



**Independent
Schools Victoria**

**Fair Work Commission
4 yearly review of modern awards**

SUBMISSION

**AM2014/225
Educational Services (Schools) General Staff Award 20XX
[MA00076]**

Exposure Draft (8 March 2019)

5 April 2019

Reason for submission

1. Whilst reviewing the Exposure Draft of the [Educational Services \(Schools\) General Staff Award](#) (Award) issued on 8 March 2019, consideration has been given to the practical effects of the definition of a night shift in clause 15 (Penalty rates).
2. It is appreciated that it would have been preferable to have become aware of the potentially adverse consequences of the definition of a night shift much earlier in the 4 yearly review of modern awards being undertaken by the Fair Work Commission (Commission). However, these consequences have only just been realised due to a particular employment situation that has arisen.
3. The following paragraphs explain the consequences of the Award's definition of a night shift.

Current Award definitions

4. The definition of a night shift in clause 15.1(c) of the Award has not changed since the Award commenced operation on 1 January 2010.
5. Clause 15.1(c) of the Exposure draft defines a night shift as a "*shift which is not a day shift and which finishes after midnight and at or before 6.00 am*".
6. Clause 15.1(a) of the Exposure Draft states that a day shift "*is a shift which starts and finishes wholly within the spread of ordinary hours in clause 9.5*".
7. Clause 9.5 does not contain just one spread of ordinary hours. There are several different spreads of ordinary hours. The multiple spreads of ordinary hours resulted from the award modernisation proceedings conducted immediately prior to 2010.
8. Whilst the start time for most spreads of ordinary hours in clause 9.5 is 6.00 am, there are some employee classification streams with later start times for the spread of ordinary hours. These are:
 - 7.00 am to 6.00 pm (clause 9.5(a));
 - 6.30 am to 6.30 pm (clause 9.5(c)).

Working a night shift in the context of the spread of ordinary hours

9. Under clause 15.1(c), an employee working a night shift under clause 15.1(c) must finish work by no later than 6.00 am. However, the ordinary hours for some employees working the next shift, which is the day shift, do not commence until 6.30 am or 7.00 am.
10. Consequently, there is a gap of either 30 or 60 minutes between the end of a night shift and the commencement of a day shift, depending upon the employee's classification.
11. An example of an inadvertent consequence resulting from the definition of a night shift is as follows:

An employer engages wellbeing services employees (e.g. first aid trained) to provide services to ill/injured students in the school's boarding house, including overnight, on weekdays.

The spread of ordinary hours for wellbeing services employees is 7.00 am to 6.00 pm from Monday to Friday (clause 9.5(a)(iii)).

For the overnight period, the Award requires an employee working a night shift to finish work at 6.00 am.

The Award states that the spread of ordinary hours for the day shift commences at 7.00 am.

Situation A: If the employee working overnight was engaged to work until 7.00 am, then the shift cannot be defined as a night shift, as the shift finishes after 6.00 am. That is, the 115% rate of pay for a night shift would not be applicable. Instead all hours of work would be paid at the overtime rate of pay of 150% for the first three hours and 200% for all remaining hours.

Situation B: If the employee was required to work a permanent overnight shift, finishing at 7.00 am (i.e. the start time for ordinary hours of work), then the shift could not be classified as a permanent night shift with all hours paid at 130%. Again, the overnight shift would be paid at the overtime rates of pay.

12. As illustrated by the above example, it is contended that the definition of a night shift creates a consequence that was unintended.
13. Continuing the above example: If the overnight wellbeing services employee works until 6.00 am, and the day shift employee commenced at 6.00 am instead of 7.00 am, then the first hour of every shift would be paid as overtime at 150%, as the period of 6.00 am to 7.00 am is outside the spread of ordinary hours.
14. It is contended that it should be possible to have seamless transition from a night shift to a day shift for a specific spread of ordinary hours. That is, it should not be necessary to pay overtime rates for regular shifts.

Effect of mutual agreement under clause 9.6 of the Award

15. Clause 9.6 of the Award allows an employer and the majority of employees in a particular group to mutually agree to vary the starting and finishing times by up to one hour, provided the total hours remain unchanged.
16. Therefore, using the example provided above, it would be possible for the employer and the wellbeing services employees to agree to vary the spread of ordinary hours to commence at 6.00 am (rather than 7.00 am) and to conclude at 5.00 pm. This would enable a night shift to be worked in accordance with the definition in clause 15.1(c), as the finishing time for a night shift would coincide with the starting time for a day shift.
17. However, if there is no mutual agreement to vary the starting time of the spread of ordinary hours, then the employer is faced with paying overtime rates for all hours worked on the overnight shift, as in the example provided above.

Referencing another modern award

18. Whilst we have not reviewed all modern awards, we draw the Commission's attention to the arrangements for ordinary hours and shift work in the [Higher Education Industry – General Staff – Award 2010](#) (2010 Award). References are to the clauses of the 2010 Award rather than to the current exposure draft.

19. Clause 21 (Ordinary hours and spread of ordinary hours) of the 2010 Award specify four spreads of ordinary hours, which commence at 6.00 am, 6.30 am, 7.00 am and 8.00 am.
20. Clause 28 (Rostering) states in clause 28.1(c) that a night shift “*finishes after midnight and at or before 8.00 am*”. In this 2010 Award, 8.00 am is the latest of the four different starting times of the spreads of ordinary hours.
21. These definitions allow the finishing time of a night shift to be timed to coincide with the starting time of a day shift.
22. For all employee classification streams under the 2010 Award, the relevant definitions allow a night shift to be worked with all hours paid at a rate of 115%, or, if the shift is a non-rotating night shift, the hours are paid at a rate of 130%.

Summary

23. It is our view that:
 - a. the multiple spreads of ordinary hours in clause 9.5 of the Award, and
 - b. defining a night shift in clause 15.1(c) as finishing by 6.00 am, irrespective of the starting time of the relevant spread of ordinary hours,has created a situation where an overnight shift cannot be defined as a night shift in some circumstances.
24. Clause 9.6, as a facilitative provision, has the potential to resolve the situation, where mutual agreement to vary the spread of ordinary hours is achieved.
25. However, changing the definition of a night shift in clause 15.1(c) to accommodate all spreads of ordinary hours in clause 9.5 removes reliance upon achieving mutual agreement under clause 9.6
26. It is submitted that proper consideration was not given during the award modernisation proceedings to the effect of specifying a single finishing time for a night shift in an award which has multiple spreads of ordinary hours. These multiple spreads of ordinary hours

would have resulted from attempting to consolidate different arrangements from many State/Territory awards.

Proposed variation

27. Further to the summary of the consequences of the definition of a night shift in clause 15.1(c), which we believe to be unintended, the following variation to clause 15.1(c) is proposed:

“(c) **night shift** is a shift which is not a day shift and which finishes after midnight and at or before the commencement of the relevant spread of ordinary hours identified in clause 9.5, which may be varied by clause 9.6.”

28. The proposed definition for a night shift:
- a. eliminates the potential for gaps between the end of a night shift and the commencement of a day shift;
 - b. does not affect the majority of the spreads of ordinary hours, which commence at 6.00 am, unless otherwise varied by mutual agreement pursuant to clause 9.6;
 - c. allows clause 9.6 to better fulfil its purpose as a facilitative provision;
 - d. is a practical attempt to resolve what is believed to have been an inadvertent consequence of the award modernisation process involving the rationalisation of awards.
29. Finally, we are hopeful that the Commission and other interested parties will review this proposed variation for clause 15.1(c) of the Award as practical, logical and uncontroversial, albeit being made late in the 4 yearly review of modern awards.