

IN THE FAIR WORK COMMISSION

Matter No: AM2014/250, AM2014/251, AM2014/263, AM2104/266, AM2014/285, and AM2014/286.

Title S 156 - Four Yearly Review of Modern Awards – Groups 4A, 4B and 4C – Exposure Drafts

SUBMISSIONS ON TECHNICAL AND DRAFTING ISSUES INN **GROUP 4A, 4B AND 4C EXPOSURE DRAFTS**

30 June 2016

Introduction

1. These submissions are made pursuant to the amended directions issued by the Fair Work Commission on 10 May 2016. These submissions address the technical and drafting issues in the following Group 4A, 4B and 4C awards (**'the Awards'**).
 - a. *Aboriginal Community Controlled Health Services Award 2010,*
 - b. *Aged Care Award 2010,*
 - c. *Children's Services Award 2010,*
 - d. *Educational Services (Teachers) Award 2010, and*
 - e. *Social, Community, Home Care and Disability Services Industry Award 2010.*
2. All pin-point references refer to the Exposure Draft of the Award unless otherwise stated.

General Submissions

Clause 5 – Access to the award and the National Employment Standards

3. The words 'whichever makes them more accessible' have been deleted from the exposure draft 'award access' provisions of each of the Awards. These words should be retained.

Ordinary hourly rate

1. The phrases '*ordinary hourly rate*' and '*minimum hourly rate*' have been inserted at various place in the Awards and in multiple exposure drafts for various awards
2. The decision of the Commission in AM2014/01¹ differentiates between the use of the term minimum and ordinary based on the issue of all purposes allowances and proposes a definition for ordinary hourly rate.² A standard definition of ordinary hourly rate has been inserted into all Awards, which does not account for the fact that in many awards workers are paid according to classification and a level or pay-point.
3. The United Voice proposes that the definition of *ordinary hourly rate* and *minimum hourly rate* should include a reference to the employee's classification, grade and level.
4. We propose the following definition of 'ordinary hourly rate' should be used in all of the Awards with an all purposes allowance:

'ordinary hourly rate means the minimum rate of pay for the employee's classification, grade and level specified in clause 17, plus any allowances specified as being included in the employee's ordinary hourly rate'.

5. We propose the following definition of '*minimum hourly rate*' should be used in all of the Awards without an all-purposes allowance:

'minimum hourly rate means the minimum rate of pay for the employee's classification, grade and level'.

Aboriginal Community Controlled Health Services Award 2010 ('ACCHS Award')

Clause 2 - Definitions

4. The national regulation of Aboriginal and Torres Strait Islander Health Practitioners uses standard terminology for ATSI health workers. It should be used in the ACCHS Award.
5. The definition of 'Aboriginal Community Health Worker' ('**AHW**') should be amended to read:

***ATSI Community Health Worker** means a person who provides better access, liaison, health promotion and preventative health services to the Aboriginal community;*

6. A new definition of 'ATSI Primary Health Care Practitioner' should be inserted. This is the accepted and appropriate title of the type of employee previously described as an AHW.
7. The following definition should be inserted at clause 2:

¹ *Award Modernisation* [2014] FWCFB 9412

² *Ibid*, [44].

ATSI Primary Healthcare Practitioner means a person who is registered with Australian Health Practitioner Regulation Agency as a registered practitioner in accordance with the requirements of the Aboriginal and Torres Strait Islander Health Practice Board.

8. The acronym ATSI should be defined as meaning 'Aboriginal and Torres Strait Islander'.
9. United Voice recognises that these are not matters drafting matters relating to the exposure draft of the ACCHS Award. We will wish to address these matters as a substantive issue.
10. In answer to the question from the drafting team, the underlined text in the 'NOTE' is no longer relevant and can be removed.

