



Business SA Submission

4 Yearly Review of Modern Awards – Plain Language – *Pharmacy Industry Award 2010*

2 September 2016

Executive Summary

Business SA is pleased to provide this submission on plain language re-drafting of the *Pharmacy Industry Award 2010*. The Fair Work Commission gave directions for interested persons to provide submissions on the revised exposure draft by 4:00pm Monday 5 September 2016.¹ This submission contains Business SA's submissions on the drafting of the revised exposure draft in section 1.0. Business SA has also identified two re-drafted clauses which we submit have a different legal effect between the current award and the exposure draft. These submissions are made in section 2.0.

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 are impacted by any changes in the award system.
- South Australian employers and employees will jointly benefit from well drafted and effective modern awards, better enabling both parties to understand their rights and responsibilities.
- Small business owners make up a large proportion of our membership, these businesses are often not able to devote the necessary resources to fully understand Australia's complex workplace regulations.
- The modern award objective is to provide a fair and relevant minimum safety net of terms and conditions.² Modern awards must be drafted such that those using the award are able to determine what they can expect and what is expected of them.
- The re-drafting process must not simplify awards such that they lose legal clarity. Certainty must prevail over simplicity.

For further information from Business SA's policy team, please contact Karen van Gorp, Senior Policy Adviser, or Chris Klepper, Policy Adviser, (08) 8300 0000 or at karenv@business-sa.com or chrisk@business-sa.com.

¹ [Directions](#) [2].

² *Fair Work Act 2009* (Cth) s 134(1).

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1.0 Drafting Submissions

1.1 **Clause 2 – Definitions – preamble**

Business SA notes the preamble for the definitions section has been edited. The expression “unless contrary intention appears” has been removed. The Drafter comments accompanying this change state this phrase is “unnecessary and has the potential to create confusion and uncertainty for award users.”

Business SA notes the drafter’s comments regarding proposed changes to this clause but submits the ‘contrary intention’ phrase in fact aids the award user’s understanding and should be retained. This phrase instructs the reader to interpret terms by the clause 2 definition unless a contrary alternative definition is provided. Such contrary intention could arise where a term is defined generally, but that same term is then defined in a specialised context elsewhere in the award.

An example of this exists in the *Mining Industry Award 2010*. Under that award ‘shift worker’ is defined twice, as follows:

In the definitions clause - “**shift worker**: means an employee for the time being engaged to work in a system of shifts, being afternoon shifts, night shifts or both, or a continuous shift-worker”³; and

In the body of the award: “For the purposes of the provisions of the NES which deal with annual leave, shiftworker means a continuous shiftworker.”⁴

Without the ‘contrary intention’ phrase in the definitions section the award reader could be unsure as to which definition of shiftworker to apply for the purposes of annual leave under the NES. The reader could reasonably assume since the term ‘shiftworker’ was defined in the definitions clause, that definition would apply, despite the clear contrary intention of clause 23.2 that it only apply to continuous shiftworkers.

Business SA provides this submission on a general basis, not simply in respect to the *Pharmacy Industry Award*. While this is not an issue which would be vehemently fought by Business SA, we are simply concerned that in circumstances such as that demonstrated above there may be confusion as to which definition to apply if no ‘contrary intention’ phrase is in the award. Unless it can be guaranteed that every award will, when re-drafted in plain language and in the future, contain no contrary or specialised definitions, then this phrase has purpose. The phrase itself serves no harm when inactive and serves an important function when utilised.

1.2 **Clause 2 – Definitions – National Employment Standards (NES)**

Business SA submits the National Employment Standards (‘NES’) which have been listed in clause 2 – definitions of the revised exposure draft would be more appropriately listed in clause 3 – The National Employment Standards and this award.

The definitions clause should simply define key terms and explain how to interpret the award. A list of the national employment standards is not necessary for defining the term ‘National Employment Standards (NES)’; particularly since clause 3 explicitly details how the award interacts with the NES.

³ *Mining Industry Award 2010* cl 3.1.

⁴ *Ibid* cl 23.2.

