clause 7. Similarly, the issue relating to substituting the words “ordinary hours” for the word “work” clause 15.1 of the Restaurant Industry plain language exposure draft is identical to the issue relating to clause 15.4 of the plain language exposure draft and has been dealt with in the same way.

[32] It is *proposed* that the following clauses of the plain language exposure draft be amended to reflect the terms in the Restaurant Industry plain language exposure draft.

Clause 13—Junior employees

[33] Clause 13 of the plain language exposure draft relates to junior employees. Clause 13.4 is in identical terms to clause 13.4 of the Restaurant Industry plain language exposure draft. The proposed variation at item 10 of the Restaurant Summary of Submissions²⁴ was accepted and the clause was amended. On that basis, clause 13.4 of the plain language exposure draft will be *provisionally* amended as follows:

13.4 ~~Where the law permits, If permitted under the law applying in the relevant place~~ junior employees may work in a bar or other place where liquor is sold or dispensed.

Clause 16—Breaks

[34] Clause 16 of the plain language exposure draft relates to breaks. Clause 16.3 is similar in terms to clause 16.7(c) of the Restaurant Industry plain language exposure draft. The proposed variation at item 14 of the Restaurant Summary of Submissions²⁵ was accepted and the clause was amended. On that basis, clause 16.3 of the plain language exposure draft will be *provisionally* amended as follows:

- 16.3** In rostering the additional paid rest breaks, the employer must ~~seek~~ **make all reasonable efforts** to ensure that breaks are spread evenly across the shift.

Clause 29—Penalty rates

[35] Clause 29 of the plain language exposure draft relates to penalty rates. Note 1 of Clause 29.2(b), is identical in terms to Note 1 in clause 27.2(c) of the Restaurant Industry plain language exposure draft. The proposed variation at item 25 of the Restaurant Summary of Submissions²⁶ was accepted and Note 1 was deleted. On that basis, Note 1 at clause 29.2(b) in the plain language exposure draft will be *provisionally* deleted.

[36] Clause 29.3 the plain language exposure draft is identical in terms to clause 27.3 of the Restaurant Industry plain language exposure draft. The proposed variation at item 26 of the Restaurant Summary of Submissions²⁷ was accepted and the clause was amended. On that basis, clause 29.3 of the plain language exposure draft will be *provisionally* amended.

[37] The accepted wording creates a duplication of the obligation expressed at clause 29.3(b). In order to eliminate the duplication it is suggested that the proposed clause 29.3(b) be deleted and clause 29.3(c) be renumbered. Clause 29.3 of the plain language exposure draft will be *provisionally* amended as follows:

29.3 Penalty rates not cumulative

- (a) Clause 29.3 applies ~~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, but for it, more than one penalty would be payable for hours worked at a particular time.~~
- ~~(b) The employer must pay the employee the higher of the penalties but not more than one.~~
- (b)(e) However, any penalty payable under clause 16.5 (Breaks) is payable in addition to the higher of any other penalties payable in accordance with paragraph (a).

Clause 30—Annual leave

[38] Clause 30 of the plain language exposure draft relates to annual leave. Clause 30.4 is identical in terms to clause 28.4 of the Restaurant Industry plain language exposure draft. Item 28 of the Restaurant Summary of Submissions²⁸ was discussed at the September conference and was resolved by adding the words “paid annual” before “leave in clause 28.4(ii). On that basis, clause 30.4 of the plain language exposure draft will be *provisionally* amended as follows:

30.4 Temporary close-down

- (a) Clause 30.4 applies if an employer:
- (i) intends to close down its operations at all or part of a workplace for a particular period (**temporary close down period**); and
 - (ii) wishes to require affected employees to take **paid annual** leave during that period.

Clause 34—Public holidays

[39] Clause 34 of the plain language exposure draft relates to public holidays. Clause 34.2 is identical in terms to clause 32.2 of the Restaurant Industry plain language exposure draft. Item 29 of the Restaurant Summary of Submissions²⁹ was accepted and the clause was amended. On that basis, clause 34.2 of the plain language exposure draft will be *provisionally* amended as follows:

34.2 Substitution of public holidays by agreement

The employer and **the majority of employees** ~~a majority of the employees~~ at a workplace, **or section of a workplace**, may agree to substitute another day for a public holiday.

