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Business SA Submissions in Reply

*Technical and Drafting
Issues Related to Sub-
Group 4D, 4E and 4F
Exposure Drafts*

22 February 2017

Executive Summary

Business SA is pleased to provide these submissions in reply. This submission will respond to submissions made by other employer and employee parties in regard to Group 4D, 4E and 4F exposure drafts. To assist in navigating this document each exposure draft response has been placed in a table signifying: the party making the submission; a **link to that party's submission; the page or paragraph number of that party's specific submission; the exposure draft clause which that specific submission applies to; the title of that clause; and Business SA's response.** Where Business SA wishes to make further comment, clear reference has been provided to each discussion point.*

Why this matter is important to South Australian businesses

As South Australia's Chamber of Commerce and Industry, Business SA is the peak business membership organisation in the State. Our members are affected by this matter in the following ways:

- South Australian businesses will be impacted by any changes to the award system
- In the current economic environment South Australian employers need certainty that their interests will be represented when changes to the award are considered
- South Australian employers and employees will benefit from a well-considered modern award review enabling both parties to better understand their rights and responsibilities

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

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Parties and Abbreviations

- Association of Professional Engineers, Scientists and Managers, Australia (APESMA)
- Australian Business Industrial and the NSW Business Chamber (ABI)
- Australian Industry Group (AIG)
- Australian Federation of Employers and Industries (AFEI)
- **Australian Manufacturing Workers' Union (AMWU)**
- **Australian Worker's Union (AWU)**
- Shop, Distributive and Allied Employees Association (SDA)
- United Voice (UV)



Submissions in Reply

1. *Amusements, Events and Recreation Award 2016*

Number	Party/Parties	Document/s Link	Their Reference/s	Exposure Draft Clause	Clause Title	Business SA Response
1.1	AWU / AFEI	AWU AER Sub / AFEI	[4] / [2]	1.1	Title and commencement	Agree
1.2	AWU	AWU AER Sub	[8]	7.2	Facilitative provisions for flexible working practices	Agree
1.3	AFEI	AFEI	[7]	10.3	Part-time employees	Agree
1.4	AWU	AWU AER Sub	[9]	13	Ordinary hours of work	Disagree, see below at [1.9]
1.5	AFEI	AFEI	[8]	13.2	Ordinary hours of work	Agree
1.6	AFEI	AFEI	[11]	17.3(b)	Meal allowance	Agree
1.7	AWU	AWU AER Sub	[13]	17.3(b)	Meal allowance	Disagree, see below at [1.10]
1.8	AWU	AWU AER Sub	[14]	19.1	Overtime	Disagree, see below at [1.11]

- 1.9 **Business SA disagrees with the AWU's submission to retitle clause 13 to 'Ordinary hours of work and rostering'. Such change would** mislead readers as to the content of clause 13. Clause 13 of the exposure draft sets out ordinary hours of work. Clause 14 of the exposure draft sets out rostering arrangements.
- 1.10 **Business SA disagrees with the AWU's response to the FWC's query regarding the meal allowance. The exposure draft clause accurately reflects the current award.¹ Deletion of the phrase 'ordinary working day' would be a substantive change to the award.**
- 1.11 **Business SA disagrees with the AWU's submission regarding clause 19.1.** Overtime is not always payable where a full time or part time employee works over 8 ordinary hours in one day. Overtime is payable where a full time or part time employee works in excess of the rostered hours for any one day. Clause 13.3 allows an employer and the majority of employees to agree that up to 10 ordinary working hours may be worked on any one day. Further, clause 13.4 allows the employer and an individual employee to agree in writing to work

¹ *Amusement, Events and Recreation Award 2010* clause 15.4.

shifts of up to 12 hours on any one day. Clause 19.1 accurately reflects this flexibility by stating overtime is payable where the employee works in excess of the rostered working hours on any one day; be that 8, 10 or 12 hours.