We note the Drafter's comments that clause 3 is *common* to other modern awards and will be subject to broader consultation in 2017. Our submission simply flags this issue as having arisen in the *Pharmacy Industry Award* revised exposure draft. Further, we do not presume to redraft the definition or clause 3, however the following wording is provided to illustrate our submission on this point:

(example clause 2): **National Employment Standards (NES)**, see part 2-2 of the Act. Divisions 3 to 12 of the Act constitute the National Employment Standards which are minimum standards applying to employment of employees. Clause 3 contains an extract of section 61 of the Act.

(example clause 3): **The National Employment Standards and this award**

3.1 The National Employment Standards (NES) and this award contain the minimum conditions of employment for employees covered by this award. The minimum standards relate to the following matters:

(a) maximum weekly hours (Division 3)

(b) requests for flexible working arrangements (Division 4)

(...)

(j) Fair Work Information Statement (Division 12).

3.2 Where this award refers to a condition of employment [clause continues].

1.3 **Clause 3 – The National Employment Standards and this award**

Clause 3 in the plain language exposure draft has merged current clause 5, regarding access to the Award and the National Employment Standards provisions, with current clause 6, regarding the relationship between the award and the NES. In doing so the meaning of each of these clauses have become less obvious. Business SA submits a sub heading regarding access to the award and NES, at the least, would ensure this provision continued to be obvious and easily found from the table of contents. This will ensure a simple, easy to understand award provision.

1.4 **Clause 4 – Coverage – ordering of clauses 4.1 and 4.2**

Business SA submits the ordering of the coverage clause can be improved. The current award's coverage clause⁵ opens by stating who the award covers. This is a plain and intuitive approach to the award's coverage clause; the clause which determines who is and is not covered by the award. The reader is immediately informed of who the *Pharmacy Industry Award* covers.

The revised exposure draft's coverage clause defines community pharmacy in cl 4.1 and then states who the award covers in cl 4.2. A reader unfamiliar with the award, intent on determining the award's coverage will need to read through to clause 4.2 to see that the award covers employers and employees in the community pharmacy industry throughout Australia.

⁵ *Pharmacy Industry Award 2010* cl 4.

Business SA submits clauses 4.1 and 4.2 of the revised exposure draft be switched. The coverage clause should start by simply stating who the award does and does not cover. From there clause 4 should move onto more specialised or specific provisions regarding coverage.

1.5 **Clause 4.1 – Definition of community pharmacy**

Business SA submits the operation of clause 4.1 can be improved. This clause states that a “community pharmacy means a business to which **each of the following** applies:” (emphasis added), however, sub-clauses (a) to (c) are not linked beyond the above statement.

Business SA submits the word ‘and’ be inserted at the end of sub-clauses 4.1(a) and 4.1(b). This will not change the legal effect of the clause and makes very clear that each of the sub-clauses must apply to the business before it can be defined as a community pharmacy.

1.6 **Clause 11.1 – Casual employment**

Business SA notes the re-drafted clause 11.1. Business SA submits the re-drafted clause has deviated from the current award. The current award states:

“A casual employee is an employee engaged **as such** and who does not have an expectation or entitlement to reasonably predictable hours of work.”⁶ (emphasis added)

Alternatively, the revised exposure draft states:

“An employee who is not covered by clause 9–Full-time employment or clause 10–Part-time employment may be engaged and paid as a casual employee.”⁷

The re-draft has changed the operation of this clause. The current award makes clear that a casual employee is one specifically engaged as a casual employee. Consequently, any award conditions regarding casual employees will apply to those employees specifically engaged to be casual employees.

The re-drafted clause operates as a ‘default’ or ‘catch-all’ clause, whereby an employee will be a casual employee unless clauses 9 or 10 apply. Instead of specifically engaging the employee as a casual under the revised exposure draft, the employee will ‘fall into’ casual employment if they are not specifically covered by clauses 9 or 10.