Clause 16 - Classifications

11. Employee progression is time-based.

Clause 17 – Allowances

12. Clause 17.2 – Bilingual Allowance: It is common practice in the Northern Territory for enterprise agreements to require proof of bilingual proficiency and accreditation in writing from a recognised interpreting or translating service.
13. Clause 17.3 (b) (i) – Travelling, transport and fares: the removal of the words 'not less than' from the clause alters the entitlement. These words should remain in the clause.
14. Clause 17.3 (b) (v): the words 'and level' should be inserted after the words 'employee's classification'. This is to clarify

Schedule A - Classifications

15. Schedule A should be updated to reflected recognised changed nomenclature.
 - a. Schedule A.1 should be amended to read 'A.1 ATSI Community Healthcare Practitioners and & ATSI Community Health Workers.
 - b. All references to 'Aboriginal Health Worker' should be deleted and replaced with 'ATSI Primary Healthcare Practitioner'.

Aged Care Award 2010 ('Aged Care Award')

Clause 2 – Definitions

16. The phrase 'casual ordinary hourly rate' is defined by clause 2 but is not used at any point in the *Aged Care Award*. We believe the intention of the drafting team was to ensure that it was clear that the ordinary hourly rate of a casual employee included any all purposes

allowance. For the sake of clarity the definition of 'casual ordinary hourly rate' should be deleted.

17. 'All purposes' is defined at clause 2 – Definitions and clause 18.2 (a) – All purposes allowances. It is unnecessary to define the term twice. For the sake of ease of use, the definition of 'all purposes' should be at clause 18.2 (a) and the definition should be deleted from clause 2.

Clause 11 – Causal Employment

18. A definition of fixed term employment should be included in the Award. We propose the following words:

Fixed term / Specific task employees

A Fixed Term / Specific task employee is an employee who is notified in writing prior to the commencement of employment of the starting and finishing dates of the employment, or in lieu of a finishing date, notified of the specific circumstance or contingency relating to a specific task, project or reason, upon the occurrence of which the term of employment shall expire.

Clause 14.4 - Rosters

19. Clause 14.4 (b): The reference to 'relieving staff' should be deleted. There is no classification or allowance in this Award for a permanent employee with no roster as exists in other modern awards.³
20. Alternatively, relieving staff should be defined as:

Relieving staff means an employee whose roster has been varied at less than 7 days notice to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

Clause 15 – Sleep overs

21. Clause 15.7 – Breaks between shifts: The clause provides an entitlement to an 8 hour break from duty to an employee who performs work during a sleepover. The current *Aged Care Award* provides an entitlement to be 'released after completion of such work until they have

³ See *Security Services Award 2010*, clause 15.8: 'A relieving officer allowance is payable to an employee who is, by agreement with the employer, appointed as a relieving officer. A relieving officer is engaged for the purpose of relieving at short notice another Security Officer and for whom a display of roster is not required. 24 hours' notice of shift will be given where possible.'

had eight consecutive hours off duty'. In the exposure draft this has been varied to read *'after the sleepover*'. The current provision permits an employee to be released from duty during the sleepover. This possibility is excluded by the exposure draft variation.

Clause 17.6 - Payment of wages

22. Clause 17.6(a) has left out the requirement for wages to be paid by *'no later than pay day*'. We submit that this must be reinserted into the clause.

Clause 18 - Allowances

23. 18.3 (a) (i) – Laundry allowance: The new order of words at dot-point one is awkward. We propose that the sentence should read:

..supply the employee with an adequate number of uniforms appropriate to the occupation free of cost...

Clause 21 - Shiftwork

24. Clause 21.2 – Shiftwork rates: While the intent of this clause is seemingly the same, the words of the current *Aged Care Award* have been varied in a way which alters the entitlement.
25. The periods in which shift penalties are earned have been express as being *'between'* a starting time and a finish time. The finish time is expressed as one minute before the hour. For example: the period for the afternoon rate has been expressed as *'starting between 10.00 am and 12:59 pm'*. The current entitlement is expressed as *'commencing at 10.00 am and before 1.00 pm'*.
26. The current times expressed in the *Aged Care Award* should be retained.