2. *Fast Food Industry Award 2016*

Number	Party/Parties	Document/s Link	Their Reference	Exposure Draft Clause	Clause Title	Business SA Response
2.1	AWU	AWU FFIA Sub	[4]	2, 10.7, 11.1(a)	<i>Minimum hourly rate</i>	Disagree, see below at [2.x]
2.2	AIG	AIG	[87]	11.1	Casual employment	Agree
2.3	AIG	AIG	[89]	12.1	Classifications	Agree
2.4	AIG	AIG	[90], [97], [98]	12.4	Classification definitions	Agree
2.5	AIG	AIG	[96]	12.4(a)(i)	Classification definitions – Level 1	Agree
2.6	AIG / SDA	AIG / SDA FFIA Sub	[104], [107] / Page 8	15.1	Breaks	Agree
2.7	AIG	AIG	[113]	16.1	Minimum wage	Agree
2.9	AIG	AIG	[124]	17.2(d)(i)	Travelling time reimbursement	Agree
2.10	AIG	AIG	[128]	20.1(a)(i)	Overtime	Agree
2.11	AWU	AWU FFIA Sub	[7]	21	Penalty rates	See below at [2.x]
2.12	SDA	SDA FFIA Sub	Page 20	Sch B.2.1	Expense-related allowances (Meal allowance)	Agree
2.13	SDA	SDA FFIA Sub	Page 20	Sch B.2.1	Expense-related allowances (Transport allowance)	Disagree, see below at [2.x]

2.14 Business SA disagrees with the AWU's submission regarding the phrase 'minimum hourly rate'. The AWU contends the current wording ('ordinary hourly rate') should be used instead to avoid any confusion, though does not specify how such confusion could arise.

The phrase 'ordinary hourly rate' carries specific meaning and its misuse is likely to cause confusion. The term 'ordinary hourly rate' is used in contrast to 'minimum hourly rate' where an award contains an all purpose allowance payable to all or some employees.² The exact

² [2015] FWCFB 4658, [42]-[43].

definition of ordinary hourly rate depends on the nature of the all purpose allowance(s) payable in an award.³ Neither the current award nor the exposure draft contain an all purpose allowance. If the exposure draft were to use 'ordinary hourly rate' instead of 'minimum hourly rate' this could cause a reader to search the award for a non-existent all purpose allowance.

- 2.15 Business SA is unsure on what basis the AWU contends the exposure draft alters the way in which the casual loading is calculated during evenings, Saturdays and Sundays.
- 2.16 **Business SA disagrees with the SDA's submission to remove 'other than primarily delivery duties' from the table. The phrase serves as an effective method in distinguishing the delivery duties transport allowance and the non-delivery duties transport allowance.**

³ Ibid.

3. *Food, Beverage and Tobacco Manufacturing Award 2016*

Number	Party/Parties	Document/s Link	Their Reference/s	Exposure Draft Clause	Clause Title	Business SA Response
3.1	AFEI/ AMWU/ UV	AFEI / AIG / AMWU FBTM Sub / UV	[28] / [147] / [13] / [3]	7	Facilitative provisions for flexible working practices	Agree
3.2	AIG	AIG	[153]	7.2(a)	Facilitation by individual agreement – Meal break	Agree
3.3	AMWU	AMWU FBTM Sub	[15]	8	Full-time employees	Disagree, see below at [3.18]
3.4	AWU	AWU FBTM Sub	[5]-[7]	9.3	Part-time employment	Disagree, see below at [3.19]
3.5	AWU	AWU FBTM Sub	[9]	10.1	Casual employment	Disagree, see below at [3.20]
3.6	AIG	AIG	[159]	10.2(a)	Casual employment	Agree
3.7	AWU	AWU FBTM Sub	[3]	12.3(a)	Ordinary hours of work – continuous shiftworkers	Agree
3.8	AMWU	AMWU FBTM Sub	[24]	14	Minimum wages and classifications	Agree
3.9	AIG	AIG	[168]	14.1(a)	Minimum wages and classifications	Agree
3.10	AIG	AIG	[170]	20.2(d)	Damage to clothing, spectacles and hearing aids	See below at [3.21]
3.11	AFEI	AFEI	[27]	20.3	Extra rates not cumulative	Agree
3.12	AIG	AIG	[173]	22.2(b)(i)	Unrelieved shiftwork on rostered day off	Agree
3.13	AFEI	AFEI	[30]	22.2(b)(ii)	Unrelieved shiftwork on rostered day off	Agree
3.14	AIG	AIG	[173]	22.4	Saturday work – day worker	Agree
3.15	AMWU	AMWU FBTM Sub	[28]	22.13	Transport of employees	Agree
3.16	AIG	AIG	[181]	23.3(d)	Rates for shiftworkers	Agree
3.17	AMWU	AMWU FBTM Sub	[31]	-	<i>Use of examples</i>	Disagree, see below at [3.22]

