

TAB AGENTS ASSOCIATION
(SA BRANCH) INC
SUBMISSION TO
THE PRODUCTIVITY COMMISSION
INQUIRY INTO THE
WORKPLACE RELATIONS
FRAMEWORK

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SUBMISSION BY THE TAB AGENTS ASSOCIATION (SA BRANCH) INC

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OUTLINE OF SUBMISSION

A) The TAB Agents Association (SA Branch) Inc makes the following submission as part of the Productivity Commission Inquiry into the Workplace Relations Framework making reference in particular to

- Union involvement
- Impact on small businesses
- Job Creation / Unemployment
- Flexibility
- Red Tape and Compliance Burden

B) Our recent experience using the Fair Work System to approve an Enterprise Bargaining Agreement between the Association and its member's employees is the basis for this submission.

1.OVERVIEW

We are a small employers' Association of TAB Agents in South Australia. We are Commissioned Agents which means we are classed as neither contractors nor employees. We are paid a commission (structure shown in attachment A) which is independent of any Fair Work involvement as far as we know.

Membership of our Association is voluntary and is approx. 83% of all TAB Agencies in S.A. (41 agents out of a possible 49). Our subscriptions are \$5 per week per agency.

A security deposit of up to \$12000 is paid to by Tatts Group Ltd, refundable upon termination of the agreement by either the agent or Tatts Group.

Each agency is run as a separate business either as partnerships, sole traders, companies or trusts, and each with individual ABN's.

Our commission and conditions are dictated by Tatts Group LTD, based in Queensland. Remuneration discussions are held every three years, however we have a very limited input.

Hours are set by Tatts Group and we have two classifications of agencies. "Day" agencies whose minimum weekly open hours (referred to as "core" hours) are 49, and "night" offices with minimum "core" hours of 61. (These are "open" hours – agents are in attendance approx. ¾ - 1 hour extra per day.)

Agents generally work the majority of these hours themselves, however many employ casual staff to either assist during busy times when more than one terminal operator is required, or to enable them to have time off.

Commission varies between agencies with maximum approx. \$150,000 pa to \$68000 pa GST inclusive, with the average probably around \$85,000 pa.

Agents are responsible for tickets, telephone, cleaning, wages, Workcover, Superannuation Guarantee for staff and other incidentals.

2. PRE EBA HISTORY

UNITAB Ltd purchased the SA TAB in 2002 and restructured the network with Commissioned Agencies.

Prior to 2009, Agents operated under the Workchoices system with individual agreements.

Following the introduction of the Fair Work Act in 2009, we were unclear as to how we should pay our staff.

Many agents contacted Fair Work Australia, and were advised that the FWO was unable to offer definitive advice as to which Modern Award would apply. Some agents however, were given Awards to follow – four of them in fact.

1. General Retail
2. Hospitality
3. Miscellaneous
4. Award Free Minimum Wage

Many but not all adopted an Award which meant that casuals were being paid different amounts at different agencies. We also (by virtue of the fact that we work alone most days) needed to address the issue of having casuals work 8 hours without a specified break.

In 2010, the NSW Tab Agents Association produced, lodged and had approved an Agreement, the "TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2010" which addressed both the consistency of the wage rates and the payment of an additional 30 mins to compensate for the meal break scenario. This document mirrored exactly our situation, and the issues we also wanted to resolve. It was underpinned by the General Retail Industry Award 2010. A second Agreement TAB Agents New South Wales Casual Employees Multi Enterprise Award 2011 was produced, lodged and approved the following year to capture agents that were not included the first time around.

It was after much discussion that the Association decided in 2011 to seek legal opinion as to

1. Which Award if any applied to us and
2. If we should produce an agreement similar to the NSW Agents EBA

I offered to follow up and engage a solicitor to answer our questions, and at a meeting in October 2011 we passed a motion to this end. I rang the Law Society and was referred to a prominent firm of solicitors in Adelaide.

3. THE LEGAL OPINION

In January 2012, having met with a solicitor, it was determined that we begin the process of drawing up an EBA, which in her opinion was a Single Enterprise agreement based on the Miscellaneous Award, this award being the one she had determined with FWA to be the correct award to underpin our agreement.

A committee was formed and we proceeded to draw up a document based on the content of the NSW TAB Agents Agreement, but with wage rates based on the Miscellaneous Award.

This was the first Agreement we attempted to lodge with FWA. Unfortunately, our agreement was not correct on many fronts and it was rejected in November that year. The basis for the rejection is included in the Decision attached. (Deputy President Bartel dated 2.1.13 – attachment B). This lodgement was made following some very hurried amendments in an attempt to rectify basic issues and procedures that had not been followed by our legal representative.

The EBA itself, received a minimal number of votes from casuals, however as the vote was conducted as per a Single Enterprise Agreement, as noted in the Decision, that vote was invalid.

In 2013, we attempted to once again produce a correct document, however circumstances saw our solicitor replaced with new Counsel.

Mr Bryant, and solicitor Alexandra Thompson both determined that we should begin from scratch to ensure compliance with regulations previously incorrect, and also the production of an agreement that Mr Bryant oversaw.

A new Ballot was held, 100% participation in vote by casuals and 100% 'Yes' vote returned. New acknowledgements were signed and the second lodgement took place in December 2013.

Unfortunately in January 2014, Ms Thompson received notification that the late return of some documents was not within the specified time frame allowable under the Act. We had no option other than to withdraw that application and re-do the process.

Once again, a procedural issue was the failure. At this point it may be pertinent to mention that unless we actually organise a formal meeting of members, we do not see each other. All correspondence had to be by way of Post or e-mail. Not an ideal situation when timelines such as 7/14/21 days are major issues.

Subsequently, a further Ballot and acknowledgements by employers and employees was undertaken and collated.

A final result was achieved with all acknowledgements returned, signed and dated correctly, 100% participation in votes by all employees at all participating outlets, and 100% acknowledgements by all employers.

The Forms 16 and 17, as well as the Final EBA and appropriate acknowledgements were lodged with the Fair Work Commission (20.3.14) within the required 14 days following the date the agreement was made that being the 10/3/14.

Notification was received re an amendment required in the Dispute Resolution Clause a few days later, however that was corrected and the EBA was due for a Decision on Friday 4 April at 1pm.

Neither I, nor Mr Bryant, nor Ms Thompson were requested to be present at the hearing and for all intents and purposes, we believed that the Agreement would be approved by Commissioner Cargill. (Notice of Listing attachment C)

At 10.50am on the 4 April, a Mr Justin Cooney from the ASU in Melbourne, e-mailed the Commissioner's chambers requesting a copy of the Form 16 and Form 17 as well as the EBA as he had "concerns" about the Award used as the reference instrument.

It is not necessary to go into the details of the e-mails that flew back and forth (I have attached copies of initial correspondence- attachment D) suffice to say, it caused a delay and advice from the Commissioners Chambers that the delay would continue until "the matter was resolved."

I mention here that we have never had any contact with the ASU in the 13 years we have been commissioned agents. None of our employers (obviously) are members **and none of our casual staff are members of the ASU**. The ASU never requested to be a party to the document and were never listed by any employee as an alternative bargaining representative.

In short, we have no connection with this union whatsoever.

4 .WHAT THE ASU CONTENDED

Basically, that our staff are "clerks" and that the Clerks Private Sector Award 2010 was the correct reference instrument. Mr Cooney forwarded us copies of 2 letters and a reference to a Full Bench Ruling (2008) as the basis of his contention.

1. The SDA Letter (attachment E)

Correspondence from the SDA National Secretary, Joe de Bruyn, dated 11.4.2013, stating that the SDA believes "betting organisations (such as TABCORP)are not covered by the General Retail Industry Award."

2. The Fair Work Ombudsman Letter (attachment F)

Addressed to David Smith, National Secretary of the ASU presumed to be dated 30.8.13 and signed by Cletus Brown, Fair Work Ombudsman, states that the FWO believes Tattsbet, as well as TABCORP/SA TAB /NT TAB / TOTE Tasmania/TAB Vic /TAB NSW & Luxbet's, employees are covered by the Clerks Private Sector Award 2010.

Reference is made also to the FULL Bench Ruling (addressed below) as well as the "nature" of the work as being "clerical".

3. The Full Bench Ruling [2008] AIRC

"[224] The ASU contended that the legal services industry required consideration under a separate industry award and that special provisions of one sort or another are appropriate for the cash processing and wagering industries. We agree that the legal services industry should be considered as a separate industry and will do so in Stage 4. At this stage we have not excluded cash processing or wagering from the Clerks private sector award. We have included a definition of clerical work to make it clear that it is a term of broad application and includes cash processing. Clerks involved in wagering also fall within the scope of the award."

5. WHAT THE ASSOCIATION CONTENDED IN RESPONSE

1 The SDA letter :

With all due respect, Mr de Bruyn's opinion is just that, an opinion. It is not a legal determination. We are a group of individual employers, we are not TABCORP, Luxbet, SA TAB or any other organisation listed. The letter therefore, did not apply to us. No Decision existed to include us in the Clerks Awards 2010.

2 The FWO Letter :

A paragraph at page 3 of this letter reference is made to the fact that the Miscellaneous Award was the instrument that covered this work and was provided as advice from FW in 2011, and that this advice is now deemed incorrect.

That is not evidenced more clearly than a situation that occurred with one of our agents who had direct dealings with Fair Work and was "told" to use the Miscellaneous Award. Fair Work even calculated the pay rates she needed to use to comply even including transitional percentages for each year.

It was also advice we believe was given to our solicitor when she first spoke to FWO about what Award should be referenced in early 2012.

It is this very same advice which we initially based our agreement.

Reference is made to wagering companies such as TABCORP etc – no mention of any agents / casual staff employment situation. Again, with regards Mr Brown, it is an opinion, not a legal determination, and having changed one's mind down the track, it seems unfair that we bear the brunt of that decision.

3 The Full Bench Ruling:

The Association position was that our staff

- Are NOT clerks, and in any event, The GRI 2010 covers clerks to the exclusion of the CPS 2010 Award
- Are not involved in wagering – in fact our contract with Tatts Group specifically prohibits actions that can be construed as wagering
- This ruling was made prior to the formation of any of the Awards that came about in 2010. How could the Full Bench in 2008 comment and pass a determination on something that did not yet exist?

These 3 references also clearly apply to a Head Office type situation.

Mr Cooney also chose to include in a later e-mail a quote from *Julie Capstaff*, Group Human Resources Manager of Tatts Group:

"As you know, the old UNiTAB Enterprise Award is the parent award for our TattsBet Limited Administration and Customer Sedrvices Collective Agreement 2012. I confirm my comments, expressed during our discussion, that in my view the Clerks Private Sector Award 2010 would now be the parent award for this agreement and any future agreements, will, in my view be BOOT tested against the Clerks Private Sector Award 2010."

A telephone conversation subsequently had with Ms Capstaff, confirmed that she was in fact, referring to Head Office personnel only and that Tatts Head Office would never presume to state what Award agents would use as there is a very clear delineation between Head Office and our staff. She believed Mr Cooney understood this. Tattsbet (previously Unitab) do not employ our staff.

