



Shop Distributive and Allied Employees' Association

**THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.**

Fair Work Act 2009
s.156—4 yearly review of modern awards
4 yearly review of modern awards—Plain language
project (AM2016/15)
Fast Food PLED
Submissions in reply

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INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association (SDA) makes these submissions in reply in accordance with the next steps identified in paragraph 29 of the Statement of the Full Bench on 28 October 2020.

Australian Industry Group

2. The SDA notes the submission of the Australian Industry Group (AIG) dated 25 November 2020 and responds as follows.

Clause 4 Coverage

3. AIG at paragraphs 2 to 27 objects to the proposed changes in the Plain Language English Draft (PLED) to the coverage provision.
4. In summary, AIG objects to the following changes
 - a. The replacement of 'meals' and 'snacks' with 'food'
 - b. The replacement of 'take away foods' with 'food'
 - c. The absence of 'inside the catering establishment'
 - d. The change in wording regarding on-hire employers and relevant on-hire employees between FFIA clause 4.5 and PLED clause 4.3
 - e. Clause 4.4(d) and the resulting potential inadvertent exclusion of employers from coverage if any of their employees are excluded by virtue of clauses 4.4(a) to 4.4(c).
 - f. An ambiguity at PLED clause 4.5.
5. The SDA notes that in paragraph 8 of its submissions of 25 November 2020, the SDA objected to the change of such a fundamental term and that the current FFIA provision for coverage should be maintained.
6. The submissions of AIG are broadly consonant with the SDA's position.

Clause 7 Facilitative Provisions

7. The SDA notes the submissions of AIG in relation to the facilitative provisions in paragraphs 28 to 31. It has no further submissions in this regard.

Clause 12 Classifications

8. AIG objects to the changes in the classifications provision at clause 12 of the PLED.
9. The SDA differs with the objections at AIG submissions paragraphs 32 to 35. That is, the SDA supports the change of wording which emphasises that classifications are decided by an external objective test rather than the subjective judgement of the employer alone.
10. It is submitted that this change aids in the clarity of the provision, without changing the fundamental meaning of the term.

11. The point raised by AIG that “it is no longer clear how the ‘principal functions of the [employee’s] employment’ are to be determined.” is not supported by an ordinary reading of the draft provision which clearly places the emphasis on the objective test. Furthermore, PLED clause 12.1 states that ‘An employer must classify an employee covered by this award in accordance with clause 12.4.’ In fact, the opposite submission could equally be made, that the current provision implies that the employer has an unfettered discretion in determining classifications.
12. In the alternative, if the Commission is minded to retain the current provision a clarificatory note stating that the test is based on the skills used and duties actually performed would be of assistance.
13. The SDA notes the remaining objections of AIG in paragraphs 36 to 50. In summary they are:
 - a. The deletion of the word ‘cooking’ at 12.4(a)(i) of the PLED;
 - b. The use of the word ‘food’ instead of ‘meals, snacks’ at PLED clause 12.4(a)(i);
 - c. The replacement of ‘and / or’ with ‘or’ in reference to meals, snacks and beverages at PLED clause 12.4(a)(i);
 - d. The deletion of ‘primarily’ in reference to ‘take away’ at PLED clause 12.41(a)(i);
 - e. The inclusion of the words ‘or retail complex’ in PLED clause 12.4(a)(i);
 - f. The use of ‘or’ in PLED clause 12.4(b)(i) instead of ‘and / or’.
14. These are broadly consonant with the SDA position at paragraph 19 of its 25 November 2020 submissions, that the current definitions of the classifications should be retained.

Clause 13.1 Ordinary hours of work and rostering

15. The SDA supports the submission of AIG at paragraphs 51 and 52 of its submissions, that is that the provision clarify that casual employees may be worked on no more than an average of 38 hours per week (averaged over a period of no more than four weeks).

Clauses 13.2(a)-(d) Ordinary hours of work and rostering

16. The SDA notes the AIG proposal at paragraph 53 of its submissions to insert the word ‘ordinary’ before hours in clauses 13.2(a) to (d) inclusive. The SDA does not oppose such an insertion.

Clause 14.4 Breaks

17. The SDA notes the objection of AIG to the use of the word ‘must’ in clause 1.4 of the PLED and its proposal to include the FFIA clause 27.1(b). The SDA opposes this on the basis that the wording in PLED clause 14.4 clarifies the entitlement.
18. It is to be noted that the wording merely clarifies the provision without imposing any additional requirements (that is employers always had to provide breaks in a way which was meaningful to the employees).

Clause 15.2 Minimum Rates

19. The SDA notes the AIG submission at paragraph 56 that the 'or' in Table 4 (after the words '19 years') be replaced with 'of age'. The SDA supports this proposal.

Clause 17.6(a)(ii) travelling time reimbursement

20. At paragraph 57 AIG objects to clause 17.6(a)(ii) in the PLED as being more expansive than the current provision at clause 19.4(a) of FFIA. The SDA does not support this submission.