Clause 23.2 – Additional leave for shift workers

27. The definition of a shift worker for the purposes of the NES has been slightly altered. The word *'and'* has been deleted from the list of definitions.
28. If the Fair Work Commission decided that Clause 23.2 (a) (ii) should clarify the period over which the *'10 or more weekends are counted'* then the period over which the 10 weekends should be counted is the twelve month period over which the leave is accrued.
29. We note the question at clause 21 of the *Social, Community, Home Care and Disability Services Industry Award 2010 ('SCHDS Award')* regarding the period over which the ten

weekends should be counted. This clause is identical to the clause in the SCHDS Award and consistency should be maintained between the Awards.

Children's Services Award 2010

Clause 2 - Definitions

30. All purposes' is defined at clause 2 – Definitions and clause 17.2 (a) – All purposes allowances. It is unnecessary to define the term twice. For the sake of ease of use, the definition of 'all purposes' should be at clause 17.2 (a) and the definition should be deleted from clause 2.

Clause 4 - Coverage

31. Clause 4.1 should be amended to refer to the *Clerks – Private Sector Award 2010* ('**Clerks Award**'). Many child care centres employ staff who are wholly engaged in clerical work for which the Award does not provide a classification. There is a history of industrial disputes regarding the classification of these workers, who are often classified as support workers under the *Children's Services Award* but are properly classified under the *Clerks Award*. We note the decision of the Fair Work Commission in *United Voice v Cuddlepie Early Childhood Learning Centre* [2015] FWC 6661.

Clause 13 – Ordinary hours of work

32. The reference to award based transitional instruments and Division 2B State awards in *Clause 13* (g) is still necessary. The clause preserves the entitlements of employees who were employed under those instruments. The purpose of the reference to the transitional instruments is to identify the employees who are entitled to the benefit of the clause.

Clause 16 – Minimum wages

33. The reference to Clause 16.7 (d) to 'supervising officer' should not be amended to 'Authorised Supervisor'.
34. The reference to a 'supervising officer' appears to have been included at Award Modernisation as a catch-all for the various types of person with statutory supervisory responsibilities. For instance, the *Child Care Services Act 2007* (WA) provided for a 'Supervising Officer' who was the person with 'day-to-day supervision and control of the service'.

35. An Authorised Supervisor was a position under Chapter 12 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). We understand that this statutory position corresponded with the state award classification for a room leader.
36. Chapter 12 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) has been subsequently been repealed.
37. A new national regulatory system has been introduced for the early childhood education and care industry since the making of the *Children's Services Award*. The early childhood education and care industry is regulated by the *Education and Care Services National Law* ('**National Law**') through an applied law system. Victoria, acting as a host jurisdiction, passed the *Education and Care Services National Law Act 2010* and the *National Law and Educational and Care Services National Regulations 2010* ('**National Regulations**'). All other jurisdictions adopted that law or passed corresponding legislation.⁴
38. Under the National Law, approved children's services providers must not operate a service unless there is a nominated supervisor for the approved service.⁵ The nominated supervisor has a range of statutory responsibilities regarding the day to day management of the service. These responsibilities are set out in the *National Law* and *National Regulations*. A nominated supervisor may be liable for breaches of the *National Law* and the *National Regulations* at their centre. A nominated supervisor must hold a supervisor certificate.⁶ These statutory duties largely overlap with the indicative duties of a Children's Services Employees Level 6 – Director.
39. A responsible person must be present at all times the centre is operating. If the nominated supervisor is not present a 'certified supervisor who has been placed into day to day charge of the service' may be the responsible person.⁷ A certified supervisor is a person who has been issued a supervisor certificate by the relevant regulatory authority.⁸ The 'certified supervisor who has been placed into day to day charge of the service' has all the same responsibilities as a nominated supervisor for the period in which they are placed in charge of the service.

⁴ See *Children (Education and Care Services National Law Application) Act 2010* (NSW); *Education and Care Services National Law (ACT) Act 2011* (ACT); *Education and Care Services National Law (Queensland) Act 2011* (QLD); *Education and Care Services (National Uniform Legislation) Act 2011* (NT); *Education and Early Childhood Services (Registration and Standards) Act 2011* (SA); *Education and Care Services National Law (Application) Act 2011* (TAS); *Education and Care Services National Law (WA) Act 2012* (WA).

