Shop Distributive and Allied Employees' Association

THE UNION FOR WORKERS IN
RETAIL. FAST FOOD. WAREHOUSING.

# 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

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## INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association (**SDA**) make these submissions in reply in accordance with directions in paragraphs 22 and 23 of the

statement[1] issued 18 February 2021 and the amended directions of 3 March 2021.[2] These submissions are made in relation to the plain language exposure draft (**PLED**) of the *Hair and Beauty Industry Award 2010* (**HBIA**), as published on the 18 February 2021.

2. The SDA refers to our previous submissions and the further submission of Australian Industry Group (**AIG**) dated 19 March 2021.

3. References to 'Items' relates to the Items as listed in the Summary of Submissions document, published by the Fair Work Commission on 18 February 2021.

## Item 8 – Clause 4.2(j) 'body massage and high frequency body treatments'

4. The SDA relies on our previous submissions and maintains that it does not perceive the change to be a substantive one.

## Item 15 – Clause 9 Full-time employees

5. The SDA refers to paragraph 32 of our submissions dated 19 March 2021 and confirms AIG's understanding of the SDA's position on this Item.

## Item 22 – Clause 12.2 Apprentices

6. The SDA reiterates our previous submissions and maintains that this does not constitute a substantive change as it simply and clearly points out the fact that there are requirements for apprentices that are outside the Award; a provision specifying that legislative requirements should be applied and adhered to does not amount to a substantive change.

7. The SDA points out that the disputed clause is also reflected in the *General Retail Industry Award* (GRIA) clause 12.2.

8. The SDA believes that there is no apparent reason why its inclusion in the PLED is problematic.

## Item 28 & 29 – Clause 13.2 Classifications

9. A paragraph 8 of their submissions dated 19 March 2021, the AIG contends that the SDA agrees that the 'change' in Item 28 & 29 is a 'substantive change.'

[1] [2021] FWCFB 858.
[2] Amended via email.

10. The SDA rejects this submission and refers to paragraph 23 of our 9 December 2020 submission that this change aids in the clarity of the provision without changing the fundamental meaning of the term.

11. AIG further contend at paragraph 9 that the clearer and beneficial drafting at PLED clause 13.2 should be rejected as:
    i. The provision has 'existed in its current form for many years' and
    ii. 'The SDA had every opportunity to seek a substantive change to the clause…They have not done so, nor led any material in these proceedings that might support a variation being made.'

12. In response the SDA notes that the *Hair and Beauty Industry Award* has existed since 2010 and that many items currently being considered under the PLED were never challenged.

13. Such a submission shows a lack of understanding of the Commission's purpose in undertaking the PLED, which is to ensure the Awards remain a relevant legal minimum by being readily understandable.

14. Furthermore, AIG has not led any material to show how a change more clearly identifying the objective test in classifications could result in negative outcomes for employers or employees. It must be inferred therefore that AIG seeks to maintain an ambiguous provision for its own sake.

15. It should be noted that the *General Retail Industry Award 2020* adopted wording matching the HBIA PLED provision:

> ***14.2*** *The classification by the employer must be based on the skill level as determined by the employer that the employee is required to exercise in order to carry out the principal functions of the employment.*

16. It is the SDA's submission that such wording should also be adopted in the HBIA PLED.

## Item 32 – Clause 15.1(a) Rostering principles

17. The SDA note AIG's concerns that PLED clause 15.1(a) provides casual employees with an entitlement that is not contained in the HBIA.

18. The SDA submit that clause 15.1(a) can be amended to apply specifically to permanent employees:

> *"The employer must prepare a roster for a permanent employee for a maximum of a 4-week period."*

19. However, it should be noted that the HBIA does anticipate a scenario where a casual employee can work according to a roster:

> ***31.2 Overtime and penalty rates***
> ***(b)*** *Overtime 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 averaged over the course of the roster cycle; or*

20. Therefore, the SDA submits that if the approach in paragraph 18 above is taken, the PLED clause 15.1(a) should also be aligned with the wording in HBIA clause 31.2(b).