Clause 17.7(b) Transport of employee reimbursement

21. AIG objects at paragraphs 60 to 61 of their submissions to the PLED wording of this provision as potentially 'much broader than the Award'.

22. The SDA does not support this submission.

23. The changes as drafted are consonant with the change in wider society and the use of other commercial transport services. Such services are often more economically efficient than conventional taxi services. They also provide the additional benefit of being called to the employee's location giving an estimated time of arrival, which is of particular benefit in terms of safety.

24. AIG's submission at paragraph 61 that such wording could allow for certain bus services and hire cars is not reasonably possible given the particular context of finishing after 10.00pm or before 7.00am. Such a concern could be mitigated with the insertion of words to the effect of 'equivalent to a taxi' at the end of PLED clause 17.7(b).

25. The SDA notes that similar wording was adopted by the Commission in the plain language revision of the *Pharmacy Industry Award 2020* at clause 19.8.

26. The AIG submission at paragraph 62 (regarding the placement of a comma) is noted and supported.

Clause 18.3(d) Accident Pay

27. The SDA notes the objection of AIG in relation to PLED clause 18.3(d) at paragraphs 63 to 65 of their submissions. In summary, AIG objects on the basis that the PLED provision does not provide for the automatic referral to the Fair Work Commission of an employee's right to accident pay in the case that his or her employer becomes bankrupt or faces.

28. The SDA does not support this submission. Such wording merely clarifies the entitlement to accident pay in the case of bankruptcy and/or liquidation and does not preclude the employer (or liquidator) from seeking a determination from the Fair Work Commission.

Clause 20.5 Overtime – Minimum payment on a Sunday

29. The SDA notes the submission of AIG at paragraph 67 of their submissions. In summary AIG objects to the insertion of 'rostered hours' where FFIA currently only refers to ordinary hours.

30. The SDA supports this submission.

Clause 20.6 Overtime Rates

31. At paragraphs 69 to 70 AIG makes reference to the ambiguity due to the lack of provision in the PLED, as currently exists at FFIA clauses 26.1(a) and (b), that is overtime rates Monday to Saturday as applying 'on any one day'.

32. The SDA supports this submission.

Clause 22.2 Additional annual leave for shiftworkers

33. AIG at paragraph 72 rightly notes the changes in the definition of shiftworker at clause 22.2 of the PLED.

34. In addition, the SDA notes that the use at PLED clause 22.2 of the word 'continuous' is substantially different to the current FFIA clause of 'regularly'. This changes the substantive meaning of the provision. It is submitted that the retention of the current definition be retained.

35. AIG at paragraph 74 proposes the deletion of the term 'shiftworker' as the Award does not contemplate shiftwork. The SDA opposes the deletion of the term as while the Award remains silent regarding shiftwork, it is to be noted that employees may be rostered in such a way as to qualify them as shiftworkers. Consequently, the provision should be retained.

36. Similarly, the AIG submissions at paragraphs 79 and 80 is likewise opposed.

Clause 22.3 Annual Leave Loading

37. The submission at paragraph 81 is supported. However, it is noted that it seems to be replicated at paragraph 82.

38. AIG queries the operation of the annual leave loading at paragraphs 75 to 78 of their submissions.

39. The SDA's position is that the current wording at clause 28.3(b) of the Award is sufficiently clear and in particular the use of 'loading' rather than 'additional payment' (as noted in our submissions of 25 November 2020 at paragraph 32).

Clause 22.8 Excessive Annual Leave

40. AIG's submissions in reference to drafting errors at paragraph 81 and 82 is supported.

Clause 32 Redundancy

41. The AIG submission at paragraph 83 in reference to a drafting error is supported.
42. Similarly, the drafting error at PLED clause 32.3(c) referenced by AIG at paragraph 84 is supported and was referenced in the SDA's submissions of 25 November at paragraph 17.

Schedule A

43. AIG identified drafting errors in Schedule A in their submissions from paragraphs 85 to 88. The SDA has no further submissions to make in this regard.

Schedule B

44. Similarly, the SDA has no further submission to make in reference to the AIG submissions paragraph 89 and 90.

Australian Business Industrial and NSW Business Chamber

45. The Australian Business Industrial (ABI) and NSW Business Chamber Ltd (NSWBC) also made submissions regarding the PLED on 25 November 2020. The SDA responds as follows.

Clause 4 Coverage

46. The ABI/NSWBC submissions regarding clause 4 are broadly in agreement with both AIG and the SDA's submissions.
47. The submissions of all parties highlight the issues raised by changing wording so fundamental to the application of the Award with, it is submitted, little to no benefit.
48. As such, it remains the SDA's position is that the current wording for Coverage should be retained.

Clause 12 Classifications

49. ABI/NSWBC at paragraph 2.3 and 2.4 raises a similar objection to AIG as dealt with at paragraphs 8 through 12 of these submissions above. The SDA notes its above outlined position.

Clause 20 Overtime

50. The ABI/NSWBC submission amending the PLED wording from 'a roster of ordinary hours to 'a rostered shift of ordinary hours'. The SDA notes its position above at paragraphs 29 and 30.