- 3.18 Business SA disagrees with the AMWU's submission. Retention of 'in this award' is not necessary. Clause 8 of the exposure draft states 'Any employee not specifically engaged as a part-time or casual employee is for all purposes of this award a full-time employee, unless otherwise specified' (emphasis added). Reference to 'all purposes of this award' makes clear any contrary specification must be expressed within this award.
- 3.19 Business SA disagrees with the AWU's submission; the proposal is unnecessary. Both the exposure draft and the current award provide for variation to a part-time employee's classification level to be provided in writing. Clause 9.4 of the exposure draft and clause 12.4 of the current award allow the terms of a part-time employee's employment (including their classification) to be varied by consent in writing. Should such variation be agreed to by consent, the variation is to be retained by the employer and a copy of that variation given to the employee, per clauses 9.5/12.5 of the exposure draft/current award respectively.

Business SA also opposes the AWU's submission regarding clause 8 - Full-time employment. The proposal does not reflect the current award, is unnecessary and would amount to a substantive change.

- 3.20 Business SA disagrees with the AWU's submission and proposed wording. Should the proposed wording be accepted this would amount to a substantive change from the current award.
- 3.21 Business SA agrees with AIG that clause 20.2(d) is repetitive and somewhat confusing. However, we submit AIG's proposed wording does not completely remedy this. AIG's proposed wording is as follows:
'The employer is liable for the replacement, repair or cleaning of any clothing or personal equipment including spectacles and hearing aids where an employee suffers any damage to, or soiling of, clothing or other personal equipment, including spectacles and hearing aids, as a result of...'

The above wording does not make clear what exactly the employer is liable to replace, repair or clean.

Business SA proposes the following wording as an alternative to clause 20.2(d): (changes emphasised)

The employer is liable for the replacement, repair or cleaning of **an employee's** clothing or personal equipment, including spectacles and hearing aids, *where such clothing or personal equipment suffers any damage or is soiled* as a result of: ...

3.22 Business SA does not share **the AMWU's enthusiasm** for use of examples in modern awards. The Commission has previously made clear that **'relevant and accurate' examples may be included in awards 'where appropriate.'**⁴ However we note a recent decision of the Commission (in regards to the plain language redrafting of awards) **which states 'Examples (and notes) should not be overused as they can be disruptive to the flow of the text.'**⁵ Examples, such as casual rates of pay and overtime calculations as suggested by the AMWU must be carefully drafted and closely scrutinised in the context of these decisions.

⁴ [2014] FWCFB 9412, [63].

⁵ [2017] FWCFB 344, [34].

4. *Hair and Beauty Industry Award 2016*

Number	Party/Parties	Document/s Link	Their Reference	Exposure Draft Clause	Clause Title	Business SA Response
4.1	AWU	AWU HBIA Sub	[6]	4.3 / 4.4	Coverage	See below at [4.16]
4.2	AIG	AIG	[191]	7.2	Facilitative provisions for flexible working practices	Agree
4.3	AWU	AWU HBIA Sub	[7]	7.2	Facilitative provisions for flexible working practices	Agree
4.4	AWU	AWU HBIA Sub	[10]	10.2(e)	Part-time employees	See below at [4.17]
4.5	AIG	AIG	[200] / [210]	10.9(c) / 14.1(f)	Rosters / Notification of rosters	Agree
4.6	AWU	AWU HBIA Sub	[17]	11.	Casual employment	Disagree, see below at [4.18]
4.7	AIG	AIG	[205]	11.1	Casual employment	Agree
4.8	AWU / SDA	AWU HBIA Sub / SDA HBIA Sub	[18] / Page 8	11.5(b)	Casual employment	Agree
4.9	SDA	SDA HBIA Sub	Page 9	13.2(b)(ii)	Maximum hours on a day	Agree
4.10	AWU	AWU HBIA Sub	[21]	15.4	Breaks between shifts	Disagree, see below at [4.19]
4.11	AIG	AIG	[216]	16.1	Minimum wages	Agree
4.12	SDA	SDA HBIA Sub	Page 13	16.1	Minimum wages	Disagree, see below at [4.20]
4.13	AIG	AIG	[219]	18.4(d)	Adult apprentices	Agree
4.14	AIG	AIG	[225]	20.2(a)	Manager's allowance	Agree
4.15	AWU / SDA	AWU HBIA Sub / SDA HBIA Sub	[23] / Pages 16-17	20.3(a)(i)	Meal allowances	See below at [4.21]

4.16 While Business SA does not consider the AWU's proposal strictly necessary, we do not oppose their submission regarding clauses 4.3 and 4.4.

