

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

Date Submitted: 19 March 2021

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 accordance with the directions set out in paragraph 22 of the Statement of Justice Ross on 18 February 2021 with regards to the plain language exposure draft (**PLED**) of the *Hair and Beauty Industry Award 2010* (**HBIA**).
2. In the Conference before Justice Ross on 12 February 2021, the SDA sought the opportunity to file further submissions to Items 15, 16, 20, 28, 29, 30, 32, 49, 50, 54, 55, 56.
3. In the intervening time the SDA, Australian Worker's Union (**AWU**) and Australian Industry Group (**AIG**) have also had discussions over the various submissions and issues the parties have made.

Permanent employees and overtime rates - Items 15, 49 and 50

4. The SDA notes its previous submissions on Items 15, 49 and 50. Further to those submissions, the SDA reiterates that the current PLED provisions relating to overtime for full-time and part-time employees are deficient.
5. The HBIA currently does not contain provisions that explicitly state that working outside conditions such as the maximum daily hours, rostering principles and span of ordinary hours would incur overtime. Therefore, any work outside the rostering provisions is not permitted and would be an award breach. The SDA submits that to rectify this, reference to all the conditions in which overtime is payable should be explicitly made.
6. In recent discussions, the SDA, AWU and AIG have reached a consensus that explicit reference to the entitlement to overtime rates for permanent employees who work outside the span of hours be included in the PLED.
7. The other issues remain unresolved between the unions and AIG.
8. The SDA acknowledges that the consideration of this issue has been raised in written submissions of the SDA (dated 19 March 2021) to the Full Bench presiding over the Overtime for casuals matter (AM2017/51).¹ It is a preference that the overtime issue should largely be dealt with in one matter.

Rostered day off – Item 56

¹ Specifically, paragraph 13 of the Full Bench Decision [2021] FWCFB 1121, dated 5 March 2021.

9. The PLED clause 23.2(a) currently reads:

23.2 Rostered day off

(a) Clause 23.2 applies if the employer and employee agree in writing that the employee will work on a day that is their rostered day off.

10. In paragraph 71 of their submissions dated 25 November 2021, AIG proposed to change this to:

(a) ~~Clause 23.2 applies if the~~ An employer and employee may agree in writing that the employee will work on a day that is their rostered day off.

11. The SDA and AWU support the current drafting as reflected in the PLED and submit that the AIG's proposed changes lessens the clarity of the provision. Making reference to the word 'may' potentially introduces some uncertainty, as there *must* be written agreement between the employer and employee for the employee to work on a day that is their rostered day off.

12. The AIG proposal has also deleted reference provided as to how the day should be paid.

Part-time employees and agreement – Item 16

13. In the PLED clause 10.3(a) word 'ordinary' has been included before 'hours' to read:

10.3 At the time of engaging a part-time employee, the employer and the employee must agree in writing on a regular pattern of work. That agreement must include at least all of the following:

(a) the number of **ordinary** hours to be worked each day;

14. The HBIA does not currently reflect this wording:

12.2 At the time of first being employed, the employer and the part-time employee will agree, in writing, on a regular pattern of work, specifying at least:

- the hours worked each day;

15. The SDA does not support the inclusion of "ordinary" before the word "hours" and submits that it should be deleted. The SDA notes that the current Award wording is also consistent with the GRIA cl 10.5(a) and it would be beneficial to maintain that consistency across instruments.

Rostering principles - Item 32

16. In paragraphs 48-49 of their submissions dated 25 November 2021, the AIG submitted that casuals are not entitled to the entitlement in clause 15.1(a). to rectify this, they

suggested limiting the application of the rostering principles in clause 15.1 to only apply to full-time and part-time employees:

15.1 Rostering principles—~~all employees full-time and part-time employees~~

(a) The employer must prepare a roster for each employee for a maximum of a 4- week period.

17. The PLED provisions in clause 15.1 are reflective of the provisions in HBIA clause 30 which applies to all employees. The HBIA clause 30 is not included in the list of provisions in clause 29 which do not apply to casual employees. Making the proposed change will bar casuals from accessing the provisions in HBIA clause 30. This is inconsistent with the current award.

