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General Retail Award 2010

Agenda for Conference – 10.30 am, 27 September 2018

This document sets the agenda for items to be discussed during the conference on 27 September 2018.

Attachment A to this Agenda sets out a revised list of outstanding items at C1 – C6 in detail.

A. Confirming *provisionally* resolved items:

Parties should attend the conference in position to state whether any of the proposed actions in A1 – A10 are opposed. In the absence of opposition from parties, the proposed actions will be adopted.

Ref	Item description and status	Proposed action
A1	Items 24 and 26 – clauses 10.6 and 10.7 – Part-time employment (regular pattern of work) • SDA supports proposed amendment, Business SA do not oppose.	10.6 and 10.7 adopted as provisionally inserted into July 18 PLED
A2	Item 30 – clause 10.10(b) – Changes to roster (part-time employment) • SDA supports proposed amendment, Business SA does not oppose.	10.10(b) adopted as provisionally inserted into July 18 PLED
A3	Item 33 – clause 11.2 – casual employment – new Note 2 • SDA supports proposed new note, Business SA does not oppose.	New Note 2 adopted as provisionally inserted into July 18 PLED
A4	Item 40 – clause 15 – ordinary hours of work • Expert proposed new 28.4: 'All hours of work on a shift are continuous'. • SDA supports. No other party made a submission.	New 28.4 adopted as provisionally inserted into July 18 PLED
A5	Item 43 – clause 15.3 – ordinary hours of work • Clause 15.3 updated to reflect current 27.2(c) following conference. • SDA supports. No other party made a submission.	Updated 15.3 adopted as provisionally inserted into July 18 PLED
A6	Item 56 – clause 16 and Table 3 – breaks • Proposed new Note 1 – no further submissions. • Business SA propose changing heading in column 2 to 'rest breaks'. SDA support this.	Change heading of column 2 from 'breaks' to 'rest breaks' as per agreed position in next PLED
A7	Item 62 – clause 23.6 – moving expenses • SDA supports proposed definition of 'immediate family' and proposed amendment with clause 23.6(b). • No other party made a submission.	'Immediate family definition' and 23.6(b) adopted as provisionally inserted into July 18 PLED
A8	Item 67 – clause 26 – Note • Parties had opportunity to review after insertion in July PLED. • No further submissions received.	Updated clause 26 note adopted as provisionally inserted into July 18 PLED
A9	Item 72 – Schedule B – use of term 'ordinary hours'. • SDA invited to elaborate on submission. No submission received.	No action – item not pressed.

Ref	Item description and status	Proposed action
A10	Drafting and typographical errors • First reference to 'employee' in 15.9(h) should 'employer' (Bus SA). • Reference in Note 1 under 15.9 to 'clause 10.10' should be 'Clause 10.10' (Bus SA). • 15.7(b) references 15.6(g)(v), but should reference 15.7(c) (SDA).	Amend drafting errors in next version of PLED

B. Items to be determined on the Submissions before the Commission (see Report 19 September 2017)

Parties should attend the conference in position to state whether any of the proposed actions in B1 – B3 are opposed. In the absence of opposition from parties, the proposed actions will be adopted.

Ref	Item description and status	Proposed action
B1	Item 13 – clause 7, Table 1 – Facilitative provisions • Whether clause reference is to 15.3 or 15.3(a) – time off instead of payment for overtime.	Adopt reference to 23.5 consistent with other exposure drafts and 4 yearly review decisions
B2	Item 57 – Minimum rates table – proposed addition of 3 new notes • SDA seeks inclusion of 3 additional notes. • ABI and Business SA oppose – additional notes are unnecessary.	Determine on papers on submissions before Commission
B3	Item 69 – clause 27.1 – Application of Part (Shiftwork) • Business SA proposed amendment to 27.1: 'Part 6 applies only to persons specifically employed to do shiftwork'.	Determine on papers on submissions before Commission

C. Outstanding items:

Parties should attend the conference in a position to answer the questions in red.

C1. Item 30A – clause 10.10(c) – Changes to roster (part-time employment)

- SDA seek to retain wording 'or to avoid any award entitlements' (from current clause 12.8(c))
- *Does Business SA or ABI oppose SDA's submission?*

C2. Item 49 – clause 15.7 – rosters (ordinary hours of work)

- 15.7(d)(vi):
  - SDA: Clause should be renumbered and moved to be a standalone clause (not under 'consecutive days off' heading)
  - SDA also submits words 'on which an employee may be worked' is not consistent with clause 28.12, and seek retention of clause 28.12 wording.
  - *Does Business SA or ABI oppose SDA's submission on:*
    - *That 15.7(d)(vi) be standalone clause?*
    - *Reverting to 28.12 of current award wording?*
  - Business SA: clause should be amended as follows:
    "The maximum number of consecutive ~~days on which an employee may be worked~~ hours on which an employee may work (whether ordinary hours or reasonable additional hours) is 6.
  - *Does SDA or ABI oppose Business SA's submission?*

- 15.8(a):
    - SDA propose to delete words 'unless otherwise agreed between the employer and the employee'.
    - *Does Business SA or ABI oppose SDA's proposal?*

