

IN THE FAIR WORK COMMISSION

Matter No: AM2014/251

Title: s156 – 4 yearly review of modern awards – Aged
Care Award – Exposure Draft

SUBMISSIONS

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Introduction

1. The Health Services Union [HSU] makes these submissions in accordance with the directions issued by the Full Bench on 10 May 2016¹, in relation to the exposure draft of the Aged Care Award.
2. In making these submissions the HSU notes the comments included at the commencement of the commencement of the aged care exposure draft *'This exposure draft does not seek to amend any entitlements under the Aged Care Award 2010 but has been prepared to address some of the structural issues identified in modern award'*.
3. The exposure draft has incorporated variations to the order of content proposed as a consequence of the plain language pilot project for the Pharmacy Industry Award. The HSU reiterates its acceptance of the new reordering of the content of modern awards.
4. These submissions deal with the exposure draft as follows:
 - a. Proposed relocation of clauses
 - b. Changes to language or meaning
 - c. Responses to questions from the AMOD drafting team
 - d. Any additional matters not dealt with elsewhere

Relocation of clauses

Definitions

5. Clause 2 contains several definitions which the HSU submits might better be located within other clauses.
6. During this 4 yearly review process there have been several changes of opinion about where definitions should sit within an award structure, the latest arising out of the plain language pilot project. For completeness the HSU supports the latest proposal that definitions be located at clause 2 of the award structure. In relation to the location of individual definitions the HSU does not support placement of the definition in multiple locations.
7. The HSU submits that where the definition relates to a term used in several places in the award, then that definition should be under separate heading at clause 2 definitions. However if the definition is only used or relevant to a single clause or entitlement; for example the definition of

¹ [2016FWC2924](#)



a shift worker for the purposes of an additional week of annual leave; then that definition should be located with the relevant clause only.

8. The definition of **aged care industry** relates to the coverage of the award, and is repeated in clause 4 Coverage. The HSU believes that it should be removed from clause 2 Definitions and remain only in clause 4 Coverage.
9. The HSU submits that the new definition of an '**all-purpose allowance**' which is contained in both clause 2 Definitions and clause 18.2(a) Wage related allowances should, contrary to the general principles outlined above, remain in both clauses, because the definition has work to do throughout the award and separately in the relevant allowance clause.

Changes to language or meaning

Ordinary hourly rate

10. Throughout the various phrases of the 4 yearly review process and in multiple exposure drafts for various awards, concerns relating to the terms *minimum* or *ordinary* rate of pay as varied have been raised.
11. The decision of the Commission in AM2014/01² concerning general and technical drafting issues made a determination at PN[44] concerning the use of the terms minimum hourly rate and ordinary hourly rate. The decision 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.
12. The HSU submits the definition of *ordinary hourly rate* should include a reference to the employee's classification level.

'ordinary hourly rate means the hourly rate for the employee's classification and level specified in clause 17, plus any allowances specified as being included in the employee's ordinary hourly rate or payable for all purposes'.

Allowances and Wages tables

13. The HSU submits that the tables throughout the exposure draft would benefit from each figure being identified as a percentage or dollar figure with the use of the relevant signs for each individual figure, in addition to the use of the sign at the top of the column.
14. Using as an example the figures in the table at C.1; the sleepover allowance rate is 5.20 percent and the quantum applicable is 43.33 per night. There isn't any doubt which each represents when you carefully read the table, but the visual effect of 5.20% and \$43.33 makes the figures vastly more comprehensible at a glance.

² [2014FWCFB9412](#)



15. The HSU submits this is relevant for all the wage and allowances tables, even where the only figures within the tables are dollar amounts.

Definitions

16. The phrase '*casual ordinary hourly rate*' is defined in clause 2 but is not used at any point in the award. The HSU submit that for the sake of clarity the definition of '*casual ordinary hourly rate*' should be deleted.

National Employment Standards and this award

17. At clause 3.3 of the exposure draft the final words '*whichever makes them more accessible*' currently contained in clause 5 have been removed. The HSU can see no logic to the removal and submits the phrase should be retained.

Minimum wages

Clause 17.5 Attendance of block release training

18. Clause 17.5(f)(ii) concludes with a cross reference to clause 2 – Definitions. The HSU believes this is incorrect and the reference should be to Schedule E – School-based Apprentices.