Business SA submits this changes the operation of clause 13.1⁸ unnecessarily. No longer must the employer specifically engage the employee as a casual employee; they simply do not employ them as a full-time or part-time employee. Engaging casual employees ‘as such’ works in concert with clause 10.2⁹ and reduces the risk of conflict regarding employment status. Further, this approach is standard across many awards; it is not necessary for the plain language re-drafting process to vary this approach. Business SA submits these words be retained. The following is an example of how the words could be retained:

‘A casual employee is an employee engaged as such and who is not covered by clause 9–Full-time employment or clause 10–Part-time employment.’

⁶ *Pharmacy Industry Award 2010* cl 13.1.

⁷ Clause 11.1.

⁸ *Pharmacy Industry Award 2010*.

⁹ *Ibid.*

1.7 Clause 14.1(e) – Rostering arrangements–full-time and part-time employees

Business SA repeats its previous submission regarding clause 14.1(e); that this clause has been subject to a substantive variation which should be reversed.¹⁰

The words “(whether ordinary hours **or overtime**)” are not present in the current award and have been added to clause 14.1(e). This is a substantive change as the current award does not contemplate working of Sundays during overtime hours for the purpose of this clause.¹¹

1.8 Clause 16.1 – Minimum wages

Business SA repeats its previous submission regarding clause 16.1; that the ordering of wage table columns misleads the reader as to the minimum hourly rate calculation.¹² By listing the minimum hourly wage in Column 2 and the minimum weekly wage in Column 3 the revised exposure draft incorrectly implies that the weekly wage is calculated based on the hourly wage.

The ordering of the columns implies the minimum weekly wage is derived from the following formula (**formula 1**):

$$\text{Minimum hourly wage} * 38 = \text{minimum weekly wage}$$

The correct minimum hourly wage calculation is as follows (**formula 2**):

$$\frac{\text{Minimum **weekly** wage}}{38} = \text{minimum **hourly** wage}$$

This distinction is important as formula 1 and formula 2 can result in substantially different values as a result of rounding. Taking the minimum hourly and weekly wage for a level 4 pharmacy assistant this concern can be demonstrated.

The revised exposure draft lists the minimum weekly wage as \$20.96 and the minimum weekly wage as \$796.30.

Formula 1:

$$\begin{aligned} \text{Minimum hourly wage} * 38 &= \text{minimum weekly wage} \\ \$20.96 * 38 &= \$796.48 \text{ (Incorrect figure)} \end{aligned}$$

Formula 2:

$$\frac{\text{Minimum **weekly** wage}}{38} = \text{minimum **hourly** wage}$$

$$\frac{\$796.30}{38} = \$20.96 \text{ (Correct figure)}$$

As demonstrated, the result from **formula 2** corresponds with the values in clause 16.1 for a level 4 pharmacy assistant’s minimum hourly wage. Alternatively, the result from **formula 1** is incorrect

¹⁰ Business SA, [Pharmacy Industry Award 2010 – Revised Plain Language Draft Plain Language Modern Awards Pilot](#), 25 May 2016, [5.4].

¹¹ Pharmacy Industry Award 2010 cl 25.4(1)(iv).

¹² Business SA, [Pharmacy Industry Award 2010 – Revised Plain Language Draft Plain Language Modern Awards Pilot](#), 25 May 2016, [5.7].

by almost 20 cents. Business SA strongly submits the columns be reversed to make clear the correct calculation is the minimum weekly rate divided by 38.

1.9 Clause 18.1(a) – Meal allowances

The exposure draft at 18.1(a) has redrafted Clause 19.1(a) of the current award by separating each element into sub-clauses. Clause 18.1(a) states: “Clause 18.1 applies to an employee to whom **each of the following** applies:” (emphasis added). The following sub-clauses are not linked by anything more than the opening statement.

Business SA submits the provision would be clearer if clauses 18.1(a)(i) – 18.1(a)(iii) finished with the word ‘and’. This amendment, in tandem with the pre-amble in cl 18.1(a) makes perfectly clear that each element must apply for an employee to be entitled to the meal allowance.

1.10 Clause 18.3 – Clothing allowance

Business SA submits the re-drafted clause 18.3(a) clothing allowance is no plainer or easier to interpret than the current provision.¹³

The current provision is made up of two sentences. The first, while admittedly a long sentence, clearly indicates what an employee is entitled to under this allowance. The second sentence specifies the allowance will not apply where the employer provides the required special clothing.