21. Accordingly, the SDA provide some proposed wording for PLED clause 15.1(a):

> *The employer must prepare a roster for a permanent employee for a maximum of a 4-week period. Where a casual employee works in accordance with a roster, the roster should be for a maximum of a 4-week period.*

    A clause like this would satisfy capturing the content of both the HBIA clause 30.1 and 31.2(b).

22. The SDA believes this will ameliorate AIG's concerns around the applicability of clause 15.1(a) to casual employees under the HBIA.

23. The AIG have argued that the heading of clause 15.1 should be changed to:

> *15.1 Rostering principles – full-time and part-time employees*

    The SDA oppose this on the basis that the HBIA does not operate to exclude casual employees from *all* the rostering principles.

24. The corresponding HBIA provision, clause 30, does not limit the application to a set of employees by its heading: "*30. Rostering principles*." Therefore, the SDA suggests that PLED clause 15.1 reads either in its current form:

> *15.1 Rostering principles – all employees*
>
> Or, in line with the HBIA:
>
> *15.1 Rostering principles*

25. Where the operation of PLED clause 15.1(a) may have a qualified application to casual employees, the other sub-clauses do not necessarily follow. The SDA believes that the variation to the current PLED clause 15.1(a) proposed above in paragraph 21 would clarify the applicability of the rostering principles for all employees. Amending this in the way the AIG have suggested would amount to a substantive change that bars a group of employees from accessing provisions which they are currently entitled.

## Item 33- Clauses 15.1(b) – (f) Rostering principles

26. The SDA disagree with the AIG's claim that clause 29 and 30 of the HBIA are "inherently interconnected". Where clause 29 may not apply to casuals by virtue of clause 13.4, this does not mean that clause 30 does not or cannot apply to casual employees.

27. In paragraphs 15 and 16 of AIG's submissions of 19 March 2021, it is argued that the rostering provisions have no application to casual employees because the preparation of rosters for them is not required by the HBIA. In response, the SDA refer to paragraph 20 above of their present submissions. This clearly indicates that there is a scenario where a casual can work in accordance with a roster.

28. The HBIA does not exclude casual employees from the roster provisions specified in clause 15.1(b) – (f). Accepting AIG's proposal would have this undesirable effect and does not reflect the current Award provisions as a minimum.

29. Clauses 30.1 – 30.5 are reflected in PLED clauses 15.1(b) – (f):
    - Clause 30.2 is captured in PLED clauses 15.1(b) and (c);
    - Clause 30.3 is captured in PLED clause 15.1(f);
    - Clause 30.4 is captured in PLED clause 15.1(d); and
    - Clause 30.5 is captured in PLED clause 15.1(e).

    On a reading of the Award, none of these provisions are expressed to exclude casual employees. AIG's proposal would expressly and inappropriately exclude casual employees from the operation of provisions of which they are currently entitled.

30. The SDA strongly opposes the AIG's suggestion to specify in the clause heading that the whole provision applies only to permanent employees. The SDA refers to our submissions in paragraph 24 above.

31. The SDA notes that the GRIA clause "15.7 Rostering arrangements" is not drafted in a way that excludes casual employees from equivalent rostering arrangements.

32. The AIG's proposal has the effect of excluding casuals from accessing several provisions that currently applies, and the SDA strongly opposes this amendment.

## Item 38 – Clause 17.2 Junior rates

33. In clause 17.2 of the PLED, the FWC posed a question which asked: "which classification levels apply to junior employees and whether junior employees holding trade qualifications (see clauses A.2(a) and A.2(b), A.3, A.4 and A.5) should be paid adult rates." The SDA provided a response to that question in their previous submissions.[3]

34. The SDA submits that junior rates should be limited to Level 1 and Level 2 employees.

35. The SDA submits that given that the relevant tradespersons rate is Level 3, junior rates should not be applicable beyond Level 2 as a tradesperson should not be paid less than the full trade rate. The SDA submits that it does not align with the Modern Awards

[3] SDA Submissions 1 December 2020 [20], 9 December 2020 [63].