(vi) *Other matters*

Clause 15—Ordinary hours of work – FWC research

[40] Item 30 relates to clause 15 of the plain language exposure draft. Clause 15.2 relates to catering in remote locations. Business SA noted that neither the current award nor the plain language exposure draft has a definition of “remote location” for the purpose of clause 15.2. At the September conference³⁰ the Commission offered to undertake some research on the definition of the phrase and the history of the clause.

[41] The *Hospitality Industry (General) Award 2010* was produced as a result of the modernisation process in AM2008/4.³¹ An exposure draft of the proposed modern award was published on 12 September 2008³². There was no clause relating to catering in remote locations in that draft. A decision was issued on 19 December 2008³³ and the Full Bench discussed the catering industry, liquor and accommodation industry and restaurants at paragraph [113] to [144]. At para [142], in relation to Hours of Work, the Full Bench stated:

“[142] We have added a clause directed to accommodating, by agreement, working arrangements for caterers servicing remote locations, such as are presently available under the *Industrial Catering, Cleaning and Incidental Services (AWU and LHMU) Award 2000*.³⁴ [AP834748]

[42] A search of the *Industrial Catering, Cleaning and Incidental Services (AWU and LHMU) Award 2000* does not reveal any similar clause relating to catering in remote locations. Nor does a search of submissions lodged between September and December 2008³⁵ reveal any similar clause.

[43] A search of modern awards located a definition for “remote work” in the *Mining Industry Award 2010*, *Corrections and Detention (Private Sector) Award 2010* and the *Hydrocarbons Industry (Upstream) Award 2010* as follows:

‘**remote work** means work required to be performed in any location that is operated by the employer as a remote location, including but not limited to sites operating on a fly in/fly out, drive in/drive out (FIFO/DIDO) or bus in/bus out basis’

[44] A further search uncovered a decision³⁶ issued on 16 January 2002 which dealt with a dispute in relation to remote localities allowances. The dispute resulted in the making of an award known as the *Telstra (Remote Locality) Award 2002*³⁷. Clause 7.4 of that award offers a definition (of sorts) for “locality”. Clause 7.4 states:

‘**7.4** Any reclassification or declassification of a Locality shall be determined having regard to:

7.4.1 the isolation of the Locality, including but not limited to:

7.4.1 (i) its distance from the nearest capital city; access to and from the Locality by road, rail and air;

7.4.1 (ii) the ease of access to, and cost of, amenities within the Locality, including electricity, gas, water, schooling, transport and food.

7.4.2 the climate of the Locality, as determined by the Bureau of Metrology;

7.4.3 the cost of living of the Locality when compared to the average cost of living in Australia;

7.4.5 the population size of the Locality.’

[45] This issue will be discussed at the next conference.

Clause 20—National training wage

[46] In accordance with determination³⁸ issued on 21 June 2017 a new provision relating to the National training wage was inserted into the current award and Schedule F of the current award was deleted. The same provision has inserted into the plain language exposure draft at clause 20 and Schedule F has been deleted.

Clause 34—Public holidays and Schedule I—2017 Part-day Public Holidays

[47] Clause 34 of the plain language exposure draft relates to public holidays. The comparable clause in the current award is Clause 37. Clause 37.1(c) of the current award relates to arrangements for part-time employees and was inserted into the current award as a result of a decision³⁹ issued on 4 June 2010. The provision was not included in the first draft of the plain language exposure draft. It is now proposed that a new subclause clause 34.4 be inserted into the plain language exposure draft as follows:

34.4 Public holiday arrangements for part time employees

- (a) Clause 34.4 applies if under an agreement under clause 10.5, as varied under clause 10.6, a part-time employee is to work on a day that is a public holiday.
- (b) The part-time employee is entitled to be absent from their employment on that day.
- (c) If the part-time employee is absent in accordance with paragraph (b), the employer must pay the employee for the ordinary hours that the employee was to work that day.
- (d) A part-time employee who works on that day is entitled to be paid in accordance with clause 29.

[48] Schedule I to the plain language exposure draft relates to 2017 Part-day Public Holidays; however, there is no reference to that subject matter in the body of the award. It is proposed that a new subclause 34.5 be inserted into the plain language exposure draft as follows:

Part-day public holidays

For provisions relating to part-day public holidays see Schedule I—2017 Part day Public Holidays.

Schedules F, G, H and I

[49] As mentioned above, in accordance with the determination⁴⁰ issued on 21 June 2017, Schedule E was deleted from the current award. The equivalent Schedule of the plain language exposure draft, Schedule F, has been deleted. The Schedules will be reordered such that they are in the order that the relevant clauses appear in the body of the award.