C3. Item 51 – clause 15.9 – Notification of rosters – ordinary hours of work

- 15.9(h) – Business SA:
    - Submits SDA's proposed 15.9(h) goes beyond 28.14(e).
    - Proposes 2 alternative amendments to 15.9(h)/(g) to address its concern:
        - Option 1 – 15.9(h): 'The employee must pay the employer at the overtime rate specified in Table 10 – overtime rates for any extra time worked by the employee because of the roster change in clause 15.9(g).
        - Option 2 – 15.9(g): 'Paragraph (i) applies to an employee whose roster is changed in a particular week for a one off event that does not constitute an emergency and then reverts to the previous roster in the following week. The employer must pay the employee at the overtime rate specified in Table 10 – Overtime rates for any extra time worked by the employee because of the roster change.'
    - *Does SDA or ABI oppose Business SA's proposed amendments?*
- 15.9(g), (h) and (i) – SDA:
    - 15.9(g) should not reference15.9(i)
        - *Does Business SA or ABI views on this?*
    - It is not clear that 15.9(g) and (h) should be read together.
        - *Does either of Business SA's proposed amendments address SDA's concern that it is unclear that (g) and (h) should be read together (see above)?*

C4. Item 56A – clause 16.6(b) – breaks between work periods

- Concerns whether penalties compounding?
- SDA submit they are. Business SA and ABI disagree.
- Parties wish to rely on submissions already filed.
- *Are parties content for item to be determined on papers?*

C5. Item 62A – clause 23.11 – Recall allowance

- Concerns meaning of "appropriate rate of pay" for recall.
- Business SA submits it means 'ordinary hourly rate'. SDA submits it means the appropriate overtime rate.
- In June conference parties asked whether they want to argue a case based on the award history or leave the phrase 'appropriate rate of pay' as is.
- SDA did not wish to make a further submission. No other party made a submission.
- *The Commission proposes to resolve on the basis that parties have not objected to leave wording as 'appropriate rate of pay'. Does any party object to this approach?*

C6. Item PTC-1, ~~63~~ and 65 – clause 25 – overtime

- During June conference parties sought opportunity to comment based after items 49 and 51 are resolved. At this stage, those items are outstanding.
- SDA declined to make a further submission at this time.
- *Discussions on items 49 and 51 during the conference inform this item. Do parties wish to add anything in light of discussions on items 49 and 51?*
- Note: Item 63 relates to reasonable overtime and is being dealt with in separate proceedings – see [2018 FWCFB 5749

C1. ITEM 30A – CLAUSE 10.10(c)—CHANGES TO ROSTERS

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
12.8 Rosters **(a)** A part-time employee's roster, but not the agreed number of hours, may be altered by the giving of notice in writing of seven days or in the case of an emergency, 48 hours, by the employer to the employee. **(b)** The rostered hours of part-time employees may be altered at any time by mutual agreement between the employer and the employee. **(c)** Rosters will not be changed except as provided in clause 12.8(a) from week to week, or fortnight to fortnight, nor will they be changed to avoid any award entitlements.	**10.10 Changes to roster** **(a)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change. NOTE: clause 15.7 contains additional rostering provisions. **(b)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee. **(c)** However, the roster of a part-time employee must not be changed from week to week or fortnight to fortnight. **NOTE 1:** Clause 15.9(i) restricts an employer from changing a roster to avoid payment of any award entitlements. **NOTE 2:** See clause 31—Rostering restrictions for the rosters of shiftworkers.

STATEMENT 2018 FWC 4046 **issued 23 July 2018:**

Item 30

[11] Item 30 relates to the 'changes to roster' provisions for part-time employees at clauses 10.10(a) to (c) (changes to roster) in the revised PLED. At the June 2018 conference the parties agreed that clause 10.10(b) should be amended to read as follows:

> '(b) The roster of a part-time employee, including but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee.'

…

Item 30A

[13] Item 30A relates to the note under clause 10.10(c) of the revised PLED. At the June 2018 conference the SDA noted that if there is provisional agreement to the changes proposed to clause 10.10 they would not have an issue with the retention of Note 1.[8]

SUBMISSIONS

Submissions relating to item 30 have been extracted where they are relevant to item 30A.

Business SA – 7 August 2018 submission

2. Item 30 – Changes to roster

2.1. In response to [12], Business SA does not oppose the amended clause 10.10(b)

SDA – 16 August 2018 submission

Item 30

6. The SDA supports the proposed wording at Revised PLED clause 10(a) – 10.10 (c).

Item 30A

7. The SDA preference, as previously submitted, is to retain the wording at GRIA clause 12.8 (c) and reinsert 'or to avoid any award entitlements' rather than a note.

RELEVANT TRANSCRIPT – 21 June 2018 **conference:**

PN118 JUSTICE ROSS: Okay, and then there's the last one about this. The SDA opposes the note. What's the basis for that? You've got the substantive provision, that is currently part of 12.8(c) is still the substantive provision under clause 15.9(g) of the PLED and the note cross-references it.

PN119 MS PATENA: I think that the note was opposed in relation to the changes to the clause and referencing it to it. I think in principle once we have provisional agreement of those changes accepted, I don't see that we would have an issue with retention of the note. So if I could - - -

PN120 JUSTICE ROSS: Yes. We'll redraft clause 10.10 - - -

PN121 MS PATENA: - - - ask that we have an opportunity to review that once the further draft is issued.

PN122 JUSTICE ROSS: Yes. We'll redraft clause 10.10 and put it up as a provisional position and give parties an opportunity to comment on it. It will include the note, and then you can see whether you want to press it, but from what you're indicating, at least your preliminary view is that if the rest of the clause is satisfactory then the note's not going to create a particular difficulty.

PN123 MS PATENA: Yes, thanks, your Honour.