The revised exposure draft has rewritten this clause into a single sentence. This increases the interpretative burden on the reader. Business SA submits the current wording be retained.

1.11 Clause 18.6(a) – Taxi fare reimbursement

Clause 18.6(a) states it “applies to an employee to whom **each of the following** applies:” (emphasis added). Business SA submits clauses 18.6(a)(i) to (18.6(a)(iii) be linked by the word ‘and’. This will reinforce how each subclause of 18.6(a) must be satisfied for an employee to be entitled to a taxi fare reimbursement.

¹³ *Pharmacy Industry Award 2010* cl 19.3(a).

2.0 Altered Legal Effect Submissions

2.1 Clause 18.6 – Taxi fare reimbursement

Business SA submits the legal effect of clause 19.6 in the *Pharmacy Award 2010* has been altered in two ways. Clause 19.6 (cl 18.6 in revised exposure draft) entitles an employee to a taxi fare reimbursement under certain circumstances. These circumstances set out the employee's legal entitlement and the employer's legal obligation under this clause. Business SA submits these entitlements and obligation have been altered between the current award and the revised exposure draft.

Clause	Pharmacy Award 2010 legal effect	Revised exposure draft legal effect
19.6	Clause 19.6 applies to an employee commencing and/or ceasing work after 10.00pm and prior to 07.00am on any day (emphasis added)	Clause 18.6(a)(i) covers an employee who starts work before 7.00 or finishes work after 10.00pm (emphasis added)
How they differ	<p>The above clauses differ because the current award's 'and/or' has been replaced by a single 'or' in the revised exposure draft.</p> <p>The time the employee commences or ceases work on a day is an element of the taxi fare reimbursement. The change highlighted above narrows an employee's entitlement to the taxi fare reimbursement.</p> <p>Under the current award an employee is entitled to the reimbursement regardless of whether they start or cease work after 10.00pm and before 7.00am on any day. The revised exposure draft narrows this time window. An employee only gains the entitlement if they start work before 7.00am or finish work after 10.00pm.</p> <p>Notwithstanding the other requirements under this clause, Business SA submits this change has narrowed an employee's entitlement to the taxi fare reimbursement.</p>	

Clause	Pharmacy Award 2010 legal effect	Revised exposure draft legal effect
19.6	Clause 19.6 states the employer will reimburse the employee for the cost from the place of employment to the employee's usual place of residence (emphasis added).	Clause 18.6(b) states the reimbursement will be cover the cost incurred by the employee in taking a taxi between the place of employment and the employee's usual place of residence (emphasis added)
How they differ	<p>The above clauses differ in the direction of travel.</p> <p>The current award clearly states the taxi fare reimbursement only applies for one direction of travel; from the place of employment to the employee's usual place of residence. Alternatively, the revised exposure draft states the reimbursement will apply to costs incurred between the place of employment and the employee's usual place of residence.</p>	

The word 'between' is significantly different to 'from' and 'to'. Payment of a fare from the place of employment ('workplace') to the usual place of residence ('home') is clearly interpreted as only applicable when travelling from the workplace to the home. The reimbursement entitlement cannot apply when travelling from home to the workplace under the current award. The entitlement only applies to a single direction of travel.

The word 'between' can be interpreted to apply when travelling in either direction, regardless of whether from the workplace to home, or from home to the workplace. The word 'between' is defined as "1. in the space separating (two or more points) (...) 3. connecting: *a link between parts*."¹⁴ Based on the ordinary meaning of 'between' a taxi journey from home to the workplace can easily entitle the employee to the reimbursement to the same degree as a journey from the workplace to the home. The revised exposure draft has extended the taxi fare reimbursement entitlement to travel in either direction.

3.0 Conclusion

Business SA would like to thank the Fair Work Commission for the opportunity to comment on this revised exposure draft.

4.0 Additional Information

Business SA's previous plain language submission can be found [here](#).

¹⁴ Macquarie, *Macquarie Essential Dictionary*, 5th ed (2010), 'Between', p 73.