

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

Date Submitted: 9 December 2020

SDA National Office
Level 6
53 Queen Street
MELBOURNE VIC 3000

Telephone: (03) 8611 7000

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 Justice Ross on 28 October 2020 with regards to the plain language exposure draft (**PLED**) of the *Hair and Beauty Industry Award 2010* (**Award**).
2. In reply to Australian Industry Group's (**AIG**),¹ Australian Workers' Union (**AWU**),² and Australian Business Industrial and the NSW Business Chamber Ltd.'s (**ABI & NSWBC**)³ submissions, the SDA refers to and relies on their submissions already filed in this matter.⁴ The SDA also make the following submissions in reply to those filed by the AIG, AWU and ABI & NSWBC.

Submissions in reply to the AIG

Clause 2 PLED – Definitions – “apprentice”

3. The SDA does not object to the proposed definition of “apprentice” in paragraph 2 of the AIG's submissions.

Clause 2 PLED – Definitions – “minimum hourly rate”

4. The SDA does not object to the amended definition of “minimum hourly rate” in paragraph 4 of the AIG's submissions.

Clause 2.1 PLED – Definitions – “overtime rates”

5. The SDA does not object to the deletion proposed in paragraph 5 of AIG's submissions.

Clause 4.2(j) PLED – Coverage

6. The SDA does not consider the changes made to have a substantive effect, as suggested by paragraph 7 to 9 of AIG's submissions.

Clause 4.3(a) PLED – Coverage

7. The SDA does not object to the amendments proposed in paragraph 14 of the AIG's submissions.

Clause 4.5(d) PLED – Coverage

8. The SDA does not object to the amendments proposed in paragraph 16 of the AIG's submissions.

Clause 4.6 PLED – Coverage

9. The SDA does not object to the amendments proposed in paragraph 19 of the AIG's submissions.

¹ Dated 25 November 2020.

² Dated 25 November 2020.

³ Dated 25 November 2020.

⁴ Dated 1 December 2020.

Clause 7.2 PLED – Facilitative provisions

10. The SDA does not object to the deletions and amendments suggested in paragraphs 20, 22 and 24 of AIG's submissions.

Clause 10.6 PLED – Part-time employees

11. The SDA agrees that the cross-reference suggested in paragraph 25 of AIG's submissions be included.

Clause 11.3(a) PLED – Casual employees

12. The SDA agrees that the cross-reference suggested in paragraph 26 of AIG's submissions be included.

Clause 11.4 PLED- Casual employees

13. AIG in paragraph 27 submit that clause 11.4 of the PLED should be deleted. The SDA objects to this, as casuals are to be paid penalty rates for hours worked outside the span of hours, as per clause 13.3 of the Award.

14. The reference to clause 13.3 of the Award that the SDA relies on is the Award clause as it existed prior to the variation of the Award on 30 October 2020 (Determination, PR723908). The SDA, along with the AIG, has brought this to the attention of the Commission, to be corrected. The pre-variation clause appears in the document, "Comparison of modern award to exposure draft – Hair and Beauty Award"⁵ provided by the Commission:

13.3 For all work performed outside the hours in clause 28.2, except Sundays, a casual employee will be paid the hourly rate for a full-time employee in this award plus 50%. For Sundays, the additional loading will be 100%.

15. Therefore, the SDA objects to the deletion of PLED clause 11.4, as it correctly identifies that casuals who work outside the span of hours are entitled to penalty rates.

Clause 11.5 PLED- Casual employees

16. The SDA agrees that the reference to clause 22.2 is erroneous and should be replaced with reference to clause 22.4, as per paragraph 28 of AIG's submissions.

Clause 12.2 PLED – Apprentices

17. The SDA disagrees with the AIG's submission in paragraphs 29 and 30. The clause does not require any additional substantive obligations, and therefore should not be deleted.

Clause 12.3 PLED – Apprentices

18. The SDA does not oppose the inclusion of 19.5(f) into the PLED as per paragraph 34 of AIG's submissions.

⁵ Dated 28 October 2020.

Clause 12.7 PLED – Apprentices

19. The SDA does not oppose the alterations as per paragraph 36 of the AIG's submissions.

Clause 12.7(d)(ii) PLED – Apprentices

20. The SDA does not oppose the insertion of "where necessary" after "accommodation" suggested by paragraph 40 of the AIG's submissions, as this is consistent with 19.5(c) of the Award.