⁵ *Education and Care Services National Law Act 2010*, ss 5, 44 and 161.

⁶ *Education and Care Services National Law Act 2010*,

⁷ *Education and Care Services National Law Act 2010*, s 162.

⁸ *Education and Care Services National Law Act 2010*, ss 105 and 117.

40. In New South Wales, a person who was an authorised supervisor under Chapter 12 of the *Children and Young Persons (Care and Protection) Act 1998* is declared to be a declared certified supervisor for this jurisdiction for the purposes of the *Children (Education and Care Services) National Law 2010 (NSW)* by clause 17.4. The effect of this is that a person who has become an authorised supervisor under the *Children (Education and Care Services) National Law 2010 (NSW)* does not need to apply to be issued a supervisor's certificate under the *National Law*. The authorised supervisor has all the duties and responsibilities of a certified supervisor under the *National Law* and may be placed in day to day charge of a service.
41. The clause should be amended to clarify that an employee who is a certified supervisor is appointed to the day to day charge of a service under the *National Law* should be paid at the applicable rate of a centre director. As this is not a drafting matter as it relates to the exposure draft, the United Voice will not make submissions at this time. We wish to note that the union will want to address these matters at the appropriate point in the review.

Educational Services (Teachers) Award 2010 [MA000077]

Clause 14.4 - Progression

42. It is unnecessary to insert a definition of years of service at clause 14.4. Years of service for the purposes of progression is defined at clause 14.2 (b), (c) and (d).

Schedule A – Hours of Work and Related Matters – Teachers employed in early childhood services operating for at least 48 weeks per year

43. Schedule A applies to teachers employed in early childhood services which operate for at least 48 weeks of the year. These centres do not operate on a term system, but provide education and care all year round.
44. Early Childhood Teachers were incorporated into the coverage of the *Educational Services (Teachers) Award 2010* by the AIRC in 2009.⁹
45. Teachers in these centres work with early childhood educators covered by the *Children's Services Award 2010*. A number of variations, including the insertion of Schedule A, were made to the *Educational Services (Teachers) Award* to achieve consistency with the conditions of other workers employed in the same children's service.
46. United Voice notes that the history of schedule A.2 does not support its inclusion at clause 15.

⁹ *Award Modernisation* [2009] AIRCFB 945, [40].

Social, Community, Home Care and Disability Services Industry Award 2010 [MA000100]

Language

47. At various place in the exposure draft, phrases relating to the minimum rate of pay have been varied. Have introduced new terms into the award, which are not defined, and in some cases, the words 'minimum hourly rate' have been used without reference to a classification. For instance, Clause 14.4 (d) now reads:

All work performed beyond the maximum span of 12 hours for a broken shift will be paid at 200% of the minimum hourly rate.

48. The words 'the minimum hourly rate' have replaced current words 'their appropriate rate'. These terms are not equivalent. The current award directs the reader to the specific employee's rate of pay; the exposure draft words are ambiguous in meaning.
49. In most cases, the words 'minimum hourly rate' has been used with reference to an employee's classification. For instance clause 14.6 provide:

The employee engaged will be paid for eight hours' work at 155% of the minimum hourly rate for their classification for each 24 hour period.

50. The use of 'classification' without reference to pay point or level is problematic given that employees under the *SCHDS Award* are paid according to both their classification and pay point. The minimum hourly rate for a classification might mean minimum rate applicable to an employee's classification.
51. The words the minimum hourly rate applicable to the employee on the basis of their classification and pay point or level.
52. We propose that the definition of '*minimum hourly rate*' we set out at paragraph 5 of these submissions should be inserted into the *SCHDS Award*.

Clause 2 – Definitions

6. The second paragraph of the definition of '*social and community services sector*' at clause 2 has been removed. The full definition is found at clause 4.3. If the definition is to be kept at clause 2, it should include the second paragraph for completeness.

