

FAIR WORK COMMISSION

S.165 FAIR WORK ACT- 4 Yearly Review of Modern Awards

Matter No. AM2014/207

NURSES AWARD 2010

Submissions of the Australian Nursing & Midwifery Federation
regarding the Nurses Award Exposure Draft 20XX

The Australian Nursing and Midwifery Federation (ANMF) provides these submissions in response to the Fair Work Commission *Exposure Draft- Nurses Award 20XX*

This submission is being lodged on behalf of the ANMF in response to the President's Statement of 28 February 2019 [2019] FWC 1262 and Statement of 15 February 2019 [2019] FWC 932 seeking comment on the updated Group 2 Exposure Drafts.

Drafting comments

1. Clause 3.3 has a typographical error, a full stop is required after 'schools'.
2. Clause 15.3(b) and (c) have a typographical error, a full stop is required in both clauses after 'absence'.

Clause 17.8 Annual leave loading

3. At clause 17.8(b) the parties are asked to clarify whether the leave loading in clauses 17.8(b)(i) and 17.8(b)(ii) is based on 4,5 or 6 weeks.
4. The ANMF refers to its previous submissions dated 28 January 2015 and 4 March 2015 and maintains its position in response to the request for clarification. This submission provides a more detailed response and responds to the submissions of Private Hospital Industry Employer Associations (PHIEA) Australian Business Industries (ABI).
5. The ANMF submits that shiftworkers are entitled to be paid the higher of leave loading or weekend and shift penalties (penalties) the employee would have received had they not been on leave during the relevant period for the full accrual of six weeks of annual leave entitlement.
6. The current wording of clause 31.1 of the *Nurses Award 2010 (Nurses Award)* is set out as follows:

31. Annual leave

Annual leave is provided for in the NES. This clause contains additional provisions.

31.1 Quantum of annual leave

- (a) *In addition to the entitlements in the NES, an employee is entitled to an additional week of annual leave on the same terms and conditions.*
 - (b) *For the purpose of the additional weeks annual leave provided by the NES, a shiftworker is defined as an employee who:*
 - (i) *is regularly rostered over seven days of the week; and*
 - (ii) *regularly works on weekends.*
 - (c) *To avoid any doubt, this means that an employee who is not a shiftworker for the purposes of clause 1.1(b) above is entitled to five weeks of paid annual leave for each year of service with their employer, and an employee who is a shiftworker for the purposes of clause 1.1(b) above is entitled to six weeks of paid annual leave for each year of service with their employer.*
7. All employees covered by the *Nurses Award* are by virtue of clause 31.1(a) entitled to an additional week of annual leave to that provided under the NES. An employee who meets the definition of shiftworker under clause 31.1(b) is therefore entitled to six weeks' annual leave. This is clarified in express terms in clause 31.1(c).

8. Clause 31.7 of the current *Nurses Award* deals with the application of leave loading as follows:

31.7 Annual leave loading

- (a) *In addition to their ordinary pay, an employee, other than a shiftworker, will be paid an annual leave loading of 17.5% of their ordinary pay on a maximum of 152 hours/four weeks annual leave per annum.*
 - (b) *Shiftworkers, in addition to their ordinary pay, will be paid the higher of:*
 - (i) *an annual leave loading of 17.5% of ordinary pay; or*
 - (ii) *the weekend and shift penalties the employee would have received had they not been on leave during the relevant period*
9. The ANMF submits that the current wording of clause 31.7 is clear that a shiftworker's entitlement to be paid the higher of leave loading or penalties is in respect of and applicable to the shiftworker's full entitlement to annual leave.
10. The limitation on the applicability of leave loading to 152 hours/four weeks set out in clause 31.7(a) is expressly exclusive of shiftworkers. It is submitted, the limitation in clause 31.7(a) is confined to employees who are not defined shiftworkers for the purposes of annual leave.

11. The Exposure Draft at clause 17.8(a) replicates that exclusion as follows:

For the period of annual leave in addition to their ordinary pay

(a) An employee, **other than a shiftworker**, will be paid an annual leave loading of 17.5% of their ordinary pay on a maximum of 152 hours/four weeks annual leave per annum; (*emphasis added*).

12. Clause 17.8(b) of the Exposure Draft sets out the entitlement to leave loading or the higher of penalties for shiftworkers without limitation as to the weeks that attract either the loading or penalties. This reflects the current entitlement under the *Nurses Award*.

13. The ANMF submits that if the applicability of receiving the higher of leave loading or penalties was limited to either 4 or 5 weeks this would represent a substantive reduction in existing entitlements for shiftworkers.

Response to PHIEA submission March 2019

14. The ANMF does not agree with the submission of PHIEA that the relevant period for the purposes of ED clause 17.8(b)(i) and (ii) is 4 weeks.

15. The ANMF refers to the submission by PHIEA dated March 2019 at pp3. For the reasons set out in paragraphs 6-13 above the ANMF submits that the contention that the entitlement to the higher of leave loading or penalties for shiftworkers should be confined to 4 weeks on the basis of the construction of the Exposure Draft clause is not correct.

16. The ANMF submits the construction of the clause, particularly when regard is had to the current clause 31.7, is that clause 17.8 (b) is not merely a clarification of how the loading is to be calculated, but also is a distinct entitlement to that set out in 17.8(a) for employees other than shiftworkers.

Response to ABI submission dated 15 March 2019

17. The ANMF does not agree with the ABI submission that the relevant period for the purposes of 17.8(b) (i) and (ii) is 5 weeks.

18. The ANMF refers to pp 13 and 14 of the submission of the Australian Business Industrial dated 15 March 2019. The ANMF does not agree with the characterisation of the entitlement to an additional week of annual leave under the Award as a 'bonus'. Nor does it agree with the argument that shiftworkers are the beneficiaries of an inequitable outcome by virtue of receiving the higher of leave loading or penalties on the their full entitlement to annual leave.

19. The ANMF submits that it is well understood and established practice that shiftworkers receive the higher of leave loading or penalties for the entirety of their annual leave entitlement in order to ensure they are not worse off by virtue of taking annual leave than they would have been if leave were not taken.

20. Non-shiftworker employees, or day workers, are not subject to the same disadvantage as shiftworkers when taking annual leave as they will receive the same ordinary pay when on leave as when working.

Response to request for clarification

21. The ANMF submits the wording of 17.8 of the Exposure Draft is not ambiguous and reflects the substantive entitlement as it is in the current *Nurses Award*.
22. In the alternative, if the Commission determines that clarification is necessary, the ANMF submits the appropriate clarification is that the application of leave loading or penalties for shiftworkers is based on 6 weeks. Such clarification could be provided by way of a note to the clause.
23. The ANMF reserves the right to make further submissions in relation to the request for clarification and any substantive issues that may arise from the request.
24. The ANMF seeks to raise this issue at the conference scheduled for 3 April 2019.

Schedule B- Summary of Hourly Rates of Pay

25. The ANMF refers to its submission of 28 January 2015 with respect to the tables set out in Schedule B. In that submission it was noted that the Schedule does not contain tables dealing with some situations where more than one loading potentially applies, for example, where casuals perform overtime.
26. The ANMF seeks to raise this issue at the conference scheduled for 3 April 2019.

27 March 2019