

Fair Work Commission
Four Yearly Review of Modern Awards
Aged Care Award
Matter No: AM2018/13

**SUBMISSIONS OF HEALTH SERVICES UNION of 23 JANUARY 2019 – FOUR YEARLY
REVIEW – SUBSTANTIVE ISSUES**

OVERVIEW

1. These submissions are made by the Health Services Union (HSU), in accordance with the Directions of President Ross, dated 13 November 2018, in relation to the *Aged Care Award* ('the Award').
2. The HSU seeks to vary the Award to ensure that it achieves the modern awards objective by:
 - a) providing that employees required to use a mobile phone for work purposes are entitled to a telephone allowance (clause 15; Exposure Draft ('ED') clause 18);
 - b) ensuring that the minimum engagement provision for part-time and casual employees applies for each part of a broken shift (clause 22.8; ED clause 14.6);
 - c) ensuring that casual loading is paid in addition to weekend and public holiday rates (clause 23; ED clause 20 and clause 29.2(c); ED clause 26.3)
3. The HSU is not filing witness evidence in relation to our claims.
4. Annexed to these submissions are draft orders with the HSU's proposed variations.

THE HSU's CLAIMS

Telephone allowance – clause 15; ED clause 18

5. The HSU submits that the Award should be varied to include a telephone allowance applicable when an employee is required to use a mobile phone for work.
6. The HSU had read and supports the submissions of United Voice (UV) of 18 January 2019, and their proposed wording in relation to a telephone allowance.

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7. We say that this amendment is necessary to meet the modern awards objective of providing a fair and relevant safety net of terms and conditions¹ for employees who are required to use a mobile phone while on call, to access rosters, or to perform other work duties.
8. Award-reliant employees should not have to purchase and maintain a mobile phone which is used for work purposes at their own cost. The modern awards objective consideration of s 134(1)(a) relating to the needs of low paid employees is relevant here.
9. Also relevant is s 134(1)(d) which refers to '*flexible modern workplaces and the efficient and productive performance of work*'. Mobile phones can assist in enabling efficient and productive work. But when an employer benefits from such increased efficiency and productivity by requiring employees to use mobile phones while on call, to use work related apps or portals, for checking rosters, or for other work related purposes then the employer should also bear this cost.
10. Finally, s 134(1)(g), which refers to a '*stable and sustainable modern award system*' is also relevant. As mobile phone use is becoming increasingly ubiquitous and relied upon in the performance of work, it is appropriate that an award in the current modern award system include a provision for a mobile phone allowance.

Broken shifts – clause 22.8; ED clause 14.6

11. The HSU submits that the Award should be varied by inserting the following sub-clause (f) at clause 22.8 (sub-clause (g) at clause 14.6 in the Exposure Draft):
 - (f) *Each portion of the shift must meet the minimum engagement requirements in 22.7(b).*
12. The effect of this amendment would be to ensure that casual or part-time employees working a broken shift in accordance with clause 22.8(a) must receive a minimum payment of two hours for each portion of the broken shift, in accordance with clause 22.7.
13. The HSU's view is that this amendment represents a clarification rather than a substantive change to the Award.
14. The minimum engagement provisions are meaningless if they can be disregarded when broken shifts apply. An employee who comes into work for part of a broken

¹ Fair Work Act 2009 ss 134(1) and 138

shift makes the same sacrifices as an employee who comes into work for a non-broken shift, such as time spent travelling to and from work.

15. Accordingly, the amendment is necessary for the Award to meet the modern awards objective to provide a fair and relevant safety net of terms and conditions.² The modern awards objective consideration at s 134(1)(g) is particularly relevant, as it underscores the need for the modern award system to be simple, stable and easy to understand.
16. This consideration is relevant as the proposed amendment ensures that the broken shift provision is consistent with the minimum engagement provision under the award, thereby ensuring that the award is clear, simple and easy to understand.
17. The modern awards objective considerations at s 134(1)(a) and (da)(ii) are also relevant. The amendment would prevent unscrupulous employers from exploiting part-time and casual workers by scheduling very short broken shifts, meaning employees could earn little pay for short, broken shifts worked over a long span of hours.