Head Office Human Resources staff would not, could not and should not comment on any aspect of employment with regards our staff. We also have never been a party to the UNiTAB Enterprise Award as it does not involve us as Commissioned Agents nor our staff.

6. THE ASSOCIATION POSITION

We believed the *correct* situation was exactly that as described in the TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2010 (and a further Agreement produced and approved in 2011 to capture agents not included in the initial 2010 Agreement) which referenced the GRI 2010 Award. This Agreement was brought to Mr Cooney's attention on numerous occasions.(Decisions attachments G & H)

The ASU in all their correspondence failed to reference this Agreement in any comparisons re BOOT or coverage.

Our businesses trade 7 days a week with many trading past the recognised "office hours" that would apply to clerks. The busiest days are Saturdays with Public Holidays also being the second busiest. (We are open 363 out of 365 days per year).

Penalty rates with regards the CPS 2010 begin at time and a half after 12.30pm on a Saturday, increasing to double time after 2.30.

7. THE PROCESS

Our EBA was finally approved in a comprehensive 15 page Decision from Commissioner Bull (the ASU also requested that we transfer the matter from Commissioner Cargill in S.A. to Commissioner Bull in N.S.W. in May 2014) on the 9 January 2015. (Decision attachment I)

Synopsis as follows as per FWC Web Site

<https://www.fwc.gov.au/documents/assets/pdf/fwcb150115.pdf>

"1 ENTERPRISE AGREEMENTS – better off overall test – s.185 Fair Work Act 2009 – applicant submitted that the employees covered by the agreement were not covered by any award so that the Miscellaneous Award 2010 applied for the purposes of the better off overall test (BOOT) – ASU submitted that the employees were covered by the Clerks Private Sector Award 2010 (Clerks Award) – the applicant made further submissions in regard to the BOOT and the General Retail Industry Award 2010 (Retail Award) – applicant submitted that the employees' primary function was to pay and sell cash amounts to customers – this function could be covered by either the Retail Award or the Clerks Award – the Retail Award however excludes the Clerks Award – Commission found that the employees were covered by the Retail Award – Commission found that the agreement and undertakings satisfied the BOOT – agreement approved. 11 TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013 AG2014/4049 [2015] FWCA 216 Bull C Sydney 9 January 2015"

The ASU also attempted to modernise the TABCORP Agreement that has been superseded by the *NSW TAB AGENTS CASUAL EMPLOYEES MULTI ENTERPRISE AGREEMENTS* both 2010 and 2011.

<https://www.fwc.gov.au/awards-and-agreements/awards/award-modernisation/variation-applications/EM2013/103>

A notice of discontinuance was lodged by the ASU in that matter on the 10 December 2014.

They have also been involved with the following in relation to award modernisation and enterprise agreements.

EM2013/102 Racecourse Totalisators (State) Award1
(RT Award)

EM2013/104 TAB Clerical and Administrative Staff PhoneTAB Operators Award
20042

(Phonetab Award)
EM2013/105 TABCORP Wagering Employees Award 20033
(Wagering Award)

<https://www.fwc.gov.au/documents/documents/awardmod/enterprise/2014FWCFB7989.pdf>

(This decision regarding these latter 3 are the basis for the appeal against our EBA outlined below)

The Awards mentioned in the Decision encompassing 3 TABCORP Awards, do not pertain to the situation with regards our staff. Only EM2013/103 would be even remotely relevant, and the ASU withdrew their application to modernise that Award due to the existence of the 2 Enterprise Agreements that have been approved using the GRI as the referenced award.

8.THE APPEAL AGAINST THE COMMISSIONER’S DECISION BY THE ASU

Following approval on the 9 January, we received notice that the ASU will be appealing the Commissioner’s Decision. This will now involve a Hearing in front of a Full Bench in Melbourne where we need representation. We expect the cost of this to come in at around \$10,000-\$15.000.

Again we stress, the ASU does not have any members among our staff of 44 with their 33 employers. They are arguing it is in the “public interest” due to the large numbers of employees in the industry – the industry certainly does employ a large number of people, however it is a very small proportion that are casuals employed by Agents in outlets.

They are using the Decision that pertained to the matters (none of which are pertinent to our employees) that are TABCORP Awards that cover TABCORP employees in Head Office, Phonetab Call Centre and On-Course.

EM2013/102 Racecourse Totalisators (State) Award¹

(RT Award)

EM2013/104 TAB Clerical and Administrative Staff PhoneTAB Operators Award

20042

(Phonetab Award)

EM2013/105 TABCORP Wagering Employees Award 20033

(Wagering Award)

These Awards all have coverage clause as TABCORP EMPLOYEES. Our staff are employed by agents – individual small businesses with their own ABN’s.

And yet again, the ASU refuse to include the **EM2013/103** – the application from which they “wholly withdrew” on the 10TH December, and which was the TABCORP Award that has been superseded by the TAB NSW Agents Agreements – the same agreements the ASU failed to refer to in any submissions opposing our EBA in the first instance.

We now find ourselves having to argue the issue of relevance of the Decision on these 3 matters to our employees AGAIN. The ASU are disputing the Commissioner’s findings. Why can this not be dealt with between the ASU and the Commissioner?

This EBA would have in all likelihood been approved on April 4th, 2014 and here we are a year later still dealing with an interfering union that seems intent on asking the same question to as many people as possible in the hope they get the answer they want.

SUBMISSION BY THE
TAB AGENTS ASSOCIATION (SA BRANCH) INC

1.UNEMPLOYMENT/UNDEREMPLOYMENT/JOB CREATION

Small businesses such as ours, employ staff on a casual basis. This is not to say that they are not provided with regular hours each week. Most agents work with a rotating roster if they employ more than one casual.

The nature of our business is that Agents choose to work the majority of hours Mon – Sat. Many agents only have 1 day off a week, and most large agencies employ a casual to assist them on busy days (Cup days, some Public Holidays) and Saturdays.

The staff therefore, are usually

- . Retirees and low income earners looking to supplement their income
- . Students who attend University/TAFE through the week and prefer to work at night and weekends
- . Mothers/Fathers who work when their partners are home to take care of children

The “unsociable” hours are the ones most of them are readily available and prefer to work

Unfortunately, until our EBA was approved, we were concerned (due to ASU objection) that we would be placed under the Clerks Private Sector Award which would have seen rates on a Saturday starting at \$29.79 and increasing to \$47.66 after 2.30pm. Completely prohibitive for all agents except perhaps the top two or three. Sunday would have seen \$47.66 and Public Holidays \$59.98. (Mr Cooney’s calculation of rates as per his submission dated 1.5.2014)

For an agent to have a weekend off, it would have cost \$995.75. Some agents only earn \$1300 gross commission per week. From that commission they deduct

- . GST
- . tax
- .super for staff
- . super for themselves
- . ancillary costs such as cleaning/tickets/phone etc

If these rates were imposed, in other words, had we not argued against the ASU application, there would have been many jobs lost. Casuals would have been too expensive to employ on Saturday, Sundays or Public Holidays, the very days when agents require extra staff. Unlike many small businesses, as per our agreement, opening on those days is compulsory, and we cannot choose to close.

Agents would have either elected to work all the shifts themselves or take on partners to avoid these high rates. Agents would have suffered a negative impact on their work life balance under the first scenario, and a halving of their commission under the second.

In any case, this would no doubt have not only cost casuals hours, but in some instances their jobs altogether – and due to the Appeal pending, still could.

2.SCOPE FOR INDIVIDUAL CONTRACTORS

There are many of us that believe our own situation as “Commissioned Agents” requires a clearer definition. In many respects we believe we are employees in that our “principal”, Tatts Group determines and exercises control over:

- . when we work

- . where we work

In Addition;

- . we use the Principal’s equipment

- . we do not pay rent or utilities

- . we use Tatts system

- . all procedures and directives are dictated by Tatts

- . we get paid according to a scale determined by Tatts every Thursday

In the regard that we may consider ourselves “contractors” the following factors appear to make that determination

- . we have our own ABN

- . we pay our own tax * (because Tatts Ltd do not)

- . we pay our own superannuation* (again because Tatts Ltd do not)

- . we employ our own employees and pay their associated expenses including the Superannuation Guarantee

Unfortunately for us, our position as “agents” is not referred to in the Fair Work Act. Neither are we “franchisees” as we do not purchase the business, we merely manage it. In fact, it seems our positions as “agents” are such because that is what Tatts deem us, It seems an antiquated notion these days yet it has persisted throughout the industry in all States.

Attempting to classify our own staff as contractors, or “engage” them as “contractors” is fraught with danger until a specific definition can be formulated.

3.SMALL BUSINESS PERSPECTIVE

Fair Work are unable to provide definitive answers. As mentioned, our agents had been told 4 different awards all with the proviso that we seek legal advice. Had we not proceeded with this as an Association, every agent would have had to obtain legal counsel.

As referred to previously, one Agent that dealt directly with Fair Work, as well as our solicitor in the first instance, were told by Fair Work to use the Miscellaneous Award. The fact that the Ombudsman changed his mind post this directive should have had no bearing on information provided in 2011.

Neither the agent in question nor our solicitor were ever advised of any change to this determination.

Had we not been part of an Association, each agent would have had to bear their own legal costs simply to determine the minimum wage to pay their staff. Our members could have been, through no fault of their own, been exposed to fines of thousands of dollars.

The costs associated with our exercise simply could not have been borne by Agents on an individual basis. Certainly any intervention by the ASU would have been extremely disruptive and costly. Any advice bar the most general that Fair Work provide sought by small business, becomes costly and time consuming.

Large businesses have access to in-house legal and human resources departments to ensure compliance and provide readily available advice.

4.FAIR AND EQUITABLE PAY AND CONDITIONS

(INCLUDING MAINTENANCE OF A SAFETY NET)

Equitable pay and conditions was one of the main reasons for pursuing the EBA option. Casuals were being paid different rates at different agencies was one of the major considerations in formulating this agreement. The maintenance of the safety net (that being the minimum wage / relevant award) we would not dispute.

Equality for the employers in this instance is an issue and why we were so keen to have rates approved (as per our EBA) that the lower Commission agents could afford.

The \$80,000 or so gap between the highest earning agents and the lowest earning agents was compounded early last year when the minimum commission structure that had been calculated one way for 12 years, was changed.

We are beholden to Tatts and their strict guidelines as to how we manage our agencies and the capacity to increase our commission is very limited.

We needed a rate structure that allowed for those "day" offices on low incomes to be able to afford a weekend off now and again. That is why we increased the base rate of the Misc Award by 50c ph and paid well over the award for Mon – Sat 9.30 to 9.30 and a lower Sunday / Public Holiday rate. That way the rates paid more often by larger "night" trading offices compensated for the smaller day only agencies.

Fortunately, Commissioner Bull realised that using BOOT as per GRI 2010 was more applicable. Our rates with the undertakings he requested [*] passed GRI BOOT and has ensured our smaller agents are not penalised to the extent that they cannot have a short holiday or a weekend off.