C2. ITEMS 49 – CLAUSE 15.7—ROSTERS (FULL-TIME AND PART-TIME EMPLOYEES)

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
28.11 Consecutive days off **(a)** Ordinary hours will be worked so as to provide an employee with two consecutive days off each week or three consecutive days off in a two week period. **(b)** This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements, which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request. **(c)** An employee can terminate the agreement by giving four weeks' notice to the employer. **28.12** Ordinary hours and any reasonable additional hours may not be worked over more than six consecutive days. **28.13 Employees regularly working Sundays** **(a)** An employee who regularly works Sundays will be rostered so as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday. **(b)** This requirement will not apply where the employee requests in writing and the employer agrees to other arrangements which are to be recorded in the time and wages records. It cannot be made a condition of employment that an employee make such a request. **(c)** An employee can terminate the agreement by giving four weeks' notice to the employer.	**15.7 Rosters** **(a)** A roster period cannot exceed 4 weeks except by agreement in clause 15.6(g)(v). **(b)** The employer must not roster an employee to work ordinary hours on more than 5 days per week, except as provided by paragraph 15.6(g)(v). **(c)** The employer may roster an employee to work ordinary hours on 6 days in one week if the employee is rostered to work ordinary hours on no more than 4 days in the following week. **(d)** Consecutive days off **(i)** The employer must roster an employee to work ordinary hours in such a way that they have 2 consecutive days off per week or 3 consecutive days off per 2 week cycle. **(ii)** Paragraph **(i)** is subject to any agreement for different arrangements entered into between the employer and an individual employee at the written request of the employee. **(iii)** Different arrangements agreed under paragraph **(ii)** must be recorded in the time and wages record. **(iv)** The employee may end an agreement under paragraph **(ii)** at any time by giving the employer 4 weeks' notice. **(v)** An employee cannot be required as a condition of employment to make a request under paragraph **(ii)**. **(vi)** The maximum number of consecutive days on which an employee may be worked (whether ordinary hours or reasonable additional hours) is 6.

SUBMISSIONS

SDA – 04 August 2017 submission

Consecutive days off

111.GRIA clause 28.11 (a) – (c) has been varied and moved to exposure draft clause 15.7 (g) - (k).

112. The exposure draft clauses make the provision more difficult for the reader due to the amount of cross referencing that is required to understand the entitlement for full time and part-time employees

have to be rostered off. This is an important provision as it ensures both the employer and employee understand that time off from work must be given in a meaningful way to allow employees to time to recover, rest and enjoy recreational or other pursuits outside of work.

113. The SDA does not support the insertion of exposure draft clause 15.7 (g) -(k). GRIA clause 28.11 Consecutive days off (a) – (c) should be retained including the sub-heading, under exposure clause 15.7.

SDA – 10 November 2017 submission

14. The SDA has several concerns with the revised PLED clause 15.7 as follows:

a. The SDA does not support the removal from the Revised PLED of subheading in GRIA clause 28.11 'Consecutive Days off ' which is an important provision both Employers and Employees need to consider when rostering work. Where consecutive days off are not rostered in accordance with this provision overtime rates may apply.

b. Revised PLED clauses 15.7(f), (g) (h) are unnecessarily complex and difficult to interpret when compared to GRIA clauses 28.11(b) , 28.13(b) and 28.13(c). A reader of plain language Award should not have to jump back and forth between clauses to understand their meaning of the Award and how to apply it.

c. GRIA clause 28.11(b), 28.13(b) and 28.13(c) are clear an unambiguous in their meaning, easy to read and should be retained.

d. Revised PLED clause [sic] 15.7(b) and 15.7(c) are consistent with the GRIA, however there appears to be an error [sic] Revised PLED clause 15.7(e) should be 15.7(d)

15. The SDA does not support the changes at 'Revised PLED clause 15.7(j) which s[sic] deletes 'worked' and replaces it with 'scheduled'. 'Worked' [sic] consistently used throughout the GRIA including at clause 28.12. The phrase 'reasonable additional hours' in GRIA 28.12 has been deleted and replaced with 'overtime' in the Revised PLED. This is a substantive change which creates additional concerns regarding overtime. Reasonable additional hours is supposed to refer to part-time additional hours not overtime. Overtime can be worked on a 7h day.

16. The SDA does not support Revised PLED clause 15.7(j) which deletes the GRIA phrase 'reasonable additional hours' as per GRIA clause 28.12 should be reinserted. The removal of GRIA 29.1 is a further substantive change that impacts on the reading of this provision.

ABI & NSWBC – 15 November 2017 submission

Item 49	Item 49 We note there are some cross-referencing issues in the PLED released 1 November 2017 and would be appreciative of the opportunity to further review the clause in a revised PLED.

Business SA – 22 February 2018 submission

4. Item 49 – Rosters

4.1. In response to [46], Business SA does not share the SDA's concern regarding proposed clauses 15.7(e) to (h). We submit that with each paragraph dealing with a single topic and following a logical flow the requirements for the employer and employee are more clearly identified.

Business SA – 07 August 2018 submission

4. Item 49 – Rosters – Consecutive days off

4.1. In response to [23], Business notes what appears to be a drafting error at clause 15.7(d)(vi).

4.2. Clause 15.7(d)(vi) reads: 'The maximum number of consecutive days on which an employee may be worked (whether ordinary hours or reasonable additional hours) is 6.' (emphasis added). The phase 'on which an employee may be worked' appears to be a drafting error.

4.3. Business SA submits clause 15.7(d)(vi) be amended to read 'The maximum number of consecutive hours on which an employee may work (whether ordinary hours or reasonable additional hours) is 6.'

SDA – 16 August 2018 submission

Item 49 Rosters

11. The SDA does not support Revised PLED clause 15.7 (d)(vi). This clause should not sit under the subheading Consecutive Days off as it relates to consecutive days an employee's hours may be worked. Revised PLED clause 15.7 (d)(vi) should be moved to sit as a standalone clause and re-numbered.

12. The Revised PLED wording at 15.7 (d)(vi) 'which an employee may be worked' is also not consistent with GRIA clause 28.12 which refers to 'Ordinary hours and any reasonable additional hours may not be worked' not 'an employee may be worked'. The GRIA wording at clause 28.12 should be retained.