Objectives for junior rates to apply beyond Level 2.[4] Therefore, juniors holding trade qualifications per PLED clause (HBIA clause) B.3 (A.3), B.4(A.4) and B.5(A.5) should be paid the full rate pertaining to those classifications. Junior rates should not apply to those classifications.

## Item 40 – Clause 18.1 'pre-apprentices' definition

36. The SDA notes paragraph 26 and 27 of AIG's submissions dated 19 March 2020. the discussions regarding the definition of pre-apprentices is still ongoing. The SDA would appreciate the opportunity to respond to any further submissions on this matter and will provide a position when appropriate.

## Item 47 – Clause 20.10(b) Transport reimbursement

37. The SDA refers to and reiterates our previous submissions in relation to this Item.[5]

38. AIG at paragraph 30 of their further submissions[6] identifies several reasons for the rejection in the HBIA PLED of a provision currently extant in other Awards, namely:
    i. Taxi fares are regulated by state and territory governments while rideshare services are not;
    ii. Rideshare services often increase their fares; and
    iii. Different services are available in the same providers.

39. In response to point i. raised above, the SDA notes that the Commission has accepted the appropriateness of such services.

40. The different fares and services available through various rideshare providers can be comparable to the known variation in taxi fares which can be caused by things such as traffic or routes chosen. To a large extent the concerns AIG have articulated about 'premium services' being utilized is mitigated, perhaps entirely, by the SDA proposal to insert words to effect of 'equivalent to a taxi' at the end of PLED 20.10(b).

41. The SDA opposes the AIG proposal at paragraph 31 of their February further submissions as adding unnecessary complexity and subjectivity. Such a change may also give rise to a misunderstanding that the employer must agree for the employee to take a taxi. Such misunderstandings must be avoided.

42. The issue of 'commercial passenger vehicle' was dealt with comprehensively by the Commission in the *Plain language project – Pharmacy Industry Award 2010.* In that matter, [2017] FWCFB 1612, at paragraphs [75] to [77] the Full Bench relevantly noted:

> [75] We also amended clause 18.7(b) to account for the emergence of other transport operators such as Uber. The words 'commercial passenger vehicle' were adopted

[4] *Fair Work Act 2009* (Cth), s 134.
[5] SDA Submissions 9 December 2020 [35].
[6] AIG Submissions 19 March 2020 [30].

instead of naming a specific operator to ensure that the provision applies to any future services that become available.

[76] Clause 18.7 of the further revised exposure draft states:

'(a) Clause 18.7 applies to an employee to whom all of the following apply:

(i) the employee starts work before 7.00 am or starts or finishes work after 10.00 pm; and

(ii) the employee's regular means of transport is not available; and

(iii) the employee is unable to arrange their own alternative means of transport; and

(iv) a proper means of transport to or from the employee's usual place of residence is not provided to, or arranged for, the employee by the employer at no cost to the employee.

(b) The employer must reimburse the employee the cost they reasonably incurred in taking a commercial passenger vehicle from the employee's usual place of residence to the place of employment or from the place of employment to the employee's usual place of residence, whichever is applicable.'

[77] Parties were invited to comment on the proposed amendments to clause 18.7. The union parties 51 and the Pharmacy Guild support the proposed amendments. We will adopt the proposed amendments to clause 18.7.

43. For completeness, it is further noted that the *General Retail Industry Award 2020* adopted the provision as follows:

*19.8 Transport reimbursement*
*(a) Clause 19.8 applies to an employee (other than a shiftworker) to whom each of the following applies:*

*(i) the employee starts work before 7.00 am or starts or finishes work after 10.00 pm; and*
*(ii) the employee's regular means of transport is not available; and*
*(iii) the employee is unable to arrange their own alternative means of transport; and*
*(iv) a proper means of transport to or from the employee's usual place of residence is not provided to, or arranged for, the employee by the employer at no cost to the employee.*

*(b) The employer must reimburse the employee the cost they reasonably incurred in taking a commercial passenger vehicle between the place of employment and the employee's usual place of residence.*

## Item 50 – Clauses 22.2 and 22.5 Overtime rates for Full-time and Part-time employees

44. The SDA supports the express and clear reference to the overtime entitlement for full-time employees who work outside the span of hours. However, the SDA submits that PLED clause 22.2 will still be deficient as it does not capture the entirety of overtime entitlements for full-time employees. Overtime for work done in excess of the maximum daily hours and outside the rostering principles must also be captured in the overtime clauses to address the deficiencies in the current drafting.