Clause 17.6 Payment of wages

19. Clause 17.6(a) has left out the requirement for wages to be paid by '*no later than payday*'. The HSU submits this must be reinserted into the clause.

Allowances

Clause 18.3(d) Travelling, transport and fares

20. At 18.3(d)(i) the words '*not less than*' have been removed. While the HSU understands the actual impact of the clause as it is currently written is that an employee will be paid the relevant amount, the actual entitlement is for '*not less than*' the rate and the words should be reinserted into the clause before the quantum.
21. At 18.3(d)(iii) the words '*Provide the employee will not be entitled to reimbursement for...which exceed the mode of transport ...*' have been replaced with '*An employee is not entitled to reimbursement for expense... if the expenses exceed the mode of transport ...*'.
22. The HSU submits the entitlement currently is that an employee is not entitled to reimbursement above [which exceeds] the standard agreed with the employer, but would be entitled to reimbursement up to that level. The HSU believes the new wording might imply that an employee would receive no reimbursement because '*an employee is not entitled...if the expenses incurred exceed...that was agreed with the employer.*'



Clause 13.2 Span of hours

23. 13.2 Span of hours now contains only the ordinary hours for a day worker and the definition for shiftworkers has been moved to clause 21 Shiftwork.
24. The definition relates to the times during which a shiftworker can work ordinary hours, that is their span of hours. The logical place is for these two clauses to be together and for clause 21 Shiftwork to reference the span of hours contained in 13.2 – as it already does in the draft.
25. Further, where this clause exists in other health and community based awards, it is located with the span of hours provisions.
26. The HSU submits the clause should be returned to clause 13.2.

Clause 14.4 Rosters

27. The arrangements for rosters at clause 14.4 relate to the normal ongoing process of providing a roster to employees regularly and the processes which enable employers and employees to vary that roster once it has been posted.
28. But at **clause 30 Consultation about changes to rosters or hours of work** the entitlement relates to the processes for consultation concerning variations to the nature of a roster; such as incorporating or removing sleepover shifts; changing from an 8:8:8 configuration to a 8:8:10 roster pattern; or modifying methods of communication about roster changes under clause 14.4. Once the consultation processes at clause 30 are completed a roster must be developed which meets the requirements of clause 14.4.
29. There are no provisions under clause 30 which relate to ‘a change of roster’ once the roster has been posted. Any new style of roster discussed and implemented in accordance with clause 30 would have to be posted ‘*at least two weeks before the first working day of the roster period...*’ and any variations would then be in accordance with clause 14.4(c) or (d)
30. The HSU submits the cross reference to clause 30 is both meaningless and misleading and should be removed.

Sleepovers

Clause 15.5

31. In the current award clause 22.9(h) provides that a sleepover may be rostered continuous with a shift, either before and/or after the shift.
32. The ‘*and*’ is missing from the redraft between 15.5(a) and 15.5(b) changing the meaning in clause 15.5 so that an employee is only able to rostered to, what is referred to colloquially as, a stand up shift on one side of the sleepover.
33. This represents a significant change in the current provisions. The clause should read:

‘A sleepover shift may be rostered:



- a. *to commence immediately at the conclusion of the employee's shift and continuous with that shift; and/or*
- b. *immediately prior to the employee's ...'*

Clause 15.7 Breaks between shifts

- 34. The current provision at 22.9(j) provides that an employee who has worked overtime during a sleepover period so that they haven't had 8 hours break between the overtime and the start of another shift receives release from the next shift or overtime according to the criteria.
- 35. The criteria currently for overtime to apply is not being released '*after completion of such work*' until they have had 8 hours off duty without loss of pay.
- 36. The exposure draft has changed this language to '*after the sleepover*'. This represents a change in the current provisions and the current words should be reinstated.