13. For consistency of approach with the Revised PLED, and with reference to the structure of 15.7(d)(i) – (v) Consecutive days, Revised PLED clause 15.8 (a) should be amended to delete the phrase 'unless otherwise agreed between the employer and the employee.' Revised PLED clause 15.8 (b) should be amended to 'Paragraph 15.8 (a) will not apply where an employee requests and the employer agrees to other arrangements'. Revised PLED clause 15.8 would require renumbering. This amendment would ensure the Revised PLED clause 15.8 is consistent with GRIA clause 28.13 and in line with the approach to structuring other rostering provisions in the Revised PLED and objectives of the process.

RELEVANT TRANSCRIPT – 21 June 2018 **conference:**

PN187 JUSTICE ROSS: All right, then I think we're onto item 49, and this is an SDA concern. You'll see that the drafter has suggested substituting "make a request" for "agree to an arrangement" in clause 15.7(k) of the PLED for greater consistency with clause 28.11(b) of the award. Is there anything the SDA wants to say about that proposition?

PN188 MS PATENA: Your Honour, sorry, could you repeat the - - -

PN189 JUSTICE ROSS: I'm just on page 15 of the revised submissions - sorry, the agenda items for conference summary.

PN190 MS PATENA: Yes.

PN191 JUSTICE ROSS: You see the note on the right-hand column where the drafter's made a comment that is suggesting substituting "make a request" for "agree to an arrangement". This is a change in clause 17.7(k) of the PLED and that's intended to ensure greater consistency with the award provision.

PN192 MS PATENA: In relation to that proposed amendment I don't think that the SDA would have an objection to that. I would need to confirm that.

PN193 JUSTICE ROSS: Sure, but I think ultimately - is your straightforward point really that you want clause 28.11 of the award not 15.7 of the PLED, 28.11(a) to (c) instead of 15.7(g) to (k)?

PN194 MS PATENA: That's correct, your Honour.

PN195 JUSTICE ROSS: And you're identifying a similar point in relation to 15.7(f), (g) and (h) and you're making a point about 15.7(j) as well. Business SA comments that they don't share some of your concern and they want an opportunity to review the revised PLED clause. That seems to be where it's up to.

PN196 MS PATENA: Yes. Sorry, your Honour, I apologise. I understood that today, based on that statement, that comments in relation to our submission, yes, would be made by the other parties.

PN197 JUSTICE ROSS: That's right, so we'll provide them with that opportunity. It's the same approach - well, they're dealing with similar clauses - the same approach in relation to item 51, because no other parties have made submissions in respect of the issue that the SDA's raised there either. So we invite further subs in response to item 51.

C3. ITEM 51 – CLAUSE 15.9 – NOTIFICATION OF ROSTERS

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
28.7 Substitute rostered days off (RDOs) **(a)** An employer, with the agreement of the majority of employees concerned, may substitute the day or half day an employee is to take off in accordance with a roster arrangement for another day or half day in the case of a breakdown in machinery or a failure or shortage of electric power or to meet the requirements of the business in the event of rush orders or some other emergency situation. **(b)** By agreement between an employer and an employee, another day may be substituted for the day that employee is to be rostered off **28.8 Accumulation of RDOs** By agreement between the employer and an employee, the rostered day off may be accumulated up to a maximum of five days in any one year. Such accumulated periods may be taken at times mutually convenient to the employer and the employee. **28.14 Notification of rosters** **(a)** The employer will exhibit staff rosters on a notice board, which will show for each employee: **(i)** the number of ordinary hours to be worked each week; **(ii)** the days of the week on which work is to be performed; and **(iii)** the commencing and ceasing time of work for each day of the week. **(b)** The employer will retain superseded notices for twelve months. The roster will, on request, be produced for inspection by an authorised person. **(c)** Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work. **(d)** Any permanent roster change will be provided to the employee in writing with a minimum seven days notice. Should the employee disagree with the roster change, they will be given a minimum of 14 days written notice instead of seven days, during which time there will be discussions aimed at resolving the matter in accordance with clause 9—Dispute resolution, of this award.	**15.9 Notification of rosters** **(a)** The employer must ensure that the work roster is available to all employees, either exhibited on a notice board which is conveniently located at or near the workplace or through accessible electronic means. **(b)** The roster must show for each employee: **(i)** the number of ordinary hours to be worked by them each week; and **(ii)** the days of the week on which they will work; and **(iii)** the times at which they start and finish work. **(c)** The employer must retain a copy of each completed work roster for at least 12 months and produce it, on request, for inspection by an authorised person. **(d)** Due to unexpected operational requirements, the roster of an employee may be changed by mutual agreement by the employer and employee at any time before the employee arrives for work. **(e)** The employer may make permanent roster changes at any time by giving the employee at least 7 days' written notice of the change. If the employee disagrees with the change, the period of written notice of the change required to be given is extended to at least 14 days in total. **(f)** The employer and employee may seek to resolve a dispute about a roster change in accordance with clause 40—Dispute resolution. **(g)** Paragraph (i) applies to an employee whose roster is changed in a particular week for a one-off event that does not constitute an emergency and then reverts to the previous roster in the following week. **(h)** The employee must pay the employee at the overtime rate specified in Table 10—Overtime rates for any extra time worked by the employee because of the roster change. **(i)** An employer must not change the roster of an employee with the intention of avoiding payment of penalties, loadings or other applicable benefits. If the employer does so, the employee must be paid any

(e) Where an employee's roster is changed with the appropriate notice for a once only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay. **(f)** An employee's roster may not be changed with the intent of avoiding payment of penalties, loading or other benefits applicable. Should such circumstances arise the employee will be entitled to such penalty, loading or benefit as if the roster had not been changed.	penalties, loadings or benefits as if the roster had not been changed. NOTE 1: clause 10.10 contains additional rostering provisions for part-time employees. NOTE 2: See clause 31—Rostering restrictions for the rosters of shiftworkers. For reference: **10.10 Changes to roster** **(a)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed by the employer giving the employee 7 days, or in an emergency 48 hours, written notice of the change. NOTE: clause 15.7 contains additional rostering provisions. **(b)** The roster of a part-time employee, but not the number of hours agreed under clause 10.5, may be changed at any time by mutual agreement between the employer and the employee. **(c)** However, the roster of a part-time employee must not be changed from week to week or fortnight to fortnight. NOTE 1: Clause 15.9(i) restricts an employer from changing a roster to avoid payment of any award entitlements. NOTE 2: See clause 31—Rostering restrictions for the rosters of shiftworkers.