We believe the Commissioner made a sound and realistic decision, having taken into account the conditions under which we work as agents and by extension, the conditions that our staff work under.

[*] No casual to work more than 4 Public Holidays

[*] All Sunday shifts to be shared equally among each casual in each agency

Another aspect to this is that many Agents once were casuals themselves. They know that, despite the lure of the Permanent Part-Time option, the 25% loading is vital to maintaining a reasonable income and the inclusion of fair penalties means that casuals can work, earn a good rate and above all, keep their jobs and their hours. We believed we had created a more than fair document for all concerned. Likewise, Agents prefer the flexibility a casual employee offers to the business.

The Association accepts that there will always be a disparity with regards employers and their ability to pay. In our case, we had designed a specific agreement in order to overcome this issue.

5.BARRIERS TO BARGAINING

The bargaining process and the appointment of a Bargaining Representative proved complicated due to the nature of the agreement.

Difficulty negotiating the Fair Work Act with regards Multi-Enterprise Agreements was also a major issue. Even Deputy President Bartel who presided over the first hearing, stated in the transcript:

“THE DEPUTY PRESIDENT: I've not dealt with a multi-employer agreement before, so it's a new thing for me, as well.”

<https://www.fwc.gov.au/documents/documents/Transcripts/211112ag201212016.htm>

The ASU made no approach to be part of the bargaining process and yet they would have been aware of the existence of TAB Agencies in other states via their dealings with the Victorian and NSW Agents.

6.RED TAPE AND THE COMPLIANCE BURDEN FOR EMPLOYERS

1. During the Bargaining Process / voting

As stated, we rarely, if ever, are all in the one place at the one time which in itself necessitated many meetings to discuss and fine tune the proposed EBA before presenting it to the casuals for their consideration.

It is also difficult when employees' signatures are required within a 7 day period. It does not allow for postal delays or availability of staff to compete / sign the necessary paperwork. Fortnightly shifts, holidays, illness etc all meant that some agents were having to visit their casuals at home in order to meet the required time frame.

An extension to allow votes to be returned would be beneficial for agents in the situation where casuals may only work one shift per week. Some employees may do as little as one shift per month.

2. Option A -Following Approval Of EBA and dismissal of ASU Appeal

The Association shall continue to maintain the services of a solicitor in order to be kept abreast of any changes that may affect us or our employees. We regard this now as a fundamental requirement for the Association which we lacked prior to 2011 when we first addressed the issue as a group.

As a small Association, we do not have the expertise to confidently deal with the industrial relations changes and the complicated nature of legislative amendments.

3. Option B -Following Decision to Uphold ASU Appeal.

If Appeal upheld, we shall then be forced to include in our bargaining process, a union that has forced our members into a protracted legal battle for the sake of our 33 members. Our staff, from feedback received have no intention of joining this Union as they are aware application of the Clerks Award will have a detrimental effect on their positions.

7.UNION INVOLVEMENT

With regards the application by the ASU we note the following;

1. The initial reason as stated by the ASU was to ensure that the "correct" award was used to underpin our agreement. We ask "Isn't this the Commission's role?"
2. **The ASU did not have a single member employed by any of our agents.** Our members also find it disturbing that the ASU has undertaken a protracted and costly exercise using ASU members' funds to pay for this application opposing our EBA. We also point out here, that this has not cost any of our staff a cent.
3. Continually, the submissions from Mr Cooney referred to Head Office and old agreements to which we were never a party, nor were our staff. The only agreement that is remotely similar to our proposal was the NSW TAB Agents Casual Employees Multi-Enterprise Agreement (2010 and 2011) both of which were based on the GRI 2010 Award, and which the ASU seemed to ignore. Incorrect calculations of the Miscellaneous Award rates also was an issue as it made our EBA appear that it would not pass the BOOT with regards the Miscellaneous Award. (Attachment J)
4. The ASU (USU) have been heavily involved in award modernisation applications for TABCORP Ltd and the Victorian Off Course Agents Association. Until April 4, 2013, we had had no contact with them at all since agencies were commissioned back in 2002. The Association believes that, were it the Union's intention to genuinely create an Agreement that they believed would have applied to our staff, they would have been in contact well before the day it was due to be heard and, most likely, approved. No doubt the ASU were aware of the existence of TAB Agencies in S.A. Their sudden interest in us is inexplicable if one assumes their sole concern was the best interests of our staff and their jobs.
5. The ASU, via applications made re NSW and VIC Association, would have been aware of the existence of our association, yet chose to wait until 2 hours prior to the hearing to approve the EBA to contact us.

The reluctance of the ASU to accept that the NSW TAB Agents Casual Employees Multi Enterprise Agreement mirrored our situation, combined with the publication in the submission

of a table that cited incorrect calculations of the Miscellaneous Award rates purporting to show our agreement as not being better off, seems, at best, disingenuous.(Attachment F) Their withdrawal from EM 2013/103 clearly demonstrates that they felt they would not have been successful, yet they have filed an appeal against us which is the same situation i.e. which award, the CPS 2010 or the GRI 2010 as the reference award for TAB Agent's staff.

8.CONCLUSION

We accept that a portion of the delay and excessive costs in our situation were caused by a number of factors. Our situation however, could happen to any number of small Associations seeking to do the right thing by their staff if there is some doubt about which Award an EBA should have as the underpinning document. In this regard, for small business, Fair Work should be the guiding body.

To alleviate this, the Association believes the following could be implemented;

1. Allow Fair Work to make the determination regarding the applicable Award prior to the Agreement being created. The Applicant would have to make a clear case outlining reasons as to why a certain award is applicable due to their own particular circumstance. That determination would then be binding. Notice of intent to create an Agreement by employers, can be made via the Fair Work system and on-line as appropriate.
2. Any 3rd party objection to that determination, to be made in writing within a set time frame, perhaps 28 days. This objection should be based on legal determinations, not opinions of individuals and should be registered PRIOR to the Agreement being drafted and voted upon. At a minimum, witness statements proffered should be from parties directly involved in the industry directly pertaining to the agreement.
3. Should a party object to the agreement after this time and once it has been drafted, that party should be liable for the Applicant's costs should they wish to contest the EBA.
4. With regards the subsequent Appeal. We believe we had made our case for application of either the Miscellaneous or the direction the Commissioner pointed us to, i.e. The General Retail Award 2010. The ASU's appeal is against the Decision of the Commissioner. Surely then, it is between the ASU and the Commission. Why are we being forced to spend more of our members' funds on an appeal process when we have already said all we have to say? It appears to us, that the ASU are intent on asking the same question to as many people as possible until they get someone to agree with them.

These suggestions would ensure correct awards were underpinning new agreements prior to them being made, maintain a safety net for employees and afford employer Associations a degree of confidence that they won't be drawn into a protracted legal quagmire. This also means that agreements are not suddenly contested after all the hard work and expense of formulating the agreement has been undertaken.

An ideal would see a number of "set" conditions for small and very small businesses such as ours. Those conditions could encompass the current Individual Flexibility Arrangements, but allow further flexibility regarding things such as penalty rates. A **"Small Business Award"** could be implemented.

It could be produced along the same lines as the Minimum Wage or the **NES** specifically for businesses that meet certain considerations including;

- . Annual Turnover below pre-determined amount
- . Employing less than say 10 employees
- . No of days trading per week
- . Ordinary Business/Open hours
- . Clarifying the "Better off" criteria as not being restricted solely to the financial aspect. In the extreme instances, application of exorbitant penalty rates, in reality, means they are worse off as employees could lose hours and even their job.

We have also been the party that on both occasions – the Hearing to approve the EBA (moved to Sydney) and the subsequent appeal (held in Melbourne) has had all conferences held interstate at the Unions request. It would only be fair that should the party opposing these issues be the one that has the travelling expenses. While video link is acceptable, it is far from ideal, which is why we have chosen to attend (3 people) the Full Bench Hearing re the Appeal in person. (this Appeal we estimate expenses in the thousands of dollars.)

It should not be this difficult, costly (probably exceeding approx. \$35000) or time consuming (over 3 years) to ascertain the minimum wage applicable to a casual employee in our organisation of 41 members and 44 staff.

Sue Williams

Bargaining Representative

TAB AGENTS ASSOCIATION (SA BRANCH) INC

SCHEDULE 2

COMMISSION SCALES AND CHARGES

1. COMMISSION SCALES

(In accordance with Clause 3 SA TAB may vary the commission scales specified below at any time)

1.1 Standard Pari-mutuel Wagering Commission

Weekly Turnover (total of pari-mutuel and fixed price)		Commission on pari-mutuel bets (except Double Trio*) (percentage of turnover)
(each band of turnover attracts the commission rate indicated for that band)		
\$0 to \$10,000	Category S Agency	2.45%
	Category STW Agency	3.40%
	Category S4 Agency	4.07%
\$10,001 to \$40,000		2.45%
\$40,001 to \$60,000		1.60%
\$60,001 to \$80,000		1.30%
\$80,001 and over		1.25%

* Double Trio bets attract a commission of 3.00%

1.2 Concessional Pari-mutuel Wagering Commission (applicable only to Agents with wagering turnover of less than \$50,000 per week).

Weekly Turnover (total of pari-mutuel and fixed price)		Commission on pari-mutuel bets (except Double Trio*) (percentage of turnover)
(each band of turnover attracts the commission rate indicated for that band)		
\$0 to \$10,000	Category S Agency	7.00%
	Category STW Agency	7.95%
	Category S4 Agency	8.61%
\$10,001 to \$50,000		1.11%

* Double Trio bets attract a commission of 3.00%

[2013] FWC 4



DECISION

Fair Work Act 2009

s.185 - Application for approval of a single-enterprise agreement

TAB Agents Association (SA Branch) Inc.

(AG2012/12016)

DEPUTY PRESIDENT BARTEL

ADELAIDE, 2 JANUARY 2013

Tab Agents Association (SA Branch) Inc. Enterprise Agreement 2012-2017.

[1] An application for approval of an enterprise agreement known as the *TAB Agents Association (SA Branch) Enterprise Agreement 2012 - 2017* (the Agreement) has been made by the TAB Agents Association (SA Branch) Inc. (the applicant or the Association). The application has been made pursuant to s.185 of the *Fair Work Act 2009* (the Act) and is an application for a multi-enterprise agreement. The Agreement purports to cover TAB agents who are members of the Association and who are the employers of the employees who will be covered by the Agreement.

[2] The application was filed on 30 October 2012. On 2 November 2012 I issued a Statement of Preliminary Findings, which identified a number of procedural and substantive issues with the Agreement. A hearing was held on 21 November 2012 at which time Ms Nachiappan of Andersons Solicitors appeared for the applicant. Arising from matters discussed at the hearing, the applicant provided further documentary material on 11 December 2012.

The purported bargaining representative of the employers

[3] The application for approval (Form F16) identifies Andersons Solicitors as the bargaining representative of the employer. This is not the case. Andersons Solicitors was engaged by the Association to advise it in relation to the Agreement.¹ At the hearing and in correspondence received from Ms Nachiappan², the Tribunal was advised that the Association and/or the Chairperson of the Association acted as the bargaining representative for member TAB Agents.