Minimum wages

Clause 17.7 Higher duties

- 37. The HSU submits that the current version of the clause at 27.1 is clearer and more consistent with the principles of the exposure drafts of the awards. It could be cleaned up slightly by dividing the first paragraph, if considered by all parties as appropriate.
 - a. *An employee engaged in any duties carrying a higher wage rate than the classification in which they are ordinarily employed will be paid a higher duties allowance.*
 - b. *The higher duties allowance will be paid for the amount of time worked on the higher duties depending on whichever is higher:*
 - i) *for working two hours or less, the employee will be paid for the time worked; or*
 - ii) *for working more than two hours, the employee will be paid for a full day or shift.*

Overtime and Penalty Rates

Clause 21 Shiftwork

- 38. The HSU reiterates it's position that the definition at 21.1 should be located with clause **13.2 Span of hours** relating to ordinary hours of work.
- 39. At clause 21.2(a)(i)-(iv) Shiftwork rates the language changes from '*commencing at xx and before xx*' to between specified hours. In doing so it also changes the times to 1 minute before the specified time stated in the current clause. So 1.00pm becomes 12.59pm etc.
- 40. To be pedantic if any variation in times needs to occur because of the language change then to ensure no variation to the entitlement, the hours should be expanded at the beginning not contracted at the end. Commencing at 10am and before 1pm, is technical between 9.59am and 1pm.



41. The HSU does not see any need for any variation in the times, and these should remain on the hour in each instance. If there is concern about the use of the word 'between' changing the entitlement then the language should revert to the original '*commencing at*' and '*before*'.

Clause 22.1 Full-time employees

42. The reference at 22.1(b) should be clause 21.2.

Leave and Public Holidays

Clause 23 Annual leave

43. At clause 23.2(a)(i) the word '*and*' has been removed from the end of the sentence. While the HSU is not clear that there could be a practical implication of deleting the word, it should be reinstated. The clause should read:

'is regularly rostered to work their ordinary hours outside the ordinary hours of work as a day worker as defined in clause 13.2; and/or'

44. Similarly at clause 23.2(b) the word '*and*' has been removed from between the words Saturday and Sunday. The clause should read:

'For the purpose of the clause 23,2(a), a weekend means work in ordinary time on a Saturday and/or a Sunday in any one calendar week.'

Clause 26 Public holidays

45. The HSU notes that clause 26.2(e) of the exposure draft doesn't contain any cross referenced clause numbering for shift and weekend rates and suggest that both should be included.

Questions from the drafting team

Fixed term

46. There are no provisions in the award which relate to fixed term employment or employees because this is the only use of the term. Inclusion of a definition would imply that the award included entitlements relating to fixed term employment/employees.
47. The HSU believes the reference to '*fixed term employee*' should be deleted from clause 11.1.

Additional leave for shiftworkers

48. The HSU notes the provision for '*10 or more weekends*' in some form or another is the main provision initiating the entitlement to an additional week of annual leave in the majority of health based awards.
49. Annual leave is 4 weeks annually. Whilst the entitlement now accrues progressively, the outcome has not varied. Neither has any provision for shiftworkers to the additional week of leave annually.



50. Further the entitlement in this award is activated if an employee is regularly rostered to work their ordinary hours outside the hours of a day worker and/or if they work four or more ordinary hours on 10 or more weekends.
51. The union does not see any need to provide additional clarification.

Matters not covered elsewhere

Clause 7 Facilitative provisions

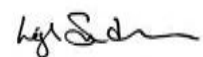
52. The HSU notes that the list of provisions identified in the table at clause 7.2 is incomplete.
53. Further provisions should be considered for inclusion as follows:
- a. 14.3 rostering of ADOs are determined by agreement
 - b. 14.6 broken shifts can only be worked/rostered by agreement
 - c. 16.1 & 16.2 the timing of breaks can be agreed
 - d. 22.3 time off instead of overtime is available where requested and by consent

Clause 12 Classifications

54. The HSU has no issues with the meaning or intent of the exposure draft clause 12, but submits that it clause 12.2 might be simpler to comprehend if it were drafted along the following lines:
- 12.2 Employers must provide written advice to employees of:
- (a) The employee's classification on commencement, and
 - (b) Any changes to the employee's classification during their employment.

Clause 17.1 Minimum wages

55. Throughout the rest of clause 17, and as an introduction to each table, there is a paragraph to the effect of '*An employee apprenticed in the xx trade will be paid the percentage of Level xx set out in the following table*'.
56. Included in other group 4 awards are paragraphs such as '*An employer must pay adult employees the following minimum wages for ordinary hours worked by the employee*'.
57. The HSU believes this later wording should be included in the clause 17.1 immediately prior to the table setting out the minimum weekly and hourly rates of pay for aged care employees.



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