Next Steps

[50] At the September conference⁴¹, it was proposed that there be further conferences in order to work towards a position where the remaining issues in dispute are clearly identified and the parties are given an opportunity to advance their positions before final determination.

[51] A further conference will be set down for **9:30am on Wednesday, 20 December 2017**.

[52] If any party requests a video link to another location a request should be made in writing to chambers.ross.j@fwc.gov.au.

[53] To assist in the discussion at the Conference interested parties are invited to make submissions in respect of the following matters:

- the categorisation of the items listed in paragraphs [7] and [8];
- the list of outstanding items published today (see paragraph [9] above);
- the revised Summary of Submissions published today;

- the revised plain language exposure draft of the *Hospitality Industry (General) Award 2017* (published today), in particular:
 - clause A.3.1 of Schedule A (see paragraph [19]);
 - clause 28.1 (see paragraphs [24] to [29]);
 - the variations made to reflect the terms of the Restaurant Industry plain language exposure draft (see paragraphs [32] to [40]);
 - the variations discussed at paragraphs [47] to [50]; and
 - the AHA's proposal in respect of Schedule D (see paragraphs [30] to [31]).

[54] Business SA is asked to confirm whether it wishes to pursue Item 8.

[55] Submissions are to be filed by no later than **4.00pm Monday, 20 November 2017**. Any party wishing to file a submission in reply should do so by no later than **4.00pm Monday, 11 December 2017**. Submissions should be sent to amod@fwc.gov.au.

PRESIDENT

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¹ [Hospitality Industry \(General\) Award 2010](#)

² [Plain language exposure draft – Hospitality Industry \(General\) award 2017](#)

³ [Revised plain language exposure draft – Hospitality Industry \(General\) Award 2017](#)

⁴ [\[2017\] FWCFB 4118](#)

⁵ [Hospitality Summary of Submissions – 22 August 2017](#)

⁶ [Hospitality Summary of Submissions – 22 August 2017](#)

⁷ [Hospitality Summary of Submissions – 22 August 2017](#)

⁸ [2017] FWCFB 5397

⁹ Ibid at [16]

¹⁰ See generally the Statement issued on 31 May 2016 [\[2016\] FWC 3520](#)

¹¹ [Transcript of conference of 12 September 2017](#) at paragraph 301-304

¹² [12 September 2017 conference transcript](#)

¹³ [Hospitality Summary of Submissions – 22 August 2017](#)

¹⁴ [Transcript of conference of 12 September 2017](#) at paragraph 185-191

¹⁵ [Business SA further submissions](#) – 22 September 2017

¹⁶ [AHA submissions](#) – 5 September 2017

¹⁷ [Hospitality Summary of Submissions – 22 August 2017](#)

¹⁸ [12 September 2017 conference transcript](#) – PN336-343

¹⁹ [12 September 2017 conference transcript](#) – PN397-402

- ²⁰ [ABI&NSWBC further submissions](#) – 22 September 2017
- ²¹ [Business SA further submissions](#) – 22 September 2017
- ²² [12 September 2017 conference transcript](#) – PN284-289
- ²³ [AHA further submissions](#) – 2 October 2017
- ²⁴ [Restaurant Summary of Submissions – 22 August 2017](#)
- ²⁵ [Restaurant Summary of Submissions – 22 August 2017](#)
- ²⁶ [Restaurant Summary of Submissions – 22 August 2017](#)
- ²⁷ [Restaurant Summary of Submissions – 22 August 2017](#)
- ²⁸ [Restaurant Summary of Submissions – 22 August 2017](#)
- ²⁹ [Restaurant Summary of Submissions – 22 August 2017](#)
- ³⁰ [12 September 2017 conference transcript](#) – PN373-377
- ³¹ [AIRC - AM2008/4](#)
- ³² [Hospitality Exposure Draft – 12 September 2008](#)
- ³³ [\[2008\] AIRCFB 1000](#)
- ³⁴ [AP834748](#)
- ³⁵ [AIRC - Award Modernisation - Catering etc - All documents](#)
- ³⁶ [Decision – PR913268 – 16 January 2002](#)
- ³⁷ [Telstra \(Remote Locality\) Award 2002](#)
- ³⁸ [PR593806](#)
- ³⁹ [\[2010\] FWA 4114](#)
- ⁴⁰ [PR593806](#)
- ⁴¹ [12 September 2017 conference transcript](#) – PN450-457