Casual loading - clause 23 (ED clause 20); clause 29.2(c) (ED clause 26.3)

18. The HSU submits that casual loading should be paid in addition to any overtime, weekend and public holiday penalty. That approach is consistent with the function of casual loading, which is to compensate casual employees for the paid leave entitlements available to permanent employees. It is consistent with the 'default approach' discussed by the Full Bench in the *Penalty Rates Decision* [2017] FWCFB 1001 (at [338]),³ which has the advantage of being simple and easy to understand, consistent with s134(1)(g).
19. The Full Bench in the *Penalty Rates Decision* reinforced the distinction between penalty rates and casual loading, finding that:

As we have mentioned, the [Productivity Commission] Final Report makes reference to the interaction of penalty rates and casual loadings and concludes that:

² *Fair Work Act 2009* ss 134 and 138

³ *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 ('Penalty Rates Decision') [338]

‘For neutrality of treatment, the casual loading should be added to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work.’

There is considerable force in the Productivity Commission’s conclusion.

Casual loadings and weekend penalty rates are separate and distinct forms of compensation for different disabilities. Penalty rates compensate for the disability (or disutility) associated with the time at which work is performed.⁴

20. In relation to the *Hospitality Industry (General) Award*, the Full Bench in the *Penalty Rates Decision* held that casual loading should be added to the Sunday penalty rate, because clause 13.1 in that award, in relation to casual loading, did not state that the loading was intended to compensate employees for Sunday work. The Full Bench found that:

The distinct purpose of the casual loading is made clear from clause 13.1 of the Hospitality Award: ‘The casual loading is paid as compensation for annual leave, personal/carer’s leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment’

Importantly, the casual loading is not intended to compensate employees for the disutility of working on Sundays.

In our view, the casual loading should be added to the Sunday penalty rate when calculating the Sunday rate for casual employees. We propose to adopt the Productivity Commission’s ‘default’ method. Accordingly, the Sunday rate for casual employees in the Hospitality Award will be $25 + 150 = 175$ per cent.⁵

21. Clause 10.4(b) of the Aged Care Award provides relevantly that: *‘A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee’s classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.’*

⁴ *Penalty Rates Decision* [2017] FWCFB 1001 at [889] to [891].

⁵ *Ibid*, at [895] – [897].

22. This clause has been amended in the Exposure Draft to read, relevantly, at 11.3, that:
'The casual loading is paid instead of the paid leave entitlements'.
23. It is clear from the terms of clause 10.4(b) (ED clause 11.3) that the casual loading is paid in substitution for the leave entitlements otherwise available to permanent employees, but not in substitution for penalty rates.
24. The HSU submits that there is no basis for casual employees to have to forgo the casual loading for weekend and public holiday penalty rates, as casual loading and penalty rates serve different functions.
25. Accordingly, clauses 23.2 (clause 20.3 ED), and (clause 26.3 ED) should be varied so that casual employees are paid casual loading in addition to weekend and penalty rates.

Health Services Union

23 January 2019

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 yearly reviews of modern awards

Aged Care Award

(MA000018)

REVIEW OF MODERN AWARDS

(AM2018/13)

ROSS, PRESIDENT SYDNEY, XX YYY 2019

Review of modern awards to be conducted.

- [1] Further to the Decision and Reasons for Decision <<DecisionRef>> in <<FileNo>>, it is determined pursuant to section 156(2) (b) (i) of the *Fair Work Act 2009*, that the *Aged Care Award 2010* be varied as follows.
- [2] By inserting a new clause 15.8:
- Phone Allowance*
- Where the employer requires an employee to use a mobile phone for the purpose of being on call, for the performance of work duties, to access their work roster or for other work purposes, the employer will either:
- (i) provide a mobile phone and cover the cost of any subsequent charges; or
- (ii) refund the cost of purchase and the subsequent charges on production of receipted accounts.
- [3] By amending clause 22.8 by inserting the following:
- (g) Each portion of the shift must meet the minimum engagement requirements in 22.7(b).
- [4] By deleting clause 23.2 and replacing with the following:
- 23.2 A employee causal who works on a weekend will be paid the following rates:
- (a) between midnight Friday and midnight Saturday – 175% of the ordinary hourly rate; and
- (b) between midnight Saturday and midnight Sunday – 200% of the ordinary hourly rate.
- 23.3 The rates prescribed in clause 23.2 will be in substitution for and not cumulative upon the causal loading prescribed in clause 10.4(b).

[5] By deleting clause 29.2(c)(i) and (ii) and replacing with the following:

(c) Casual employees

- (i) A casual employee will be paid only for those public holidays they work at 275% of the ordinary hourly rate for hours worked.
- (ii) The rates prescribed in clause 29.2(c)(i) will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.4(b) and weekend rates prescribed in 23.2.

The determination shall operate on and from XX YYY 2019.

PRESIDENT