[4] According to Ms Nachiappan, the employers voted that the Association would be their bargaining representative for the Agreement at an Annual General Meeting held in December 2011.³ The minutes of that meeting have not been provided. What has been provided is a copy of a pro forma letter dated 7 December 2012 addressed to the Chair of the Association that, according to Ms Nachiappan, was circulated to the members of the Association for signing. The letter includes the following passages:

"I refer to the TAB Agents Association (SA Branch) Inc. meeting held on 18 October 2011. As per my vote on the day, I confirm as follows:

1. I appoint you, SUE WILLIAMS as Chair of the TAB Agents Association (SA Branch) Inc., as my bargaining representative for the negotiation of an Enterprise Bargaining Agreement in 2012. This is consistent with *Fair Work Act 2009*, s176(1)(d).
2. I authorise yourself and the TAB Agents Association (SA Branch) Inc. to instruct Andersons Solicitors with regard to preparation of the Enterprise Bargaining Agreement and assistance in the balloting and approval of same.
3. I am the owner/proprietor of the TAB Agency as per this letterhead. This Agency is currently a member of TAB Agents Association (SA Branch) Inc. I am the employer and party to this Agreement (as per clause 2 of Agreement). I consent to be continuously bound by this agreement, regardless of the agency status as an ongoing member of the TAB Agents Association (SA Branch) Inc. or otherwise.”

[5] As an aside I note that the minutes of the meeting on 18 October 2011 contain no reference to the appointment of the Association or the Chairperson or any other person as a bargaining representative in relation to the Agreement.

[6] The above letter was drafted by Ms Nachiappan after the hearing. Paragraph 1 of the pro forma letter is somewhat surprising given the following exchange which occurred at the hearing:

“MS NACHIAPPAN: ... The way I see it, she is the bargaining rep. She is the Chairperson of the TAB Association.

THE DEPUTY PRESIDENT: Is she appointed in writing as the bargaining rep?

MS NACHIAPPAN: That’s the correspondence I’m due to forward to the tribunal, as being appointed by each and every member outlet to bargain on their behalf for this enterprise bargaining agreement.

THE DEPUTY PRESIDENT: Okay.

...

MS NACHIAPPAN: ... Would that make the process smoother if Andersons Solicitors and myself is identified as the bargaining rep?

THE DEPUTY PRESIDENT: No. What would make the process smoother is the person who is the bargaining rep for the negotiation of the agreement actually identifies themselves. This isn’t something you do in retrospect.

MS NACHIAPPAN: I understand.

THE DEPUTY PRESIDENT: Be clear on that.

MS NACHIAPPAN: I understand, your Honour.

THE DEPUTY PRESIDENT: That's why there's an appointment in writing at the time."⁴

[7] Section 176(1) of the Act identifies the persons who are bargaining representatives for agreements that are not greenfields agreements, and states that:

"Bargaining representatives

(1) The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed enterprise agreement that is not a greenfields agreement:

(a) an employer that will be covered by the agreement is a bargaining representative for the agreement;

(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:

...

(c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;

(d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement."

[8] This section makes it clear that a person is a bargaining representative of the employer if the person is appointed in writing by the employer to bargain on their behalf in relation to a proposed enterprise agreement. There is no room for retrospective appointment, and a collective vote of certain TAB Agents at a meeting that predated the Agreement, assuming this occurred, does not satisfy the requirement of a written appointment of a bargaining representative by each employer.

The negotiation of the Agreement

[9] Section 172(3) of the Act deals with multi-enterprise agreements and relevantly provides that two or more employers that are not single interest employers may make an enterprise agreement (a multi-enterprise agreement) with the employees who are employed at the time the agreement is made and who will be covered by the agreement. The Agreement was not negotiated by the employers or a bargaining representative appointed in accordance with the statutory requirements.

The parties bound by the Agreement

[10] Only Ms Williams has filed a Form F17 in support of the application for approval, and while she has identified herself as an "Agency Manager" it is clear that she is completing the form in her capacity as Chairperson of the Association. For example, where the form requests

the legal name of the employer, Ms Williams refers to Annexure A filed with the F17 which lists 43 TAB Agencies.

[11] The Parties Bound clause stipulates that the Agreement is binding on the Association, its members and employees of its members. No members of the Association are named in the Agreement. Under the wording of this clause, an employer could cease to be a member of the Association and in so doing would remove itself and its employees from the scope of the Agreement. This is inconsistent with the scheme of the Act, which provides that multi-enterprise agreements may be made between two or more employers and the employees employed at the time the agreement is made and who will be covered by the agreement.⁵ The problems with the scope of the Agreement as currently expressed cannot be rectified retrospectively by amending the Agreement or by the provision of undertakings as suggested by Ms Nachiappan.

The ballot process

[12] Section 184 of the Act provides:

“184 Multi-enterprise agreement to be varied if not all employees approve the agreement

Application of this section

(1) This section applies if:

- (a) a multi-enterprise agreement is made; and
- (b) the agreement was not approved by the employees of all of the employers that made a request under subsection 181(1) in relation to the agreement.

Variation of agreement

(2) Before a bargaining representative applies under section 185 for approval of the agreement, the bargaining representative must vary the agreement so that the agreement is expressed to cover only the following:

- (a) each employer whose employees approved the agreement;
- (b) the employees of each of those employers.

(3) The bargaining representative who varies the agreement as referred to in subsection (2) must give written notice of the variation to all the other bargaining representatives for the agreement.

(4) The notice must specify the employers and employees that the agreement as varied covers.

(5) Subsection (3) does not require the bargaining representative to give a notice to a person if the bargaining representative does not know, or could not

reasonably be expected to know, that the person is a bargaining representative for the agreement.”

[13] The ballot of employees appears to have been conducted on a collective basis, that is, the employees of all employers who are members of the Association participated in the same ballot. The ballot paper did not identify the employer of the employee casting the vote.

[14] On the information before the Tribunal there are 44 members of the Association and 44 employees who “will be covered by the Agreement”.⁶ However, only 13 employees cast a valid vote,⁷ which would indicate that the Agreement was not approved by a valid majority of the employees employed by 31 (unidentified) employers. In these circumstances the provisions of s.184 of the Act have not, and could not have been complied with.

Conclusion

[15] There are a range of other concerns with the Agreement which it is unnecessary to detail here, other than to note that in the main they are concerns which would be able to be addressed by undertakings pursuant to s.190 of the Act. However, due to defects in the process of negotiation of the Agreement, in the ballot process and in the scope and parties bound by the Agreement, the application for approval of the Agreement is rejected.



DEPUTY PRESIDENT

Appearances:

S Nachiappan for the applicant

Hearing details:

2012
Adelaide
November 21

Printed by authority of the Commonwealth Government Printer
<Price code C, PR532825>

¹ Minutes of the Unitab Agents Association (SA Branch) Inc. 7 February 2011 and 18 October 2011. This association subsequently registered a change of name and became the TAB Agents Association (SA Branch) Inc.

² Dated 20 November 2012.

³ Correspondence from Ms Nachiappan to the Tribunal dated 20 November 2012.

⁴ PN 151-164.

⁵ Section 172(3)(a) of the Act.

⁶ Form F17, Q2.9.

⁷ Contrary to the submissions of Ms Nachiappan at PN 38-41.



Notice of Listing

Title of Matter: Application by TAB Agents Association (SA Branch) Inc.

Section: s.185 - Application for approval of a multi-enterprise agreement

Subject: Application for approval of the TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Matter Number(s): AG2014/4049

Hearing Details:

The above matter is listed for **eHearing, in Chambers**, before Commissioner Cargill at:

01:00 pm
Friday, 4 April 2014

Parties are not required to attend the Fair Work Commission.

Any person wishing to be heard in this matter should contact the Chambers of Commissioner Cargill at least one hour prior to the abovementioned time and the matter will be listed for an attendance hearing.

In the absence of any person indicating they wish to be heard, the application for approval of the agreement will be determined in accordance with the requirements of the *Fair Work Act 2009* on the basis of the materials lodged with the Fair Work Commission to date.

To:

Notified:	Address/email/fax no.:
Ms Alexandra Thompson Andersons Solicitors	
Ms Sue Williams TAB Agents Association (SA Branch) Inc.	

Inquiries:

All inquiries relating to this notice are to be directed to Mark Evans

2 April 2014 02:18 pm



Attachment D.

sue williams <tattsbetagentsassociationsa@gmail.com>

E mails re ASU

1 message

Sue > Thu, Apr 24, 2014 at 7:51 AM
To: "tattsbetagentsassociationsa@gmail.com" <tattsbetagentsassociationsa@gmail.com>

Have pasted these in case you can't open them in previous e mail
Sue

Dear Parties
This matter has been allocated to Commissioner Bull.

The correspondence has been brought to the Commissioner's attention. The Commissioner has advised that the Australian Services Union should provide its submission by no later than **close of business Thursday, 1 May 2014**.

Kind Regards,

ALYCE BOWE
Associate to Commissioner Bull
Fair Work Commission

www.fwc.gov.au

From: EVANS, Mark
Sent: Wednesday, 16 April 2014 3:41 PM
To: 'Justin Cooney'
Cc: Alexandra Thompson
Subject: RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Dear Mr Cooney

RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Could you please confirm that in filing a form F18, it is the intention of the ASU to oppose the approval of the agreement.

Please note that Commissioner Cargill will be on annual leave as of 18 April 2014 and the matter will have to be allocated to another member of the Commission, as such the Commissioner is not in a position to provide information regarding expected timelines for filing of an F18. This will be a matter for the new Commissioner that has been allocated the application.

Kind Regards,

MARK EVANS
Relief Associate to Commissioner Cargill
Fair Work Commission

www.fwc.gov.au

From: Justin Cooney
Sent: Wednesday, 16 April 2014 2:58 PM
To: EVANS, Mark
Cc: Alexandra Thompson
Subject: RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Hi Mark

Thank you for arranging the forwarding of the F16 and F17. The ASU would like to make a submission on this matter in lodging an F18. What are the timelines the Commissioner would expect that the ASU should submit material? Also can you please let the Commissioner know that a similar application for on course employees in NSW has been lodged and allocated matter number AG2014/5587 - Application by Tab Limited and is with Commissioner Bull's office. Thanks.

Regards
Justin Cooney
Industrial Officer

Australian Services Union - National Office
Ground Floor, 116 Queensberry Street, Carlton South

Tel (03) 9342 1446
Fax (03) 9342 1499
www.asu.asn.au

From: EVANS, Mark
Sent: Monday, 14 April 2014 10:16 AM
To: Alexandra Thompson; Justin Cooney
Subject: RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Thank you Ms Thompson

RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013
Mr Cooney, please see the attached F16 & F17 forms for the above agreement.

Kind Regards,

MARK EVANS
Relief Associate to Commissioner Cargill
Fair Work Commission

www.fwc.gov.au

From: Alexandra Thompson |
Sent: Sunday, 13 April 2014 11:08 AM
To: Chambers - Cargill; Justin Cooney
Subject: RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Dear Mr Evans,

Please note that we have now obtained instructions from our client to agree to permit the ASU to have access to the Form 16 and Form 17 in respect of this Application.