45. The SDA have made submissions to the Full Bench in AM2017/15 Overtime for Casuals in relation its position in paragraph 44. The PLED should clearly reflect all the circumstance where full-time employees would attract an overtime payment.

46. In response to AIG's position in paragraphs 36 and 37, the SDA submit that it is necessary that the PLED expressly identifies that work done outside the span of hours by part-time employees attracts overtime. The current PLED clause 22.3 is deficient as it also does not clearly capture the entirety of overtime entitlements for part-time employees.

47. The SDA have made submissions to the Full Bench in AM2017/15 Overtime for Casuals in relation its position in paragraph 44. The PLED should clearly reflect all the circumstance where part-time employees would attract an overtime payment.

48. The SDA have also made previous submissions in the PLED process in relation to this matter.[7]

49. Additionally, the SDA would like to bring to the Commission's attention that clause 12.9 of the HBIA has been omitted from the PLED:

> **12.9 Award entitlements**
>
> A part-time employee will be entitled to payments in respect of annual leave, public holidays, personal/carer's leave and compassionate leave arising under the NES or this award on a proportionate basis. Subject to the provisions contained in this clause all other provisions of the award relevant to full-time employees will apply to part-time employees.

50. This clause has the effect of clarifying the equal application of provisions to both full-time and part-time employees and confirming the Awards alignment with the obligations outlined in the International Labour Organisation Convention 175 (Part-Time Work Convention).[8] It should therefore be retained in the PLED.

51. The SDA proposes that the clause be inserted where the part-time provisions currently sit, either as a sub-clause in 15.3, or as a new PLED clause 10.8.

52. The SDA note AIG's submissions at paragraph 39. The SDA have made submissions on this matter to the Full Bench in AM2017/15 Overtime for Casuals. If this matter is to be dealt with in the PLED process, then the SDA may seek the opportunity to make further submissions on this matter.

## Item 54 – Clause 23.1 Penalty rates

53. The SDA note paragraph 40 of AIG's submissions and confirm its assent to the proposed insertions.

[7] See SDA submissions dated 19 March 2021, paragraphs 4 to 9.
[8] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C175.

54. In addition, the SDA proposed a further clarificatory addition to the new note. This addition is reflected in the SDA's submissions made on 19 March 2020.[9]

## Item 56 – Clause 23.2(a) Rostered day off

55. The SDA relies on paragraphs 9 to 12 in our submissions dated 19 March 2021. The SDA submit that the current PLED wording should be retained as it already addresses AIG's concerns, whilst also making it clear what an employee is paid if they work on their rostered day off.

## Item 59 – Clause 24.3 Annual leave loading

56. AIG's further submissions of 19 March 2021 deal with its understanding of annual leave loading, which they state at paragraph 47 turns on the understanding of annual leave loading being judged in total at the end of the period.

57. Such an approach seems to presume that annual leave can only be taken as a specific period. However, such a requirement does not appear in the Award while the Act itself provides:

> **FAIR WORK ACT 2009 - SECT 88**
>
> **Taking paid annual leave**
>
> (1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.
>
> (2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

58. This approach is not novel, as section 236(2) of the *Workplace Relations Act 1996* (Cth) states: "To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take."

59. It follows that annual leave may be taken in any period agreed to between the employer and employee. The Commission is able to take notice that annual leave loading is often granted in hourly components. As a consequence, any loadings should also accrue hourly.

60. AIG at paragraph 52 submits that this is a substantive change, the SDA does not agree with this characterization of the Award. It must be noted that the provision the subject of AIG's challenge is also found in the *General Retail Industry Award 2020* as follows:

> **28.3 Additional payment for annual leave**
>
> **(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 28.3 for the employee's ordinary hours of work in the period.