Clause 13.2 PLED – Classifications

21. The AIG objects to the changes in the classifications provision at clause 13.2 of the PLED, as per paragraphs 41 to 44.
22. The SDA does not object to the changes made to clause 13.2 of the PLED. The SDA relies on paragraph 13 of their previous submissions. 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.
23. It is submitted that this change aids in the clarity of the provision, without changing the fundamental meaning of the term.
24. 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. In fact, the opposite submission could equally be made, that the current provision implies that the employer has an unfettered discretion in determining classifications.
25. In the alternative, if the Commission is minded retaining the current provision a clarificatory note stating that the test is based on the duties actually performed would be of assistance.

Clause 14.1 PLED – Ordinary hours of work and rostering

26. The SDA supports AIG's submission in paragraph 46-47. The SDA does not object to the changes suggested by AIG, as noted in paragraph 46 of their submission.

Clause 15.1(a) PLED – Roster notification

27. The SDA does not support AIG's suggestion in paragraph 49 that there be a change to the heading of clause 15.1.
28. Clause 15.1 of the PLED is aligned with clause 30 of the Award. The Award suggests that casuals are not intended to be excluded from clause 30 as it is omitted from the list of provisions that do not apply to casual employees.

Clause 15.1(b) – (f) PLED – Rostering principles

29. The SDA objects to the AIG's submission in paragraph 50 that clause 30 of the Award does not apply to casuals. The Award does not indicate that this clause does not apply

to casuals. If the contrary was the case, then clause 30 would also be included in the list of provisions in clause 13.4 of the Award that do not apply to casuals.

30. Therefore, the wording of clauses 15.1(b) – (f) in the PLED should be retained, as extending to all employees. Amending the heading as suggested by the AIG would exclude casuals from the entirety of clause 15 in a way that the Award does not.

Clause 15.3 PLED– Note

31. The SDA agrees with the correction made by the AIG in paragraph 53 of their submissions.

Clause 18.4 – Minimum rates of adult apprentices

32. The SDA does not oppose the amendments suggested in paragraph 59 of AIG's submissions.

Clause 20.9(a)(ii) PLED – Travelling time reimbursement

33. In reference to the AIG's submissions in paragraph 60 – 62, the SDA does not oppose the inclusion of the words "any additional costs" in the PLED clause 20.9(a)(ii).

34. These words are included in other Awards, such as the *General Retail Industry Award 2020*.⁶

Clause 20.10(b) PLED– Transport of an employee reimbursement

35. The SDA does not oppose the changes to the Award clause, through the adoption of the term "commercial passenger vehicle" in the PLED. This term is appropriate given the rising use of alternative transport operators. The requirement imposed by the word "reasonably" in the clause will function to prevent employees from accessing more expensive options.

Clause 21.3 PLED – Penalty rates for casual employees

36. In response to the AIG submissions in paragraph 70, the SDA submit that casual employees are entitled to the penalty rates prescribed by the third row of Table 17. The Award clause 31.2(c) reflects this position. The hours listed in the third row are the ordinary hours of work on a Saturday and therefore attract a 33% loading.

37. The SDA also submit that casual employees are also entitled to the penalty rates prescribed by the second row of Table 17, per clause 13.3 of the Award. The SDA refers to paragraph 14 of these submissions.

38. Therefore, the SDA objects to the AIG's submissions that the second and third row be deleted from Table 17 of the PLED.

Clause 22.2 PLED – Overtime rates for full-time employees

39. Clause 32.1(a) of the Award prescribed overtime rates for hours worked "in excess of the ordinary number of hours worked". AIG's submission suggests that, read with

⁶ See *General Retail Industry Award 2020*, clause 19.4(b) and 19.5(c).

clause 28.2(a) of the Award, overtime is only payable for hours worked in excess of an “average of 38 [hours] per week”. The SDA objects to this position and submits that the wording in clause 22.2 of the PLED is aligned with clause 31.2(a) of the Award and should be retained.

40. The SDA suggests that wording should be included clarifying that overtime applies after 38 hours, or an average of 38 hours where the usual roster has hours worked averaged over a roster cycle.