Kind Regards,

Alexandra Thompson | Associate

From: Chambers - Cargill
Sent: Friday, 4 April 2014 11:02 AM
To: Justin Cooney
Cc: Alexandra Thompson
Subject: RE: AG2014/4049 - TAB Agents South Australia al Employees Multi Enterprise Agreement 2013

Dear Mr Cooney

RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

We are currently seeking the views of the Applicant to the request by the ASU to obtain the F16 & F17 documents.

Please note that the Commissioner's decision of the application, indicated in the Notice of Listing to take place after 1pm today, will be delayed until after this issue has been resolved.

Kind Regards,

MARK EVANS
Relief Associate to Commissioner Cargill

www.fwc.gov.au

From: Justin Cooney |
Sent: Friday, 4 April 2014 10:51 AM
To: Chambers - Cargill
Subject: FW: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Hi

The Commissioner has a matter on today, AG2014/4049. The ASU has concerns about the Award used as the reference instrument. I have been emailed the EBA from AMOD, is it possible to send me the application documents including the F16 and F17?

Regards
Justin Cooney
Industrial Officer

Australian Services Union - National Office
Ground Floor, 116 Queensberry Street, Carlton South

www.asu.asn.au

From: Justin Cooney
Sent: Friday, 4 April 2014 10:46 AM
To: 'john.posener@fwc.gov.au'
Subject: FW: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Hi John

The Commissioner has a matter on today, AG2014/4049. The ASU has concerns about the Award used as the reference instrument. I have been emailed the EBA from AMOD, but is it possible to send me the application documents including the F16 and F17?

Regards
Justin Cooney
Industrial Officer

Australian Services Union - National Office
Ground Floor, 116 Queensberry Street, Carlton South

www.asu.asn.au

From: AMOD [<mailto:AMOD@fwc.gov.au>]
Sent: Friday, 4 April 2014 10:29 AM
To: Justin Cooney
Subject: RE: AG2014/4049 - TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013

Good morning Justin,

Please find the requested agreement attached.

Thanks,

Sevim Guven
Members Support Research Team

Fair Work Commission
Tel: [03 8661 7961](tel:0386617961)
Fax: [03 9655 0412](tel:0396550412)

11 Exhibition Street, Melbourne Victoria 3000
GPO Box 1994, Melbourne Victoria 3001
www.fwc.gov.au

P Please don't print this e-mail unless you really need to

From: Justin Cooney
Sent: Friday, 4 April 2014 10:13 AM
To: AMOD
Subject: Request for a copy of an agreement in progress

Hi

Can I please have a copy of the documents relating to application:

		Application for	
		approval of the	
	TAB	TAB Agents	
	Agents	South Australia	21
AG2014/4049	Association	Casual	March
	(SA	Employees	2014
	Branch)	Multi Enterprise	
	Inc.	Agreement	
		2013	

Regards
Justin Cooney
Industrial Officer

Australian Services Union - National Office
Ground Floor, 116 Queensberry Street, Carlton South

www.asu.asn.au

Sent from my iPhone

Attachment E



Shop, Distributive & Allied Employees' Association

REGISTERED OFFICE: SIXTH FLOOR, 53 QUEEN STREET, MELBOURNE 3000 TELEPHONE: (03) 8611 7000 FAX: (03) 8611 7099 E-MAIL: general@sda.org.au
ABN 99 789 302 470

NATIONAL PRESIDENT

Gerard Dwyer

NATIONAL SECRETARY

Joe de Bruyn

Thursday, 11 April 2013

David Smith
National Secretary
Australian Services' Union
Ground Floor
116 Queensberry Street
Carlton South, VIC, 3053
By E-mail: dsmith@asu.asn.au

Dear David,

Re: Application by the ASU to vary the General Retail Award Industry Award (AM2012/102)

I refer to your letter dated 11 April 2013 concerning the ASU application to vary the *General Retail Industry Award 2010* to remove clerical classifications in AM 2012/102 currently before the Fair Work Commission.

The SDA would welcome the withdrawal of this application and supports the ASU application to insert a Travel Agents classification into the *Clerks – Private Sector Award 2010*, as a result of an award review decision of SDP Kaufman re: Clerks - Private Sector in [2012] FWA 9731 preserving the ASU's rights to further pursue such an application.

The SDA confirms that the retail industry does not include subscription services (such as Foxtel), betting organisations (such as TAB CORP) and travel agents and that these employers are not covered by the *General Retail Industry Award 2010*.

The SDA seeks that this confirmation will be satisfactory to ensure the withdrawal of the ASU's application.

Yours sincerely,

Joe de Bruyn

NATIONAL SECRETARY



Fair Work

OMBUDSMAN

Mr David Smith
National Secretary
Australian Services Union
Ground Floor
116 Queensberry Street
CARLTON SOUTH VIC 3053

CC Mr John Nucifora
National Industrial Officer
Australian Services Union

RECEIVED ASU National Office - 3 SEP 2013		
Action Office:	JN	
Copies		
File No. 81.650		

Dear Mr Smith

Thank you for your query regarding modern award coverage for employees taking wagers in off-course betting agencies.

In particular you have asked for our view on modern award coverage for clerical and administrative work, including tele-betting and call centre, employees employed by wagering industry employers such as the following:

- TABCORP / TAB Vic/TAB NSW & Luxbet
- Betfair
- TattsBet/UniTAB/SA TAB/NT TAB & TOTE Tasmania
- TAB Ozbet
- WA TAB
- Off Course Agencies
- Golden Casket

I note, and agree with, your comment acknowledging that in some instances enterprise awards may apply until the end of 2013 unless modernised.

To being with, I think it is important to set out our understanding of 'off-course wagering'. We understand this to be the taking of wagers on horse racing, both gallops and harness, and greyhound racing off-course, that is, not at the place where the racing is taking place. This would also include taking wagers on other sporting events taking place at another venue.

It is the view of the Fair Work Ombudsman that the Clerks Private Sector Award would typically provide coverage for people taking bets in off course wagering agencies.

We reached this conclusion after consideration of the work undertaken by these people, the history of work of this nature, previous award coverage and decisions of the former Australian Industrial Relations Commission (AIRC).

In particular we note that in the decision [2008] AIRCFB 1000, the AIRC, in considering the private sector clerical occupation, stated at paragraph 224:

The ASU contended that the legal services industry required consideration under a separate industry award and that special provisions of one sort or another are appropriate for the cash processing and wagering industries. We agree that the legal services industry should be considered as a separate industry and will do so in Stage 4. At this stage we have not excluded cash processing or wagering from the Clerks private sector award. We have included a definition of clerical work to make it clear that it is a term of broad application and includes cash processing. Clerks involved in wagering also fall within the scope of the award. (my emphasis)

We are not aware of any later decisions which alter this position.

I note in your letter that there is some argument that the General Retail Industry Award 2010 (Retail Award) is a more appropriate instrument to cover this type of work. As I understand it, this argument is based on the Retail Award providing more appropriate recognition of the predominantly casual nature of the workforce in off-course agencies and the prevalence of evening and weekend work. In addition to this I also understand that it is argued that the availability of refreshments at some off-course agencies has changed the nature of the type of work sufficiently to make the Retail Award more appropriate.

We are not inclined towards these arguments.

The prevalence of a particular type of employment, that is full-time, part-time or casual employment, within an occupation, does not in itself preclude coverage under a modern award, particularly where a relevant modern award provides for all the different types of employment. Similarly, whether the hours of work are predominantly outside the ordinary hours for a particular occupation or employer is not of itself determinative of whether the employer or employee falls within the coverage of the award. Rather, in both cases, it will depend upon the specific or particular coverage terms of the award.

We are of the view that if the primary purpose and nature of the work is to process off-course wagering the Clerks Award provides coverage for this type of work.

For completeness, I also point out that where 'off-course wagering' occurs in a hotel covered by the Hospitality Industry General Award 2010, employees undertaking this work would be covered by the Hospitality Award as this award provides an appropriate classification for the duties involved.

Further, in relation to the aspect of your query that relates to call centre work I point out that I am unable to provide a definitive answer as the individual circumstances would need to be considered in each case. Generally, if the call centre operators were employed by the bookmaking business the work would be covered by the Clerks Award. However, if the bookmaking business engaged a contract call centre to perform this work there is an argument that the Contract Call Centres Award 2010 may apply.

I regret to advise you that I have identified some instances back in 2011 where incorrect advice was provided by the FWO before we had considered all the issues involved. This advice provided the Miscellaneous Award 2010 as the instrument that covers this work. Once the issues were considered in full we reached the conclusion that the Clerks Award provides coverage to wagering employees in off-course agencies and we have advised and enforced compliance on this basis.

Finally, in relation to the specific companies listed in your letter I must advise that I am not familiar with the operations of each organisation listed so am not able to provide a definitive individual response.

However, to the extent that these employers employ people undertaking the duties described above in the circumstances outlined, that is taking wagers on horse or greyhound racing or other sports events off-course, it is our view that that work is covered by the Clerks Award.

Forms of gambling that fall outside the remit of sports betting, for example lotteries and 'scratchy' tickets, would not necessarily fall within the coverage of the Clerks Award. More details about the individual employment arrangements would need to be considered to determine award coverage.

I trust this information is of assistance to you and if you would like to discuss it further please call me on the numbers below.

Yours sincerely

Cletus Brown | Director
Fair Work Ombudsman

30/8/13

Fair Work Info Line: 13 13 94 www.fairwork.gov.au

Attachment H.

[2011] FWAA 7624

[Download Word Document](#)**FAIR WORK AUSTRALIA****DECISION***Fair Work Act 2009*

s.185 - Application for approval of a multi-enterprise agreement

TAB Agents' Association of New South Wales
(AG2011/12537)**TAB AGENTS NEW SOUTH WALES CASUAL EMPLOYEES MULTI ENTERPRISE AGREEMENT 2011****Retail industry**

COMMISSIONER MCKENNA

SYDNEY, 4 NOVEMBER 2011

Application for approval of the TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2011.

[1] An application has been made for approval of an enterprise agreement known as the *TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2011* ("the Agreement"). The application was made pursuant to s.185 of the *Fair Work Act 2009* ("the Act"). The application has been made by the TAB Agents' Association of New South Wales, as a bargaining representative for the employers named in Schedule 1 of the Agreement. The Agreement is a multi-enterprise agreement.

[2] I am satisfied that each of the requirements of ss.186, 187 and 188 of the Act relevant to this application for approval has been met. One Broken Hill-based employer has provided a written undertaking addressing a Broken Hill-specific allowance. A copy of the undertaking is attached to this decision and marked Annexure "A". I note that, under s.191 of the Act, the undertaking is taken to be a term of the Agreement. The NSW Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union, trading as the United Services Union ("USU") concurs with the content of the undertaking.

[3] The USU has given notice under s.183 of the Act that it wishes to be covered by the Agreement. In accordance with s.201(2) of the Act, I note the Agreement covers that organisation.