- 4.17 **Business SA submits the AWU's proposal regarding clause 10.2(e) is not necessary. Clause 10.5 clearly establishes** that a part-time employee must be rostered for a minimum of three consecutive hours per shift. The exposure draft accurately reflects the current award in this regard.
- 4.18 **Business SA disagrees with the AWU's submission. The amendments proposed** would be a substantive change to the award.
- 4.19 **Business SA opposes the AWU's submission regarding clause 15.4.** Clause 15.4. of the exposure draft accurately reflects clause 32.4 of the current award. The amendment proposed by the AWU will substantively change this clause.
- 4.20 **Business SA disagrees with the SDA's submissions regarding use of the word "adult" and "minimum". The word "adult" is appropriate** as it distinguishes the minimum wages set in clause 16.1 from the minimum wages for juniors as determined by clause 17. Use of the word "adult" does not prohibit an employer from choosing to pay the full adult rate to a junior. Further, use of the word "minimum" is appropriate as this indicates the rate may need to be adjusted where a loading or rate may apply.
- 4.21 **Business SA does not oppose the wordings proposed by the AWU and SDA. Whilst similar, our preference is for the AWU's wording with the following slight change. Business SA submits a comma be placed at either end of the phrase 'without being given 24 hours' notice of the overtime'. The above change would result in the following wording:**
An employee required to work more than one hour of overtime after the employee's ordinary time of ending work, without being given 24 hours' notice of the overtime, will be either provided with a meal or paid a meal allowance of \$17.85.

5. *Professional Employees Award 2016*

Number	Party/Parties	Document/s Link	Their Reference	Exposure Draft Clause	Clause Title	Business SA Response
5.1	AIG	AIG	[262]	2.2	Professional engineering duties	Agree
5.2	ABI	ABI	[10.1]	2.2	Professional engineering duties	Agree
5.3	AIG	AIG	[268]	2.3	Telecommunications service	Agree
5.4	AIG	AIG	[272]	2.4	Experienced scientist	Agree
5.5	AIG	AIG	[280]	4.1	Coverage	Agree
5.6	AIG	AIG	[290]	11.1(a)	Casual employment	Agree
5.7	AIG	AIG	[293]	13.5	Ordinary hours of work	Agree
5.8	AIG	AIG	[296]	14.1	Minimum wages	Agree
5.9	APESMA	APEMSA	[5]	14	Minimum wages	Disagree, see below at [5.12]
5.10	AFEI	AFEI	[43]	17.4(a)	Annual close-down	Agree
5.11	AIG	AIG	[309], [312]	17.4(a)	Annual close-down	Agree

5.12 Business SA **disagrees with APESMA's submission that the minimum hourly rate for the Level 3 Professional/senior (lead quality auditor)** contains a rounding up error. The hourly rate is derived from the annual wage based on the formula stated in clause 14.2(a). Applying this formula using the annual wage of a Level 3 Professional/senior (lead quality auditor) results in the following:

$$\text{Hourly rate} = \frac{\left(\text{Annual wage} \times \frac{6}{313} \right)}{38}$$

$$\text{Hourly rate} = \frac{\left(60292 \times \frac{6}{313} \right)}{38} = \frac{1155.757}{38} = 30.41466$$

As demonstrated above, the hourly rate for a Level 3 Professional/senior lead quality auditor is \$30.41, as correctly reflected in the minimum wages table at clause 14.1.

6. *Registered and Licensed Clubs Award 2016*

Number	Party/Parties	Document/s Link	Their Reference	Exposure Draft Clause	Clause Title	Business SA Response
6.1	ABI	ABI	[14.1]	4.2	Coverage	Agree
6.2	ABI	ABI	[14.2]	11.3	Casual employees	Agree
6.3	UV	UV RLCA Sub	[5]	15.8(e)(ii)	Work performed on a rostered day off	Agree

Conclusion

Business SA would like to thank the interested parties for their submissions on the Group 4DEF exposure drafts and the Fair Work Commission for the opportunity to respond to those submissions.