SUBMISSIONS

SDA – 04 August 2017 submission

Accumulation of RDO's

101. GRIA clause 28.8 has been varied and moved from under clause 28 '38 Hour Week Rosters' to exposure draft clause 15.9

102. The variation to GRIA clause 28.8 is substantive as currently it has no application to part time employees. This clause does not and should not have application to part-time employment.

103. The SDA does not support the insertion of exposure draft clause 15.9. GRIA clause 28.7 Substitute rostered days off (RDOs) should be reinstated under provisions for full time employees in clause 15.6 of the exposure draft.

SDA – 10 November 2017 submission

Items 40-45 – Hours of work

…

17. The SDA does not support Revised PLED clause 15.9 (c) For consistency with the GRIA clause 28.14 (d) and Revised PLED clause 15.9 (a), Revised PLED clause 15.9 (c) the clause should at least refer to 'completed work roster'

18. The SDA does not support Revised PLED clause 15.9 (e). For consistency with the GRIA clause 28.14 (c) should only refer to 'permanent roster changes' or must be considered as substantive change.

19. GRIA clause 28.14 (d) has been removed m part and replaced with a note after 15.9 (e). This is substantive change which removes the obligation on parties to have discussions aimed at resolving roster disputes in accordance with the dispute resolution provision.

20 The SDA does not support Revised PLED clause 15.9 (f). This is substantive change from GRIA clause 28.14 (g) which does not and should not reference Revised PLED clause 15.9 (g). Further Revised PLED clause 15.11 is referenced in 15.9 (f) and does not exist in the Revised PLED.

21. The SDA does not support Revised PLED clause 15.9 (g). As stated above paragraph 10 of these submissions. This is a substantive change which removes the rate to be paid where rosters are changed with the intent described at 28.14 (f). GRIA clause 28.14 (f) should be retained.

SDA – 22 February 2018 submission

Item 51 – Paragraph 38 – Notification of rosters

10. The SDA does not support PLED clause 15.9(g) which is intended to replace GRIA clause 28.14 and GRIA clause 12.8. (GRIA clause 12.8 has been replaced with a note under PLED 10.10(c)) This is a substantive change which removes the rate to be paid where rosters are changed with the intent described at 28.14(f) and removes reference to 'other benefits applicable'. GRIA clause 28.14(f) should be retained at PLED 15.9(g). As stated above a paragraph 5 of this submission, benefits or entitlements under the GRIA are not limited to paid entitlements.

Business SA – 07 August 2018 submission

5. Item 51 – Rosters – Notification of rosters

5.1. In response to [28], Business SA opposes the drafting of clause 15.9(h). The legal operation of clause 15.9(h) differs from the current award equivalent at clause 28.14(e). We submit clause 15.9(h) should clearly refer to the roster change in clause 15.9(g) or, in the alternative, should be combined with clause 15.9(g).

5.2. The relevant clause in the current award is clause 28.14(e). Clause 28.14(e) states: 'Where an employee's roster is changed with the appropriate notice for a once-only event caused by particular circumstances not constituting an emergency, and the roster reverts to the previous pattern in the following week, then extra work done by the employee because of the change of roster will be paid at the overtime rate of pay.' (emphasis added).

5.3. The PLED has split clause 28.14(e) into two clauses: 15.9(g) and 15.9(h). These are reproduced below.

5.4. Clause 15.9(g) reads: 'Paragraph (i) applies to an employee whose roster is changed in a particular week for a one-off event that does not constitute an emergency and then reverts to the previous roster in the following week.'

5.5. Clause 15.9(h) reads: 'The employee must pay the employee at the overtime rate specified in Table 10 – Overtime rates for any extra time worked by the employee because of the roster change.' (emphasis in original). Please note for the purposes of this discussion, we assume that the first reference to 'employee' should instead refer to 'employer'.

5.6. Business SA submits the current requirement for extra time to be paid at the overtime rate is limited to the circumstances described in clause 28.14(e) of the current award. We make this submission given this

5.7. Business SA submits that clause 15.9(h) does not limit the requirement to pay overtime rates to the circumstance in clause 15.9(g). By providing the overtime rate obligation in a distinct paragraph this gives the impression that the overtime rate is payable where any extra time is worked due to a roster change. This may not always be the case however. For example, clause 15.9(d) allows the roster of an employee to be changed by mutual agreement between the employee and the employer at any time before the employee arrives at work, provided the change is due to unexpected operational requirements.

5.8. Business SA provides two possible solutions for this matter. Clause 15.9(h) could be amended to refer to clause 15.9(g) as follows: 'The employee must pay the employer at the overtime rate specified in Table 10 – Overtime rates for any extra time worked by the employee because of the roster change in clause 15.9(g).