[4] The Agreement is approved and, in accordance with s.54 of the Act, will operate from seven days after the issuing of this decision. The nominal expiry date is 21 March 2015.

COMMISSIONER**ANNEXURE "A"**

[2011] FWAA 1594
Download Word Document

Attachment G.

FAIR WORK AUSTRALIA

DECISION

Fair Work Act 2009
s.185—Enterprise agreement

TAB Agents Association of New South Wales
(AG2011/6778)

THE TAB AGENTS NEW SOUTH WALES CASUAL EMPLOYEES MULTI ENTERPRISE AGREEMENT 2010

Retail industry

COMMISSIONER THATCHER

SYDNEY, 15 MARCH 2011

Application for approval of the TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2010.

[1] An application has been made for approval of an enterprise agreement known as the TAB Agents New South Wales Casual Employees Multi Enterprise Agreement 2010 (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). The Agreement is a single enterprise agreement.

[2] I am satisfied that each of the requirements of ss.186, 187 and 188 of the Act as are relevant to this application for approval have been met.

[3] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 22 March 2011. The nominal expiry date of the Agreement is 21 March 2015.

COMMISSIONER

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<Price code A, AE884622 PR507549>



DECISION

Fair Work Act 2009

s.185 - Application for approval of a multi-enterprise agreement

TAB Agents Association (SA Branch) Inc.
(AG2014/4049)

TAB AGENTS SOUTH AUSTRALIA CASUAL EMPLOYEES MULTI ENTERPRISE AGREEMENT 2013

Miscellaneous

COMMISSIONER BULL

SYDNEY, 9 JANUARY 2015

Application for approval of the TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013. ASU opposed approval based on incorrect reference instrument used for BOOT.

[1] On 20 March 2014, an application was made by Ms Susan Williams (the Applicant) as the bargaining representative of members of the *TAB Agents Association (SA Branch)* for approval of an enterprise agreement known as the *TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013* (the Agreement). The application was filed on behalf of the Applicant by Ms Alexandra Thompson from Andersons Solicitors. The Agreement was initially allocated to Commissioner Cargill and was allocated to my Chambers on 16 April 2014.

[2] The proposed Agreement is a multi-enterprise agreement. Section 172(3) of the *Fair Work Act 2009* (the Act) provides that two or more employers that are not single interest employers may make a multi enterprise agreement with the employees who are employed at the time the Agreement is made and whom will be covered by the Agreement. Section 186(2)(b) of the Act requires that the Agreement has been genuinely agreed to by each employer and no employer has been coerced to make the Agreement.

[3] A significant aspect of the enterprise agreement approval process is for the Commission to determine whether the Agreement passes the better off overall test (BOOT)¹. The Applicant representing the 33 employer parties to the Agreement submitted that there was no modern award covering the only classification in the Agreement, being a *casual payer/seller*, and that where employees are not covered by any modern award then the modern *Miscellaneous Award 2014* (Miscellaneous Award) should apply for the purpose of determining the BOOT. There were approximately 44 employees at the time of making the Agreement.²

¹ S.186(2)(d)

² Applicant's Supplementary Submissions 14 July 2014, at 20(2)

[4] On 4 April 2014, the *Australian Municipal, Administrative, Clerical and Services Union* (the ASU) via its representative Mr Justin Cooney, alerted the Commission to concerns it had about the *Miscellaneous Award* being the nominated reference instrument for the purpose of determining the BOOT in the agreement approval process.

[5] The ASU submitted that the *Clerks Private Sector Award 2010* (the Clerks Award) should be the relevant award for the purpose of determining the BOOT.

[6] On 23 April 2014, the Commission sent correspondence to the ASU directing it to provide written submissions by no later than close of business Thursday, 1 May 2014.

[7] On 1 May 2014, the ASU provided to the Commission an outline of submissions and a copy of a letter from the Fair Work Ombudsman dated 30 August 2013, to support the view that the *Clerks Award* provides coverage for people taking bets in “off course” wagering agencies.

[8] The Commission later sent further correspondence on 6 May 2014, directing the Applicant and the employer bargaining representative, Ms Susan Williams, to provide their response to the ASU’s submissions by no later than close of business Wednesday, 14 May 2014.

[9] On 15 May 2014, the Commission received the Applicant’s submissions in support of the Application. The submissions were forwarded by Ms Thompson from Andersons Solicitors and signed by Mr Tim Bryant as Counsel for the Applicant.

[10] A telephone conference was held in Chambers on 16 May 2014. Ms Thompson, Mr Bryant and Ms Williams appeared on behalf of the Applicant, and Mr Cooney appeared on behalf of the ASU.

[11] During the conference, the Commission directed the Applicant to provide further submissions by 23 May 2014. The submissions were to address whether the Agreement would pass the BOOT when tested against the *General Retail and Shop Industry Award 2010* (the Retail Award). The Applicant was also requested to advise who the employer Applicants were, as the Form 17 appeared to have more listed employer names than employer signatures.

[12] On 27 May 2014, the Applicant provided the Commission with supplementary submissions regarding the BOOT and the *Retail Award*.

[13] On 28 May 2014, a further telephone conference was held. The conference was attended by the same participants as had participated in the telephone conference of 16 May 2014. The main issue discussed was the relevant reference instrument for the BOOT.

[14] The Commission directed the Applicant to provide further submissions in regard to the BOOT and the modern *Retail Award*. The Applicant was to include indicative rosters, job descriptions and any undertakings regarding employees not working on public holidays and up to five Sundays per annum.

[15] On 11 July 2014, the Applicant provided the Commission with three documents:

- a statement of Ms Sue Williams - Bargaining representative for the Applicant;
- rosters of ten TAB agencies from May/June 2014 for the position of casual payer/seller; and
- a roster summary document.

[16] On 14 July 2014, the Applicant provided further supplementary submissions in support of the Application.

[17] A further telephone conference was held on 14 July 2014.

[18] The Commission again requested the Applicant provide an undertaking in the prescribed form regarding not working on public holidays and up to five Sundays per annum.

[19] The Commission also directed the ASU to provide final submissions by 25 July 2014 and for the Applicant to advise of any further comments.

[20] The matter was then listed for a hearing on 8 September 2014 in Melbourne with a video link to Adelaide. Mr Bryant of Counsel appeared for the applicant and was granted leave to appear pursuant to s.596(2)(a) of the Act.

Submissions

Applicant

[21] The Applicant's initial position was that there was no modern award covering the employee classification and as such, the modern *Miscellaneous Award* should apply.

[22] This position was indicated on the Applicant's Form 17 - *Employer's Statutory Declaration*, which identified the *Miscellaneous Award* as the relevant reference instrument for the purpose of determining the BOOT.

[23] Clause 3.1 of the Form 17 states:

"There are no modern awards or agreements that clearly apply to the employees who will be subject to of (sic) this proposed agreement. Some employees are paid by reference to specific awards the applicability of which is to be questioned. Part of the purpose of this proposed agreement is to bring certainty to the employment conditions of persons employed in this industry. However some employees are employed and paid under the terms of the Miscellaneous Award 2010 and may be (sic) appropriate to refer to this award as a comparison with the present award."

[24] The Applicant provided the Commission with an outline of submissions supporting the position that the modern *Miscellaneous Award* should be the relevant reference instrument for the purposed of the BOOT. Should the *Miscellaneous Award* not be accepted it was put in the alternative that the employees work can be characterised as sales rather than clerical and therefore they would be covered by the modern *Retail Award*.

[25] As this matter progressed, the Applicant submissions and position was directed to coverage by the *Retail Award*.³

[26] The Applicant opposed the ASU's position that the type of work engaged in by the employees is clerical work covered by the *Clerks Award*. The Applicant also stated the ASU have no member employees subject to the Agreement and was not involved in the Agreement negotiation process.

[27] In relation to the work conducted by the employees, the Applicant stated in their 15 May 2014 submissions at paragraph 3 that:

d. The only function that employees undertake is to pay and sell cash amounts to customers as determined by a third party (Tatts Group Ltd) betting terminal and to pay out in respect of such transactions for and on behalf of the third party;

e. Specifically, they take no part in determining the nature of the financial transaction, for example setting prices, framing markets or determining the odds, entered between the customer on the one hand and the third party on the other."

[28] Further at paragraph 13:

13. Indeed the work done by such employees is no different from any retail employee at any newsagency processing a cross lotto form for a customer."

[29] Mr Byrant submitted that if the employees are clerks due to the cash handling they undertake, then they are excluded from the *Clerks Award* and covered by the *Retail Award*.⁴

ASU Submissions

[30] The ASU opposed the approval of Agreement on the basis that the *Miscellaneous Award* and the *Retail Award* are the incorrect reference instruments and submitted that the *Clerks Award* is the appropriate reference instrument for applying the BOOT. That being the case, the Agreement does not satisfy the BOOT.

[31] The ASU submitted at paragraph 22 of their 1 May 2014, submission that:

"... the industry conditions and the terms of conditions of employment of the employees are sufficiently analogous to clerical and administrative work generally to warrant the Clerks-Private Sector Award as the reference instrument."

[32] The ASU argued that the type of work conducted by the employees is wagering and that wagering is a clerical and administrative industry, which is covered by the *Clerks Award*.⁵ The history of award regulation in the wagering industry was canvassed in the ASU's submissions. The ASU also relied on the Commission's award modernisation decision⁶ in making the *Clerks Award* to support their argument.

³ Applicant's Supplementary Submissions 14 July 2014, at (8)

⁴ PN85

⁵ ASU Outline of submissions 1 May 2014 at (21)

⁶ [2008] AIRCFB 1000

[33] Further written submissions from the ASU were received on 30 July 2014, responding to those made by the Applicant.

[34] At the hearing, Mr Cooney submitted that the vast majority of work performed by employees was cash handling which falls within the *Clerks Award*.⁷

Conclusion

Award Coverage

[35] In determining the appropriate reference instrument for the purposes of the BOOT it is necessary to understand the actual nature of the industry the employees are engaged in and the scope of their duties.

[36] The premises in which the employers operate are either wholly owned or rented by a third party Tatts Group Ltd.⁸ Most agencies are located in stand-alone buildings or strip shops.⁹ Each employer is a member of the TAB Agents Association (SA Branch Inc). The control by Tatts Group Ltd over the employers operations is all-embracing, for example Tatts Group Ltd are responsible for the:

- premises and facilities used;
- opening and closing hours;
- procedures followed; and
- setting prices, framing markets, determining odds, benefits paid and the terms of payment.¹⁰

[37] The nature of the employers' business is to act as an agent for Tatts Group Ltd. Employers under the terms of their agreements with Tatts Group Ltd are contractually prevented from engaging in wagering, acting as a bookmaker, a bookmaker's clerk or agent.¹¹ Most employers employ one or two employees. It is said that for the most part employees are students working outside lecture times, parents with child care responsibilities and retirees.

