NATIONAL OFFICE
Level 1, 16 - 20 Good Street, Granville NSW 2142
T: 1300 040 482 **E:** members@nat.awu.net.au **W:** www.awu.net.au
Daniel Walton National and NSW Branch Secretary

THE AUSTRALIAN WORKERS' UNION STRONGER TOGETHER

ABN 28 853 022 982

Fair Work Act 2009
FAIR WORK COMMISSION
s. 156 – 4 yearly review of modern awards
AM2016/15

AWU SUBMISSIONS CONCERNING THE PLAIN LANGUAGE EXPOSURE DRAFT FOR THE HAIR AND BEAUTY INDUSTRY AWARD 2020

Background

1. On 28 October 2020, the Fair Work Commission (**"FWC"**) issued a Statement directing interested parties to file submissions in response to the Hair and Beauty Award Plain Language Exposure Draft (**Hair and Beauty Award PLED"**) by 4pm on 25 November 2020.

2. The Australian Workers' Union's (**"AWU"**) submissions regarding the Hair and Beauty Award PLED are below.

Issues identified

3. Clause 11.4 and 14.4: The interaction between these provisions is confusing. The span of hours in clause 14.4 is important for casual employees because it determines when ordinary rates and penalty rates apply in accordance with clause 11.4. However, clause 14.1 indicates clause 14.4 does not apply to casual employees because it states: "Clause 14 applies to full-time and part-time employees."

4. Given a number of sub-clauses within clause 14 are already expressly confined in their operation to full-time and/or part-time employees, an option to resolve the existing confusion may be:

    - delete clause 14.1; and
    - specify that clauses 14.7, 14.8 and 14.9 only apply to full-time and part-time employees.

5. Clause 14.4: The span of ordinary hours on Sunday appears to have inadvertently been increased by one hour to 6pm.

6. Clause 22.2 and 22.5: These provisions create ambiguity concerning the entitlement of full-time and part-time employees to overtime rates if they work outside the span of hours in clause 14.4. The ambiguity arises because clause 22.2 of the Hair and Beauty PLED only refers to the payment of overtime rates where an employee works in excess of 38 ordinary hours per week.

7. Clause 31.2 of the *Hair and Beauty Industry Award 2010 (***"Current Award"**) prescribes overtime entitlements for full-time and part-time employees and cross-references the hours of work in clause 28.2. Clause 28.2 contains maximum weekly ordinary hours and a span within which these ordinary hours can be worked. The intent of these provisions is clearly to require the payment of overtime rates where an employee works in excess of an average of 38 ordinary hours per week and outside the span of ordinary hours. There is nothing surprising about this, given the payment of overtime rates where an employee works outside the span of ordinary hours is a standard modern award condition. The only alternative construction is that the Current Award prohibits the working of hours outside the span.

8. Clause 22.2 and 22.5 of the Hair and Beauty Award PLED are also deficient because they do not prescribe the payment of overtime rates when a full-time and part-time employee works in excess of the maximum daily hours in clause 14.7 and 14.8. As per the above submission, if overtime rates are not payable for hours in excess of the maximum per day, the provisions must operate to prohibit the working of any additional hours.

9. Clause 22.5 - NOTE 1: The wording is currently inaccurate because the Sunday and public holiday rates have not been calculated in the manner stated in the note.

10. Clause 24.6(f): This clause contains a typographical error, reading (our emphasis at underlined):

> *'The payment must not be less than the amount that would have been payable had the employee taken the leave at the time the payment is made. See clause: Error! Reference source not found.'.*

It appears the FWC intended to insert a cross-reference to clause 24.3 – Annual Leave Loading. The AWU submits the clause should be amended to reflect this change.

Questions raised in the Statement

11. Definition of a pre-apprentice: The AWU supports the inclusion of a definition for a "pre-apprentice" and proposes the following:

A pre-apprentice is an employee undertaking an accredited pre-apprenticeship course. A pre-apprentice must be paid in accordance with the minimum rates prescribed in clause 18.3. The pre-apprentice rates can be paid for a maximum period of 2 weeks.

12. Junior rates: The AWU considers the payment of junior rates should be confined to employees falling with the Level 1 classification on the basis that employees performing work above this level are required to have at least Certificate II qualifications or are performing skilled work. The payment of junior rates is not appropriate for employees at Level 2 and above.

13. If the Full Bench is of the mind that junior rates should not be restricted to the Level 1 classification, the AWU submits that junior rates should, at a minimum, be limited to classifications Levels 1 and 2 based on a recent Full Bench decision in the 4-yearly review.

14. In the *4 Yearly Review of Modern Awards – Award Stage – General Retail Industry Award 2020 – substantive issues*,[1]a Full Bench said when considering the appropriate application of junior rates to the *General Retail Industry Award 2020*, (our emphasis at underlined):

> *"[84] It seems to us that the application of junior rates to level 4 classification employees gives rise to an anomaly. It is conceivable that, depending on their age and service with their employer, a 20 year old tradesperson may only receive 90 per cent of the level 4 minimum rate. Such an outcome is inconsistent with the general approach adopted by the Commission to the proper fixation of minimum rates. As mentioned earlier, the tradespersons rate (level 4 in the Retail Award) should align with the C10 rate in the Manufacturing and Associated Industries and Occupations Award 2020; but that is not presently the case for junior employees under the Retail Award. As mentioned earlier, the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees."*

15. Applying the Full Bench's reasoning, the application of junior rates in the Hair Award must be confined to classification Levels 1 and 2, as the relevant tradesperson rate in the Hair Award (as aligned with the C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010*) is that of Level 3.

[1] *4 Yearly Review of Modern Awards – Award Stage – General Retail Industry Award 2020* [2020] FWCFB 6301.

16. As emphasised by the Full Bench, the achievement of the minimum wages objective requires that minimum wage rates reflect the value of work performed by employees. [2] It is contrary to the minimum wages objective for employees who are tradespersons to be paid less than the full trade rate, when considering the level of skill, qualifications, and significant degree of work experience obtained by employees with a trade.

17. Should the Commission find that junior rates should not be applicable to Level 3 employees, the AWU submits that junior rates equally should not be applied to the higher classification levels (4, 5, and 6) contained in the Award.

18. Apprenticeships starting before 1 January 2014: The AWU supports the removal of the clauses which provide a separate rate of pay for apprentices who commenced their apprenticeship before 1 January 2014 (relevantly, clauses 18.1(a), 18.2(a) and 18.3(a)). The AWU considers these clauses to now be obsolete and unnecessary, as hairdressing and beauty therapy apprenticeships are, in the experience of the AWU's membership, generally completed within three years. It is highly unlikely that any apprenticeships commenced prior to 1 January 2014 remain incomplete.

Additional issue – tool allowance

19. Clause 20.8(a): The AWU has recently encountered several employers who have argued the tool allowance prescribed in clause 20.8(a) of the Hair and Beauty PLED is not applicable when an employee is required to provide and use their own scissors or other cutting instruments. The AWU considers the argument that the reference to the provision of "tools" in clause 20.8 for a hairdresser would not include scissors or other cutting instruments to be completely lacking in merit. However, it would be helpful if this issue expressly resolved in the Hair and Beauty PLED via the following amendment to clause 20.8(a) (added words underlined):

> *If an employer requires an employee to provide and use their own tools (including, but not limited to, scissors and other cutting instruments), then the employer must pay the employee a tool allowance of $8.99 per week.*

[2] *4 Yearly Review of Modern Awards – Award Stage – General Retail Industry Award 2020* [2020] FWCFB 6301 at [83].