[9] Paragraph 23.

**(b)** The additional payment is payable on leave accrued.

**(c)** For an employee other than a shiftworker the additional payment is the greater of:

**(i) 17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

**(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 22—Penalty rates.

**(d)** For a shiftworker the additional payment is the greater of:

**(i) 17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

**(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 25—Rate of pay for shiftwork.

61. The provision remained unchanged from the initial Plain Language Exposure Draft – General Retail Industry Award 2017 which rendered the provision as:

**32.3 Additional payment for annual leave**

**(a)** During a period of paid annual leave an employer must pay an employee an additional payment in accordance with clause 32.3 for the employee's ordinary hours of work in the period.

**(b)** The additional payment is payable on leave accrued.

**(c)** For an employee other than a shiftworker the additional payment is the greater of:

**(i)** **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

**(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates as specified in clause 26—Penalty rates.

**(d)** For a shiftworker the additional payment is the greater of:

**(i)** **17.5%** of the employee's minimum hourly rate for all ordinary hours of work in the period; or

**(ii)** The employee's minimum hourly rate for all ordinary hours of work in the period inclusive of penalty rates for shiftwork as specified in clause 29—Rate of pay for shiftwork.

62. In responding to the drafting of the GRIA PLED, neither the initial submissions of Australian Business Industrial and the NSW Business Chamber nor Business SA (of 2 and 3 August 2017 respectively) mention annual leave loading as an issue. The issue does not appear to have been raised in any of the Commission's summary documents nor in any of the SDA's submissions.

63. That such an important provision remained unchanged and (it appears) unchallenged over a process lasting some three years can only lead to the conclusion that the Commission rightly decided in its favour in respect of the Retail Industry. The Commission should so conclude in regard to the Hair and Beauty Industry.

64. This differs fundamentally from extant wording in an Award remaining unchallenged as the entire PLED process hinges on the critical analysis and commentary of interested parties on the various drafts.

65. It should be noted that this approach is not, as is alleged, a novel one. The *Workplace Relations Act 1996* (Cth) at section 235 provides for payment of annual leave on the following basis:

> **Annual leave--payment rules**
>
> (1) If an employee takes annual leave during a period, the employee must be paid a rate for each hour (pro-rated for part hours) of annual leave taken that is no less than the rate that, immediately before the period begins, is the employee's basic periodic rate of pay (expressed as an hourly rate).
>
> (2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid a rate for each hour (pro-rated for part hours) of the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time, is the employee's basic periodic rate of pay (expressed as an hourly rate).

66. In effect, AIG is seeking to make late submissions regarding a settled matter for a substantive change to the way annual leave loading is applied in the hair and beauty industry. The Commission should reject such submissions.

67. Annual Leave Loading was initially conceived as a mechanism to ensure that employees did not suffer a financial detriment while on leave. In this context it becomes clear that the purpose of the provision providing that either the weekend penalty rates, or the 17.5% loading apply is to ensure that employees do not suffer a detriment in respect of their weekend penalty rates. However, to exclude the 17.5% from other days or hours taken may result in an employee suffering a detriment on those days. As such, the submissions of AIG, together with their proposed wording, should be rejected.

68. The SDA favours the retention of the current PLED wording, noting that the retention of the word 'loading' rather than 'additional payment' would go some way to ameliorating the concerns of AIG.

69. Should this matter be further ventilated, the SDA would seek opportunity to reply to any further submissions.

## Clause 18.6(a) – 'Hairdressing trainee' definition

70. The SDA and AIG have had some discussions on this issue. These discussions are still ongoing. The SDA would like the opportunity to respond to any further submissions on this matter and will provide a position when possible.

## Other matters

71. It has come to the SDA's attention that HBIA clause 12.10 Conversion of existing employees, has also not been included in the PLED. The SDA proposes that it also be added in a suitable location. The SDA suggests that PLED clause 10 is an appropriate place for this clause.