[38] Employers can operate as day or night agencies, opening hours are confined within the following span:

10.00am - 6:30pm Mon - Weds
10:00am - 10:00pm Thurs - Frid
09:30am - 9:00pm - Sat
10.30am - 5:30pm - Sun

⁷ PN75, 87

⁸ Applicant's submissions 15 May 2014 at (3)

⁹ Witness Statement of Susan Williams Exhibit A1 at (6)

¹⁰ Applicant's submissions 15 May 2014 at (3)

¹¹ Applicant's submissions 15 May 2014 at (9)

[39] The busiest day is Saturday when the majority of race meetings and sporting events are held.¹² The work involved requires no specific training and for most employees only a 30 minute orientation is necessary to achieve the requisite skills.

[40] The employees' primary functions are to pay and sell cash amounts to customers. The employees are all engaged on a casual basis and do not work full time. The duties of a casual payer/seller are listed at sub clause 9.2 of the Agreement:

9.2 The indicative duties of a payer/seller include:

(a) Operating TAB equipment in order to sell TAB products to consumers and otherwise assist customers, including but not limited to -

(i) retail wagering terminals:

(ii) operation of touch screens:

(b) undertaking training as required as new products and technologies are introduced:

(c) advising and assisting customers with general service enquiries;

(d) responsible Service of Wagering;

(e) effectively updating all racing materials;

(f) processing Account Betting Transactions;

(g) balancing cash and tills at the end of shifts;

(h) ensuring the TAB Agency (or other venue/site of work) is presented in a clean and tidy manner;

(i) complying with all TAB operational and security procedures advised to them;

(j) adhering to all banking requirements including delivery of excess cash to designated banks as instructed;

(k) observing an adherence to procedures relating to the opening and closing of Agencies, including the securing of cash, as advised, and

(l) all tasks ancillary or incidental to these duties.

[41] Ms Williams, the Applicant's bargaining representative, was cross-examined on her witness statement by Mr Cooney. Ms Williams' evidence was that employees do not operate in conjunction with head office, where employees perform largely administration and clerical tasks, specifically wagering.¹³ Most duties are associated with using a terminal where a

¹² Witness Statement of Susan Williams Exhibit A1 at (10)

¹³ Witness statement of Susan Williams at (12) Exhibit A1

customer transaction is processed. Employees pay and sell cash amounts to customers as determined by the betting terminals.¹⁴ Ms Williams stated that the best illustrative comparison would be with a casual shop assistant selling lottery tickets at a lottery kiosk.¹⁵

Clerks Private Sector Award 2010

[42] The *Clerks Award* provides at clause 4.1:

“4.1 This award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature, and to those employees. However, the award does not cover:

- (a) an employer bound by a modern award that contains clerical classifications; or*
- (b) an employee excluded from award coverage by the Act.”*

(My underline)

[43] Clause 3 **Definitions and Interpretation** of the *Clerks Award* defines clerical work in the following terms:

“clerical work includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk”

(My underline)

[44] The Applicant states that employees do not attend to phone enquiries, maintain records, operate a switchboard, perform typing; nor are they involved in the preparation of invoices or reconciliation of accounts.

[45] The Applicant submits that all business is conducted on a personal level with the customer and the employees do not undertake clerical work. If on the other hand it is held that the employees undertake clerical work, they are excluded from the *Clerical Award* and covered by the *Retail Award* as it includes clerical classifications.

[46] This conclusion is reached as a result of the application of clauses 4.1 and 4.6 of the *Clerks Award*. Clause 4.1 repeated above provides that the *Clerks Award* does not cover an employer bound by a modern award that contains clerical classifications. Clause 4.6 states:

4.6 “Without limiting the generality of the foregoing this award does not cover employers covered by the following industry awards with respect to employees covered by the awards:

- ...
- *The General Retail Industry Award 2010*

¹⁴ Applicant’s written submissions of 15 May 2014 at 3(d)

¹⁵ PN37 and Witness statement of Susan Williams at (16) Exhibit A1

- ...”

[47] Clearly the employees handle cash which is included as clerical work under the *Clerks Award* definition of clerical work extracted above. It appears from the evidence that handling cash (credit card transactions cannot be conducted¹⁶) is principally what the employees are engaged in.

[48] The Applicant has stated that the employees are engaged in retailing rather than “wagering.”¹⁷ The evidence has demonstrated that employees are principally involved in cash handling, a duty that meets the definition of “clerical work” under the *Clerks Award*, and as the employees are engaged, wholly or principally, in this work they would prima facie be covered by the *Clerks Award* despite the work not being traditional office based clerical work. However, this coverage defaults to that of the *Retail Award* pursuant to clauses 4.1 and 4.6 of the *Clerks Award* where the *Retail Award* also covers the work.

[49] The question then becomes whether the *Retail Award* contains a clerical classification covering the duties of a casual payer/seller.

General Retail Industry Award 2010

[50] The *Retail Award* coverage is described at clause 4. Sub clause 4.1 reads:

“This industry award covers employers throughout Australia in the general retail industry and their employees in the classifications listed in clause 16 - Classifications to the exclusion of any other modern award....”

[51] Clause 16 refers to the classifications contained in Schedule B. Schedule B describes the functions undertaken by retail employees between Levels 1 and 8. Each Level is related to functions performed by employees at a retail establishment. Various classification Levels refer to a *clerical assistant* and *clerical officer*. The *Retail Employee Level 1* classification includes a *clerical assistant* which is defined as an employee accountable for clerical and office tasks as directed within the skill levels set out.

[52] The duties of a *Retail Employee Level 1*¹⁸ include performing the following functions at a *retail establishment*:

- *the receiving, arranging or making payment by any means;*
- *the recording by any means of a sale or sales;*
- *the provision of information, advice and assistance to customers.*

[53] The above are tasks undertaken by the employees covered by the Agreement and the *receiving, arranging or making payment by any means* must include paying and selling cash amounts to customers, which the Applicant submits, is the principle task of the employees.¹⁹ For the purposes of clause 4.1(a) of the *Clerks Award*, the *Retail Award* contains clerical classifications.

¹⁶ PN71

¹⁷ Applicant’s Supplementary Submissions 14 July 2014, at (3)

¹⁸ See Schedule B Classifications

¹⁹ Applicant’s written submissions of 15 May 2014 at 3(d)

[54] The words *retail establishment* are not defined in the *Retail Award* although it was not argued by the ASU that the work premises being stand-alone buildings or strip shops and described by the Applicant as “high street businesses” were not retail establishments.²⁰

[55] There is however a definition of “*general retail industry*” which is described as:

“... the sale or hire of goods or services to final consumers for personal or household consumption.”

[56] A list of non-exhaustive examples is then provided, none of which neatly encompasses the employers’ business. The Applicant argues that the work of employees is more properly characterised as sales and therefore covered by the reference to the sale of services in the definition of retail establishment.

[57] I accept that the employers are engaged in the “*general retail industry*” in that they provide for the sale of a service to final consumers for their personal consumption. The substantial character of the employers’ enterprise is to take and pay bets via the retail point of sale (the betting terminals), to effect the betting odds and benefits that are dictated by the Tatts Group Ltd.²¹

[58] Further support for this conclusion arises from clauses 4.7 of both the *Retail* and *Clerks Awards* which reads as follows:

“Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.”

[59] The nature of the work performed, the business of the employers and the priority given to the *Retail Award* at clause 4.6 of the *Clerks Award* would indicate the *Retail Award* is the most appropriate award in respect of coverage.

[60] A similar, in principle, conclusion was reached in the Full Bench decision of *Mr David Joseph v Amandon Pty Ltd T/A World Business Travel*²² the Full Bench held:

“[28] We note the broad description of the retail industry in the coverage and definitions clause of the General Retail Industry Award 2010 (General Retail Award). In our view the work of a travel consultancy in selling and making travel bookings on behalf of clients falls within the description of the retail industry because it involves selling goods and services to final consumers for personal or business consumption. ... We also are of the view that the Clerks (Private Sector) Award 2010 covers the substantial clerical nature of the work of travel consultants and their supervisor, although the most appropriate award to the business of Amandon is the General Retail Award because of the nature of the employer’s business and the priority given to the

²⁰ Ibid at (6)

²¹ Witness statement of Susan Williams at (8) Exhibit A1

²² [2013] FWCFB 8539

General Retail Industry Award in the coverage clause of the Clerks - Private Sector Award.”

[61] I have also had regard for the general principles of ascertaining award coverage. This Tribunal and its predecessors have applied the “principal purpose” test, which was articulated in the Full Bench decision of the Australian Industrial Relations Commission (AIRC) in *R Brand v APIR Systems Limited*.²³ The decision, cited the decision of the Full Bench of the AIRC in *Carpenter v Corona Manufacturing Pty Ltd*, which stated relevantly as follows:

“In our view, in determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances in which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed.”

[62] The principle purpose for which *payer/sellers* are employed is to sell the TAB Group Ltd’s products, not to perform clerical work.

[63] The Full Bench went on to conclude:

“[14] In this appeal both parties accepted that the ‘principal purpose’ formulation as stated in Carpenter v Corona Manufacturing Pty Ltd should be applied. We are content to decide this application on that basis”

[64] This decision was delayed awaiting the outcome of the Full Federal Court decision in *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd*²⁴ delivered on 3 November 2014. The Full Court considered the coverage of the *Retail Award* in respect of overlapping coverage with the *Road Transport and Distribution Award 2010*.

[65] The Full Court held that it was not necessary for the work of a *Retail Employee Level 1* to be performed at a retail establishment, it is sufficient if a retail establishment is the base or location of the employment, even if the work is performed away from the retail establishment e.g. driver and door- to-door salesman. This finding is consistent with the view of Boulton J expressed in a decision to vary the *Retail Award*²⁵ in accordance with the transitional review provisions where he held that work performed outside the walls of a shop could be covered under the award.

“[23] ... The present clause may give the impression that door-to-door sales is the only type of work conducted outside the walls of a shop that is covered by the Award, although no such restriction flows from the Award’s coverage or classification structure.”

[66] The issue of work outside the walls of a retail establishment does not arise in this case as the Applicant argues that the retail establishment is the stand-alone building or shop where

²³ PR938031

²⁴ [2014] FCAFC 148

²⁵ *Modern Awards Review 2012 - General Retail Industry Award 2010 re Transitional review of modern awards* [2013] FWC 6056

the agency is based and the employees work. The Full Court decision is therefore not directly relevant to this matter.

Full Bench Award Modernisation Decision

[67] The ASU drew the Commission's attention to the Award Modernisation decision of 19 December 2008,²⁶ in which the Full Bench made a number of comments relating to the coverage of the *Clerks Award*. It was stated that one objective of award modernisation is to limit the number of awards applying to a particular employer. The ASU had sought a general presumption in favour of coverage by the *Clerks Award*, for all employees covered by a general clerical occupational award or NAPSA. This was rejected with the Full Bench stating that while the *Clerks Award* will have significant coverage it will not cover all clerical employees in the private sector.²⁷

"[221] The Australian Services Union (ASU), supported by some employer groups, sought the establishment of a general presumption in favour of coverage by the Clerks—Private Sector Award 2010 (the Clerks private sector award) for all employees currently covered by a general clerical occupational award or NAPSA. We do not consider that it is appropriate to establish a presumption of this type. It is clear that the Clerks private sector award will have very significant application. However it will not cover all clerical employees in the private sector."