Clause 7 – facilitative provisions for flexible work arrangements

53. Clause 7.2 is incorrectly numbered clause 5.2.

Clause 11 – Casual employment

54. The minimum engagement of casual disability services employees is 2 hours.

Clause 12 - Classifications

55. Clause 12.4 (a) should refer to 'at each pay point within the level'.

Clause 14 – Rosters arrangements

56. Clause 14.2 (b) – Rest Breaks between rostered work: A sleepover period is distinct from any time the employee may be rostered to work before and/or after the sleepover period. Consequently, a shift cannot 'incorporate' the start or end of a sleepover. The current wording should be retained.

57. Clause 14.3 (d): 'Mail' and 'facsimile' must remain as methods of communicating roster changes. United Voice members, particularly in the Home care sector, report that they receive their roster by mail or facsimile. The statement of Veronica Keane, filed in the Part Time common issue, is illustrative of this point.¹⁰ In this context, the proposal to delete the references to mail and facsimile would be a substantive change.

58. Clause 14.3 (e): The reference to 'relieving staff' should be deleted. There is no classification or allowance in this Award for a permanent employee with no roster as exists in other modern awards.¹¹

59. Alternatively, relieving staff should be defined as:

***Relieving staff** means a full-time or part-time employee whose roster has been changed according to 14.3 (f) (ii), subject to clause 10.3.*

60. Clause 14.4 – Broken Shifts: Time spent performing a sleepover would meet the definition of a broken shift if work was performed contiguously with the beginning and the end of a sleepover period. Broken shifts are permitted under the current clause 25.6 of the SHCDS Award. This clause grants employers the flexibility of rostering employees on broken shifts. Employees are protected from unduly long periods of work by the requirement that all work

¹⁰ Witness statement of Elizabeth Anne Nichols, dated 26 April 2016, filed in AM2014/197- Part Time Employment, [15].

¹¹ See Security Services Award 2010, clause 15.8: 'A relieving officer allowance is payable to an employee who is, by agreement with the employer, appointed as a relieving officer. A relieving officer is engaged for the purpose of relieving at short notice another Security Officer and for whom a display of roster is not required. 24 hours' notice of shift will be given where possible.'

outside of the 12 hour span of work will be payable at an overtime rate of 200 per cent. A sleepover period is not a period of rest. The employee suffers the disability of being away from their home and must be ready to work at any time during the shift. The application of the rules concerning broken shifts to the period of work before and after a sleepover limits unsafe working hours. We note that no allowance is payable for a broken shift under the SCHDS Award, so the issue of double payment does not arise.

61. Clause 14.6 – 24 Hour Care: The words ‘for eight hours’ should be added after the word ‘normally’ at clause 14.6 (d). This clarifies the intention of the clause.

Clause 17 - Allowances

62. Clause 17.2 (c): The parties are asked if the heat allowance clause is obsolete. Only clause 17.2 (c) (iii) is restricted to employees who commenced work before the specified date. Clause 17.2 (c) (i) and (ii) apply to all employees. Some employees may have been worked for the same employer for more than 25 years, even if this is increasingly unlikely.
63. The heat allowance provision is not obsolete.

Clause 19 - Overtime

64. Clause 19.3 (a) : The phrases ‘termination of their ordinary work’ and ‘commencement of their ordinary work’ have been deleted from the exposure draft and replaced with the phrases ‘end of work’ and ‘start of work’. The current use of ‘ordinary work’ should be retained. The use of the term ‘ordinary’ indicates that the work is rostered work.
65. Further, the words ‘off duty’ have been deleted and replaced with the words ‘a break of’. The original terminology should be maintained. This wording is consistent with the remainder of the clause.

Clause 21.2 – Additional leave for shiftworkers

66. If the Fair Work Commission decided that Clause 21.2 should clarify the period over which the ‘10 or more weekends are counted’ then the period over which the 10 weekends should be counted is the twelve month period over which the leave is accrued.
67. We note the question at clause 23 of the *Aged Care Award* regarding the period over which the ten weekends should be counted. This clause is identical to the clause in the *SCHDS Award* and consistency should be maintained between the Awards.

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