Clause 22.5 PLED – Overtime rates

41. There appears to be a typographical error in clause 22.5 of the PLED. The SDA suggests the correction as follows:

22.5 Overtime rates

An employer must pay an employee for overtime worked as set out in clauses 22.2, 22.3 and ~~22.2~~ 22.4 at the following rates:

Clause 23.2(a) PLED – Rostered days off

42. The SDA opposes the AIG’s proposed amendment in paragraph 71 of their submissions. The original wording, “clause 23.1 applies if,” provides greater clarity for when the entitlement to the relevant penalty rates applies for working on a rostered day off.

Clause 24.2 PLED – Additional annual leave for shift workers

43. The SDA opposes the deletion of clause 24.2 as suggested by the AIG in paragraph 74 of their submissions as this would amount to a substantive change to the Award.
44. The SDA does not oppose the alterations suggested by the AIG in paragraph 73 of their submissions.

Clause 24.3 PLED- Annual leave loading

45. The SDA submits that the ambiguity arising from the wording of 24.3(a) and 24.3(b) of the PLED be resolved by reverting to the wording of clause 33.3 of the Award.
46. The SDA objects to the AIG’s suggestion in paragraph 79 that clause 22.3(b)(ii) be deleted for the reasons outlined in paragraph 43 above.

Clause 24.6(f) PLED – Cashing out of annual leave

47. The SDA does not object to AIG’s submission in paragraph 80.

Clause 24.7(a) PLED – Excessive annual leave

48. The SDA object to the AIG’s submission in paragraph 81 for the reasons outlined in paragraph 43 above.

Clause 24.9(d) PLED – Excessive annual leave

49. The SDA object to the AIG’s submission in paragraph 82 for the reasons outlined in paragraph 43 above.

Clause 29.2, 29.3 PLED – Public holiday substitution

50. The SDA submits that the PLED clauses, as drafted, do not reflect fully the Award provisions 35.2, 35.4 and 35.4. Currently, the PLED clauses only account for part-days.

51. It is SDA's preference that the PLED clauses revert to the current Award clauses 35.2, 35.3 and 35.4 as it is easier and clearer to maintain the current structure. Alternatively, the PLED clauses 29.2 and 29.3 should be replicated for a full-day public holiday.

Clause 34.1(c) PLED – Redundancy – Transfer to lower paid duties

52. The SDA support AIG's submission in paragraph 87.

Clause 34.1(c) PLED – Redundancy – Job search entitlement

53. The SDA support AIG's submission in paragraph 88.

Clause B.5.3 PLED Summary of hourly rates – Apprentices

54. The SDA support the AIG's submission in paragraph 89 and recommends the amendments as suggested.

55. The SDA further submits that separate rates be included for beauty therapy apprentices.

Clause B.5.4 PLED Summary of hourly rates – Apprentices

56. The SDA support the AIG's submission in paragraph 89 and recommend the amendments as suggested.

57. The SDA further submits that separate rates be included for beauty therapy apprentices.

Clause B.5.6 Summary of hourly rates – Pre-apprentices

58. The SDA support the AIG's submission in paragraph 93 but clarifies that the rates in the final column should be the same as the rates in the third column.

Submissions in reply to the ABI & NSWBC

Clause 4 - Coverage

59. The SDA does not oppose the alterations proposed by the ABI & NSWBC in paragraph 3.1 of their submissions.

Clause 13.2 PLED – Classifications

60. The SDA opposes the submissions made by ABI & NSWBC in paragraph 3.2 of their submissions and refer to our above submissions in reply to the AIG regarding clause 13.2 in paragraphs 21 to 25.

Submissions in reply to the AWU

61. The SDA supports the submissions of the AWU.

Clause 22.5 PLED – NOTE 1

62. The SDA supports paragraph 9 of AWU's submission.

Other issues for comment

Junior rates

63. In response to AIG's submission in paragraph 56 and 57, the SDA refers to paragraph 20 of its previous submission – that junior rates should be limited to Level 1 and Level 2 employees.

Clause 18 PLED question – Apprenticeships starting before 1 January 2014

64. In response to the question raised in clause 18 of the PLED, the SDA supports the deletion of the rates applying to apprentices starting before 1 January 2014.