[224] ... At this stage we have not excluded cash processing or wagering from the Clerks private sector award. We have included a definition of clerical work to make it clear that it is a term of broad application and includes cash processing. Clerks involved in wagering also fall within the scope of the award."

(My underline)

[68] During the modernisation proceedings in May 2008, leading to the making of a number of modern awards including the *Clerks Award*, the Australian Council of Trade Unions (ACTU) made submissions to the Full Bench relevant to the *Clerks Award*. It was submitted the proposed Private Sector Clerical Industry Award would be subject to exclusions within specified industries including legal services, betting and lotteries.²⁸ It was submitted that the retail industry applies to all persons working in or in connection with any retail shop or establishment including clerical and administrative work performed within the four walls of the store.²⁹

[69] The ASU submitted that certain industries should have their own sector clerical awards, these industries included TAB Betting and Lotteries.³⁰ Suffice to say the Full Bench did not accept the ASU's position of separate clerical awards for these sectors. The Full Bench went on to make the *Clerks Award* and the *Retail Award* as priority awards. As stated in their decision, clerical work is a term of broad application and that the *Clerks Award* will

²⁶ [2008] AIRCFB 1000

²⁷ Ibid at paragraph 221

²⁸ AM 2008/1 Transcript of 26 May 2008 at PN87

²⁹ Ibid PN98

³⁰ Ibid PN485

not necessarily apply to employers covered by other awards with clerical classifications.³¹ The *Retail Award* was one of 22 final specific exclusions in the *Clerks Award* at clause 4.6, referred to above.

[70] I also note the comments of Glynn J in *Clerical and Administrative Employees (Class Structure) State Award*³² when referring to the duties of a “clerk” that “*The term, and indeed the office of “clerk”, is one of venerable antiquity ... The work of the clerk is also evolving.*”

[71] While clerks involved in wagering and cash handling also fall within the scope of the *Clerks Award*; for the reasons I have previously given I consider that the *Retail Award* more appropriately covers the classification of *casual payer/seller* in the Agreement now before the Commission for approval. As noted previously the employers in this application are contractually prevented from engaging in wagering.

Miscellaneous Award 2010

[72] Clause 4 - Coverage of the *Miscellaneous Award* provides that its coverage shall apply to classifications listed in clause 14 who are not covered by any other modern award. There are a number of exemptions to coverage, which are not applicable in this matter. As I have concluded, the *Retail Award* would cover the employees bound by the Agreement in the absence of the Agreement being approved; as such consideration of the *Miscellaneous Award* for the BOOT does not arise.

Better Off Overall Test

[73] The Applicant and the ASU accepted that the Agreement does not pass the BOOT if the *Clerks Award* is used as the reference instrument. However, having held that the *Retail Award* covers the employers and employees³³ the *Clerks Award* cannot qualify as the reference instrument for the purposes of the BOOT but rather the *Retail Award* is the appropriate reference instrument. The ASU made no submissions regarding the *Retail Award* and the BOOT.

[74] The classification of *casual payee/seller* was said to be equivalent to the classification of *Retail Employee Level 1* under the *Retail Award*.³⁴ The Agreement provides at sub clause 10.2 that employees are to receive a 3% per annum increase on their hourly rate for the duration of the Agreement. It was submitted by the Applicant this is a benefit that must be taken into consideration when undertaking the BOOT.

[75] At the telephone conference held on 14 July 2014, the Commission raised some concerns regarding the BOOT when applied to the *Retail Award*. The Applicant advised that the employers would consider providing undertakings to deal with these concerns. The undertakings were included in the Applicant’s written submissions of 14 July 2014 and in a final form on 7 January 2015. The 7 January undertakings were made upon a further request

³¹ [2008] AIRCFB 1000 at [222]

[1996] NSWIRComm 190

³³ This decision is specific to the classification of the employees and this Agreement not a general finding for the wagering industry.

³⁴ Applicant’s submissions of 15 May 2014 at (34)

from the Commission, to provide an undertaking that all employees will be paid as of January 1 2015, the rate specified for the second year as per clause 10.1 of the Agreement.

[76] The undertakings read as follows:

"1. Sunday shifts rostered to casuals at each agency are to be shared equally between the casuals employed by that Agent at that agency

2. No casual is to work more than 4 Public Holidays in any one year.

Further to the above, the wage rates proposed in the second year will apply as at 1.1.2015."

[77] The undertakings are not so substantial that if asked to vote again the employees who voted would not approve the Agreement. I am therefore satisfied that the undertakings do not result in a substantial change to the Agreement as per s.190(3)(b) of the Act.

[78] The undertakings are taken to be a term of the Agreement. A copy of the undertakings is attached at **Annexure A**.

[79] Further in respect of the BOOT the Applicant submits that:

(1) The hourly rate applicable for employment is in all cases from Monday to Saturday inclusive higher than the corresponding hourly rate under the General Retail Award 2010.

(2) The rate for Sunday work is less under the proposed agreement than under the General Retail Award 2010 but not such as to offset the advantage in other periods from Monday to Saturday.

(3) Similarly the rate for Public Holiday work is less under the proposed agreement than under the General Retail Award 2010 but not such as to offset the advantage in other periods from Monday to Saturday provided such work offered to employees be limited to not more than 4 days per year.

(4) The meal allowance provided under the proposed agreement is more generous financially than that provided under the General Retail Award 2010.

[80] On the basis of the submissions of the Applicant, the roster summary tendered and the undertakings provided, I am satisfied that the requirements under s.186(2)(d) and s.193(1) being that the employees are better off overall under the Agreement have been met.

[81] The Agreement will cover employees classified as a *casual payer/sellers* working for the employers listed in Schedule 1 to the Agreement

[82] I am satisfied that pursuant to s.186(3A) of the Act, this group is fairly chosen as being geographically or organisationally distinct.

[83] I am satisfied that each of the requirements of ss.187 and 188 of the Act as are relevant to the application for approval have been met.

[84] The Agreement is approved. In accordance with section 54(1), the Agreement will operate from 16 January 2015. The nominal expiry date of the Agreement is 31 December 2017.



COMMISSIONER

Appearances:

Mr Bryant, Counsel for the Applicant.

Mr Justin Cooney for Australian Municipal, Clerical and Services Union - (New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Branch

Hearing details:

2014.

Melbourne with video link to Adelaide:

8 September

Annexure A

Dear Commissioner Bull

AG2014/4049

Please find below Undertakings as requested as per our phone call of 7.1.15.

I, Susan Jane Williams , have authority to act on behalf of the employers of the SA TAB Agents Association in the matter of providing the following undertakings for inclusion in the TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013:

1.Sunday shifts rostered to casuals at each agency are to be shared equally between the casuals employed by that Agent at that agency

2. No casual is to work more than 4 Public Holidays in any one year.

Further to the above,the wage rates proposed in the second year will apply as at 1.1.2015.

Thank you

Looking forward to hearing from you soon. I have advised all agents of this regarding the amendment of the rates.

Kind Regards

Sue Williams

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Better off overall test

Attachment "5"

29. The ASU submits that as demonstrated above the work requirements for the payer/seller under the Agreement is consistent with at least Level 2 under the CPS Award. As such, the standard rate Monday to Friday prescribed in the Agreement for a casual payer/seller are \$1.33 per hour less than the CPS Award rate of pay for a casual Level 2 employee. The ASU submits that an payer/seller classified employee cannot be better off under the Agreement as compared to the Award.

30.	Clerks – Private Sector Award 2010	Miscellaneous Award 2010	TAB Agents South Australia Casual Employees Multi Enterprise Agreement 2013
	Level 2 – Year 1 (724.50 p/w) \$19.07 + 25%(casual loading) = \$23.83	Level 2 (\$664.80) \$17.49 + 25%(casual loading) = \$21.87	Payer/Sellers Weekday 7am-7pm (1 st year) \$22.50
1 hour at standard rate Mon to Fri inclusive, 7am to 6 pm.	Cl.25.1 – \$23.83 p/h	Cl.20 - \$21.87 p/h	Cl.10.3 - \$22.50 p/h
Saturday	Cl.27.2 – 1.25x \$29.79 p/h	Cl.22.2(c) – 1.45x \$31.71 p/h	Cl.10.3 \$28.52 p/h
Sunday	Cl.27.2 – 2.0x \$47.66 p/h	Cl.22.2(d) – 1.75x \$38.27 p/h	Cl.10.3 \$34.42 p/h
Public Holiday	Cl.31.3 – 2.5 x \$59.58 p/h	Cl. 22.2(e) – 2.5x \$54.67 p/h	Cl.10.3 \$37.86 p/h
Overtime	Cl.27.1 (1.5x first 3 hrs) \$35.75 p/h	Cl. 22.1 (1.5x first 3 hrs) \$32.80 p/h	Cl.15.1 (1.5x first 3 hrs) \$33.75 p/h
	(2.0x thereafter) \$47.66 p/h	(2.0x thereafter) \$43.74 p/h	(2.0x thereafter) \$45.00 p/h
Shiftworkers		See attached.	
Afternoon Shift	Cl.28.4(c) – 1.15x \$27.41 p/h		
Night Shift	Cl.28.4(c) – 1.15x \$27.41 p/h		
Permanent Night Shift	Cl.28.4(c) – 1.30x \$30.98 p/h		
Sat/Sun/Pub Holiday (ordinary working period)	Cl.28.4(d) – 1.5x \$35.75 p/h		
Sat/Sun/Pub Holiday (not ordinary working period)	Cl.28.6 – 2.0x \$47.66 p/h		

The amounts highlighted in yellow indicate where the award/s amount exceeds the agreement.

31. The above table shows a casual payer/seller employee as marginally better off under the Agreement than Level 2 of the Miscellaneous Award on the Monday to Friday, 7am to 6pm rate, which of course is then reflected in the corresponding overtime rate. An employee under the Agreement is worse off when working Saturday, Sunday and Public Holidays as compared to the Miscellaneous Award.

Miscellaneous Award 2010 [MA000104]

Clause	Penalty Type	Description	Amount	Frequency	Time Penalty Applies
22.2(a)	Saturday	For all work performed by an employee, other than a casual, on a Saturday which is not overtime.	120.00% (Loading)	Per hour	Any time
22.2(c)	Saturday	Casual For all work performed by a casual employee, on a Saturday which is not overtime.	145.00% (Loading) E	Per hour	Any time
22.2(b)	Sunday	For all work performed by an employee, other than a casual, on Sunday which is not overtime.	150.00% (Loading)	Per hour	Any time
22.2(d)	Sunday	Casual For all work performed by a casual employee on Sunday which is not overtime.	175.00% (Loading) E	Per hour	Any time

Casual/part-time loading is generally calculated on the base hourly rate, whereas a penalty is calculated on the relevant rate of pay, including the base hourly rate plus any applicable all-purpose allowances. "

The ASU calculations were based on the casual rate. The 25% difference between casual and other employees makes it abundantly clear, as well as the explanatory notes in the Award.