

Fair Work Commission
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East Sydney NSW2011
By email: amod@fwc.gov.au

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Re: AM2014/251 AWU submissions on the Exposure Draft for the Aged Care Award 2016

BACKGROUND

1. On 10 May 2016 the President, Justice Ross published a Statement and Directions regarding a plain language pilot and Group 4 awards.
2. The Directions require the filing of submissions regarding drafting and technical issues in Group 4A, B and C exposure drafts by 30 June 2016.
3. The submissions of the Australian Workers' Union (AWU) in relation to the exposure draft for the *Aged Care Award 2016* ('the Exposure Draft') as published on 19 May 2016 appear below.

DRAFTING AND TECHNICAL ISSUES

Definitions – 'casual ordinary hourly rate' 'ordinary hourly rate' and 'minimum hourly rate'.

4. Clause 2: The term 'casual ordinary hourly rate' is defined at this clause, but is not referred to elsewhere in the Award. The definition explains that the casual loading is payable for all purposes. Given that 'all purposes' is already defined, it would be sufficient and appropriate to refer to the casual loading as payable for 'all purposes' at clause 11.2 – the substantive clause for casual employees.
5. Missing terms 'ordinary hourly rate' and 'minimum hourly rate' should instead be defined at clause 2. These terms have been standardised in the Award Modernisation decision AM2014/01¹ but would benefit in this Award by referencing the Classification, Level, and Grade of employees.

Definition of casual employee and fixed term employee

6. Clause 11.1: This clause defines casual employees as (emphasis added):

...engaged on an hourly basis, other than as a part-time, full-time or fixed term employee, to work up to and including 38 ordinary hours per week

7. The AWU submit that the words 'employed on an hourly basis' should be removed, as the use of these words is inconsistent with the requirement that

¹ [2014] FWCFB 9412.

casual employees are entitled to at least the minimum engagement period of 2 hours under clause 14.5.

8. The reference to 'fixed term employee' should also be removed, as there is no provision in this Award defining such category, and to create a category would be a substantive change.

Ordinary hours – part time and casual employees

9. The ordinary hours for part time and casual employees are unclear. We refer to section 147 of the *Fair Work Act 2009* (Cth) ('the FWA') which states:

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award

10. Clauses 22.2(a), 22.2(b), 13, and 10.2: For part time employees the overtime provisions at clause 22.2(a) and (b) utilise *some* of the features of ordinary hours prescribed at clause 13, but also refer to the system of ordinary hours by agreement prescribed at clause 10.2.

11. For the sake of simplicity, the AWU suggest the system of ordinary hours is established in the substantive clauses for part time employees, rather than by dual construction with the overtime provisions.

12. We make the same suggestion in relation to casual employees noting the need to ensure critical terms at clause 13 that are currently not accounted for at clause 22.2(a) and (b). These include:

- 12.1. an additional averaging cycle (114 hours per 21 days); and
- 12.2. the differentiation between ordinary hours for day workers and shiftworkers (8 hours versus 10 hours); and
- 12.3. the span of hours (6am – 6pm).

13. The ordinary hours should be clear from a reading of clauses 10, 11 and 13 as applicable, and consequential amendments will be necessary to reconcile the overtime provisions if our submissions are accepted.

14. These amendments will rectify the suggested inconsistency with section 147 of the FWA.

END



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NATIONAL LEGAL OFFICER