5.9. In the alternative, clause 15.9(h) could be added as a second sentence in clause 15.9(g). We put forward the following: 'Paragraph (i) applies to an employee whose roster is changed in a particular week for a oneoff event that does not constitute an emergency and then reverts to the previous roster in the following week. The employer must pay the employee at the overtime rate specified in Table 10 – Overtime rates for any extra time worked by the employee because of this roster change.' 5.10.Business SA also notes two drafting errors in clause 15.9. We submit the first reference to 'employee' in clause 15.9(h) should be changed to 'employer'. We also submit reference to 'clause 10.10' in Note 1 should be amended to 'Clause 10.10'.

SDA – 16 August 2018 submission

Item 51 Notification of rosters

14. The SDA does not support Revised PLED clause 15.9 (g) and (h) and (i). Revised PLED clause 15.9 (g) should not reference Revised PLED clause 15.9 (i). Further it is not clear that Revised PLED clause 15.9 (g) and (h) should be read together. The logic of GRIA clauses 28.14 (e) and (f) need to be considered in further re-drafting of the Revised PLED.

C4. ITEM 56A – CLAUSE 23.11 – RECALL ALLOWANCE

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
31.2 Breaks between work periods **(a)** All employees will be granted a 12 hour rest period between the completion of work on one day and the commencement of work on the next day. Work includes any reasonable additional hours or overtime. **(b)** Where an employee recommences work without having had 12 hours off work then the employee will be paid at double the rate they would be entitled to until such time as they are released from duty for a period of 12 consecutive hours off work without loss of pay for ordinary time hours occurring during the period of such absence. **(c)** By agreement between an employer and an employee or employees the period of 12 hours may be reduced to not less than 10 hours	**16.6(b)** If an employee starts work again without having had 12 hours off work, the employer must pay the employee at the rate of 200% of the rate they would be entitled to until the employee has a break of 12 consecutive hours.

SUBMISSIONS

SDA – 10 November 2017 submission

Item 56 - Breaks between work periods

22. Revised PLED clause 16.6 (b) should be read m the same way as GRIA clause 31.2 (b) 'that an employee will be paid double the rate they would be entitled to' which must be inclusive off all relevant penalties, overtime and loadings.

Business SA – 22 February 2018 submission

5. Item 56 – Breaks between work periods

5.1. In response to [61], Business SA disagrees with the SDA's submission regarding proposed clause 16.6(b). Business SA does not agree with the SDA that the current award provision at clause 31.2(b) is inclusive of penalties, overtime and loadings. Such an interpretation is not supported by the current award and would represent a significant change in legal effect.

5.2. Prevailing industrial practice is that extra rates are not cumulative.[2] Rather, where multiple penalties may be payable to an employee, that penalty which is to the greatest advantage of the employee will be paid. In the absence of any further evidence from the SDA to support their interpretation, Business SA opposes suggestions the 200% rate compounds with other penalties.

[2] See for example, Clerks – Private Sector Award 2010 cl 28.7; Manufacturing and Associated Industries and Occupations Award 2010 cls 32.3(a)-(b), 33.

Business SA – 07 August 2018 submission

7. Item 56A – Breaks between work periods

7.1. In response to [34], Business SA has no further submissions to make regarding clause 16.6(b). We are content to rely on the submissions we have provided on this point previously

SDA – 16 August 2018 submission

Item 56A Breaks between work periods

16. The SDA relies on its previous submissions regarding Revised PLED clause 16.6(b). Breaks between work periods is a stand-alone entitlement in the GRIA and has no relationship to overtime. There is no reference to overtime contained in the clause or within GRIA clause 29 overtime.

RELEVANT TRANSCRIPT – 21 June 2018 **conference:**

PN198 Item 56A deals with breaks, and this concerns clause 16.6(b) of the PLED. You say that clause should read that an employee would be paid at a rate they would be entitled to. I'm not exactly sure - can you tell me what change it is you're seeking in 16.6(b)? And there's a question in the PLED as well clarifying whether the rate an employee is entitled to be paid is a percentage of the minimum hourly rate or whether the 200 per cent compounds on other penalties, but let's deal with your proposed change. You say, the SDA says, it compounds, is that the short point, on other penalties?

PN199 MS PATENA: That's correct, your Honour.

PN200 JUSTICE ROSS: And Business SA says it doesn't. Is that right?

PN201 MR KLEPPER: Yes, that's correct.

PN202 JUSTICE ROSS: ABI have a view about that?

PN203 MS THOMSON: We agree with Business SA, your Honour.

PN204 JUSTICE ROSS: Does anyone want to say anything further about it, or are you content if the Bench determines that on the basis of what you've already said and put in your submissions?

PN205 MR KLEPPER: Your Honour, if we're going to be providing some further submissions in regards to some earlier items, perhaps we could use that opportunity if we could find some more information to provide on this point as well.

PN206 JUSTICE ROSS: Yes, certainly.

PN207 MR KLEPPER: I'm not saying Business SA has got any more, but I'm sure we could use that as an opportunity.

PN208 JUSTICE ROSS: That's fine. We can say that there will be an opportunity provided for any party to say anything further that they wish to say in respect of item 56A. We'll set that out in a statement and ultimately we'll decide that issue on the basis of the submissions that are put in.

C5. ITEM 62A – CLAUSE 23.11 – RECALL ALLOWANCE

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
20.10 Recall allowance **(a)** Unless otherwise agreed an employee recalled to work for any reason, before or after completing their normal roster or on a day on which they did not work, will be paid at the appropriate rate for all hours worked with a minimum of three hours on each occasion. **(b)** The time worked will be calculated from the time the employee leaves home until the time they return home.	**23.11 Recall allowance** **(a)** Clause 23.11 applies to an employee who for any reason is recalled to work by the employer to perform specific duties on a day on which they: **(i)** have completed their normal roster; or **(ii)** did not work. **(b)** Unless otherwise agreed between the employer and the employee, the employer must pay the employee at the appropriate rate of pay for whichever of the following is the greater: **(i)** the time between when the employee leaves their place of residence until they return there; **(ii)** 3 hours.