18. It is worth noting that the HBIA does anticipate a situation where a casual works in accordance with a roster:

31.2 Overtime and penalty rates

(b) Overtime – casual employees

Hours worked by casual employees:

(i) In excess of 38 hours per week or, ***where the casual employee works in accordance with a roster***, in excess of 38 hours per week...

Therefore, there are provisions in clause 30 that are potentially applicable. Excluding casuals from its operation results in a substantive and unnecessary change.

19. SDA propose preserving the current PLED clause, to maintain that 15.1(a) applies to casuals as well:

15.1 Rostering principles—~~all employees~~

(a) The employer must prepare a roster for each employee for a maximum of a 4- week period.

20. In the alternative, the SDA proposes retaining wording akin to clause 30 of the HBIA, which does not specify whether the rostering principles clause applies to all employees or just permanent employees.

Overtime & penalty rates for casual employees – Items 20, 50 and 54 & 55

21. The SDA submits that the proposed PLED provisions relating to casuals and overtime is also deficient in its current form. However, a recent Full Bench Decision² has clarified that the HBIA should reflect that casual employees receive a penalty payment for working outside the spread of hours. The SDA submits that the PLED should reflect this Decision.

² [2021] FWCFB 1121.

22. The unions and the AIG have since come to a consensus on Items 20 (retaining the PLED clause 11.4),³ 54 and 55, and the following proposed amendments to the PLED.

23. The SDA proposes the following table and accompanying notes to rectify and replace Table 14 – Penalty rates in clause 23.1 of the PLED:

For ordinary hours worked:	Full-time and part-time employees % of minimum hourly rate	Casual employees % of minimum hourly rate
Monday to Friday—before 7.00 am and after 9.00 pm	N/A	150
Saturday—before 7.00 am and after 6.00 pm	N/A	150
Saturday—between 7.00 am and 6.00 pm	133	133
Sunday—before 10.00 am and after 5.00 pm	N/A	200
Sunday—between 10.00 am and 5.00 pm	200	200
Public holiday—all ordinary hours	250	250
Rostered days off – all ordinary hours	200	–

NOTE 1: Schedule B—Summary of Hourly Rates of Pay sets out the hourly penalty rates for all employee classifications.

NOTE 2: Full-time and part-time employees are entitled to the overtime rates prescribed by clause 22 for work performed outside the spread of hours prescribed by clause 14.4.

NOTE 3: For the purposes of overtime, the spread of hours does not apply to casual employees, however they receive a penalty payment for working outside the spread of hours prescribed in clause 14.4.

24. The SDA understands that the AIG agrees with the position and the proposed drafting provided in paragraph 34.

25. The SDA submits that if the above proposals are adopted, the issues raised in Items 20, 50, 54 and 55 will be resolved.

³ In previous submissions, dated 25 November 2020 (paragraph 7), AIG proposed to delete PLED clause 11.4.

26. The SDA also submits that the casual overtime clause should include that overtime is paid on hours of work outside the rostering principles in clause 15.1. The SDA notes that it has made submissions on this matter in the Casuals and overtime matter (AM 2017/51). A detailed submission has been made in the overtime matter (SDA submission 19 March 2021) The parties preference is for the overtime matter beyond the agreed issue of working outside the span of hours, should be dealt with primarily in one matter and so have made their submissions in detail in the overtime matter.

Classifications – Item 28

27. The SDA notes it previous submissions on Item 28 along with AIG’s request to make further submissions on this point.

28. The SDA will respond to AIG when their submissions are made available.

Span of hours – Item 30

29. The PLED clause 14.1 restricts the application of the “Ordinary hours of work” provisions (clause 14) to full-time and part-time employees:

14.1 Clause 14 applies to full-time and part-time employees

30. For simplicity, the SDA proposes the deletion of PLED clause 14.1 so that the span of hours explicitly applies to casual employees:

14. Ordinary hours of work

~~14.1 Clause 14 applies to full-time and part-time employees~~

31. However, the SDA submits that by making the proposed amendments above (paragraphs 25 onwards) relating to the overtime and penalty rates provisions, this issue will be, in substance, rectified (as casuals will receive a penalty payment for work outside the spread of hours).

Other matters

32. Contrary to previous submissions, the SDA would like to submit that no changes are required to clause 9 of the PLED, relating to Item 15. The SDA are satisfied with the drafting as it currently stands.