SUBMISSIONS

SDA – 10 November 2017 submission

25. The 'appropriate rate of pay' for the purposes of clause Revised PLED 21.11 should be 'appropriate overtime rate'.

SDA – 16 August 2018 submission

Item 62A Allowances

19. The SDA makes no further submissions in relation to matters raised by the Commission regarding the 'appropriate rate of pay' at this time.

RELEVANT TRANSCRIPT – 21 June 2018 **conference:**

PN229 JUSTICE ROSS: No, that's all right. Just bear with me for a moment. We'll come back to that. I'll just get the Act and we'll see where they define it and I'll put that to the other parties. Whilst we're on allowances, I'll come back to the moving expenses allowance, can I take you to the recall allowance, it says in 23.11. The parties were asked to - because we've simply picked up what's in the current award and it refers to "Must pay the employee at the appropriate rate of pay" and there was a question about what does that mean.

PN230 Is it at ordinary hours or are overtime or penalty rates included? For example, if the employee's recalled to work on a weekend, what rate of pay are we talking about? Or are you content to leave it with a level of ambiguity and just leave it as "the appropriate rate of pay"?

PN231 MS PATENA: Your Honour, just in line with - and I'm crossing back to the break between shifts and there's obviously similar ambiguity in relation to that rate, I think, yes, the SDA's position is it's the appropriate overtime rate. You're being recalled to work so that rate may be time and a half or double time.

PN232 JUSTICE ROSS: Do you get that from the current award?

PN233 MS PATENA: Well, that's the thing, it's not explicit so that's how we would interpret it but, again, I haven't - - -

PN234 JUSTICE ROSS: See the current award just says "Will be paid at the appropriate rate for all hours worked with a minimum of three hours on each occasion". Look, unless there's an agreement between all of you about what "appropriate rate" means, by reference to some award history or something like that, let me just check with Business SA and ABI. What do you say about the SDA's proposition that it's the overtime or penalty rate if that's applicable?

PN235 MR KLEPPER: It's Business SA here. I mean, I think we would agree as well to the extent that this is ambiguous. Obviously we would propose the interpretation that it's at the ordinary hourly rate or the – yes, the ordinary hourly rate which would be applying. Yes, without any award history to hand, that would be me interpreting this, obviously – yes interpreting the ambiguity or the (indistinct).

PN236 JUSTICE ROSS: All right. Well - - -

PN237 MS PATENA: Your Honour, if I might interrupt.

PN238 JUSTICE ROSS: Sure.

PN239 MS PATENA: I would, with your permission, like to see if we can examine any award history in relation to that particular clause which might be of assistance. Obviously if we cannot, we don't have satisfactory history in relation to that provision, then it may be that it's left because we can't agree but if there is relevant award history that supports my interpretation or the other, that would be helpful.

PN240 JUSTICE ROSS: No, no, I think that's a sensible thing to do otherwise we're going to end up with a large case to resolve it one way or the other and it may be, absent some clarity from the award history, it may be better just to leave it as it is. Look, can I go back to - and so we'll adopt that. You can advise, the SDA can advise, as to - because it was seeking, I think, the penalty rate type provision.

PN241 There will be the same opportunity for Business SA and ABI. Just check the award history and then come back with whether you want to argue a case based on that history or whether you're content to leave it as "the appropriate rate of pay" as it is in the current award, okay

C6. ITEMS PTC1~~, 63~~ and 65 – CLAUSE 25 – OVERTIME

COMPARISON OF RELEVANT CLAUSES

Current clause	PLED clause
29.1 Reasonable overtime **(a)** Subject to clause 29.1(b) an employer may require an employee to work reasonable overtime at overtime rates in accordance with the provisions of this clause. **(b)** An employee may refuse to work overtime in circumstances where the working of such overtime would result in the employee working hours which are unreasonable having regard to: **(i)** any risk to employee health and safety; **(ii)** the employee's personal circumstances including any family responsibilities; **(iii)** the needs of the workplace or enterprise; **(iv)** the notice (if any) given by the employer of the overtime and by the employee of their intention to refuse it; and **(v)** any other relevant matter. **29.2 Overtime** **(a)** Hours worked in excess of the ordinary hours of work, outside the span of hours (excluding shiftwork), or roster conditions prescribed in clauses 27 and 28 are to be paid at time and a half for the first three hours and double time thereafter. **(b)** Hours worked by part-time employees in excess of the agreed hours in clause 12.2 or as varied under clause 12.3 will be paid at time and a half for the first three hours and double time thereafter. **(c)** Hours worked by casual employees: **(i)** in excess of 38 ordinary hours per week or, where the casual employee works in accordance with a roster, in excess of 38 ordinary hours per week averaged over the course of the roster cycle; **(ii)** outside of the span of ordinary hours for each day specified in clause 27.2; **(iii)** in excess of 11 hours on one day of the week and in excess of 9 hours on any other day of the week; shall be paid at 175% of the ordinary hourly rate of pay for the first three hours and 225% of the ordinary hourly	**25.1 Payment of overtime** **(a)** .An employer must pay an employee for hours worked in excess of the ordinary hours of work or outside the span of hours (excluding shiftwork) or roster conditions prescribed in clause 15—Ordinary hours of work at the overtime rate specified in column 2 of Table 10—Overtime rates. **(b)** An employer must pay a part-time employee for hours worked in excess of the agreed hours in clause 10.5 or as varied under clause 10.6at the overtime rate specified in column 2 of Table 10—Overtime rates. **(c)** An employer must pay a casual employee at the rate specified in column 3 of Table 10—Overtime rates (inclusive of the casual loading) for hours worked by the casual employee: **(i)** in excess of 38 ordinary hours per week or, if the casual employee works in accordance with a roster, in excess of 38 ordinary hours per week averaged over the course of the roster cycle; or **(ii)** outside the span of ordinary hours for each day specified in clause 15.1 (Ordinary hours of work); or **(iii)** in excess of 11 hours on one day of the week and in excess of 9 hours on any other day of the week. **(d)** Overtime is calculated on daily basis. **25.2 Overtime rate** **(a)** The overtime rate mentioned in clause 25.1 for a full-time or part-time employee is the relevant percentage specified in column 2 of Table 10— Overtime rates (depending on when the overtime was worked as specified in column 1) of the employee's minimum hourly rate of pay. **(b)** The overtime rate mentioned in clause 25.1 for a casual employee is the relevant percentage specified in column 3 of Table 10—Overtime rates (depending on when the overtime was worked as specified in column 1) of the employee's minimum hourly rate of pay (inclusive of casual loading) **Table 10—Overtime rates** …

rate of pay thereafter (inclusive of the casual loading). **(d)** The rate of overtime for full-time and part-time employees on a Sunday is double time, and on a public holiday is double time and a half. **(e)** The rate of overtime for casual employees on a Sunday is 225% of the ordinary hourly rate of pay, and on a public holiday is 275% of the ordinary hourly rate of pay (inclusive of the casual loading). **(f)** Overtime is calculated on a daily basis.	

SUBMISSIONS

SDA – 04 August 2017 submission

Overtime

142. GRIA clause 29.1 Overtime has been varied and moved to exposure draft clause 25.

143. The SDA relies on its submissions in relation to matters AM2014/196 and AM2014/197. The SDA does not support the proposed variation and requests the current GRIA clause is reinstated in the exposure draft.

144. GRIA clause 29.2 Overtime has been moved to exposure draft clause 25.1 and 25.2 and varied.

145. The Overtime provision must be drafted with precision to ensure the reader is clear at which points overtime rates must be paid to full time, part -time and casual employees.

146. The exposure draft clause does not accurately reflect the current entitlements to overtime payments contained in the GRIA, including but not limited to clause 27.3 Maximum hours on a day, clause 27.2 (c) Continuous hours, clause 28.11 Consecutive days clause 31.2 Break between work periods or the entitlements.

147. The clause should be drafted after all exposure draft rostering provisions are determined to ensure that referencing from this clause is accurate.

148. The clause should be e-drafted to include each employment type, full time, part - time and casual employees to ensure that referencing from this clause is accurate and simple for the reader, particularly employers and employees.

149. The clause should include a reference to exposure draft 'Part 3 Hours of Work', in relation to the 'span of hours', and any reference to 'ordinary hours' as per submissions under 'Hours of work'.

150. GRIA clause 29.2 (d) has also been removed which is a substantive change which impacts on how overtime is calculated under the Award which currently is 'on a daily basis'.

151. The SDA does not support the insertion of the exposure draft clause 25.2, the GRIA clause should be reinstated.

SDA – 10 November 2017 submission

Item 63 – Reasonable overtime – being dealt with in separate proceedings – see [2018] FWCFB 5749

> 26. The SDA relies on its previous submissions in relation to Revised PLED clause 29.1. In line with the provisional view of Justice Ross at conference on 19 September 2017, that clause should not have been removed. The SDA presses the reinstatement of GRIA clause 29.1 into the revised PLED until the matter has been conclusively determined.

Item 65 - Overtime

27. The SDA does not support the Revised PLED clause 25.1(a)(i) and (ii) as it is a substantive change from GRIA clause 29.2(a); for the following reasons:

a. Revised PLED clause 25.1(a) only refers only [sic] to full time employees.

b. The GRIA clause 29.2(a) applies to 'employees' which includes full-time, part-time and casual employees.

c. Under the Revised PLED part-time and casual employees lose their existing entitlements to overtime that the GRIA clearly provides under clause 29.2.

28. For the reasons noted above, and as the SDA has previously submitted Revised PLED clause 25.1(a)(i) and (ii) should be removed and GRIA clause 29.2 reinstated, subject to any determinations arising from AM/2014/196 [sic] or AM2014/197.

ABI & NSWBC – 15 November 2017 submission

Item 63	This item remains outstanding and we look forward to the opportunity to provide comment, upon the release of a further Statement by the Commission.

SDA – 16 August 2018 submission

Item PTC1 and 65 Overtime

21. The SDA makes no further submissions in relation to 'Overtime' at this time.

RELEVANT TRANSCRIPT – 21 June 2018 **conference:**

PN298 JUSTICE ROSS: All right. Let's go to overtime, item 63 and 65. What does the SDA – perhaps you can assist me with the clause should have been removed but I'm not quite following what the issue is here. It's clause 25 of the PLED.

PN299 MS PATENA: Your Honour, look I'll make comments in general to the overtime provision, is that because the application of the overtime needs to be considered in the context of rostering provisions, we'd like the opportunity to review that once the change is made to the relevant rostering provisions, which I think are – so section 15 and potentially 10, and noting that there has been, I think, since – yes, so there are major concerns, just to understand to ensure that - so we're not continually having to re-visit and shift our position, I'd like to have the opportunity to resolve, where we can, the other drafting matters and then look at overtime again.

PN300 JUSTICE ROSS: All right. No, that's fine, and the same opportunity can be provided to everyone. We can re-visit whether there are any outstanding issues in respect of clause 25, having regard to the other changes that have been made, okay. That would apply to everybody. Then under 67, that's a penalty rate issue and relates to 26.1. We spoke about an amendment to clause 26.1 at the conference on 19 September.