



Australian Federation of Employers and Industries (AFEI)

**4 Yearly Review of Modern Awards
Reply Submissions — Exposure Drafts Group 2**

1 September 2015

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Introduction

1. These submissions concern the Exposure Drafts for modern awards in Stage 2 of the four yearly review of modern awards (**the Review**). Specifically, they concern the following modern awards:
 - a. *Animal Care and Veterinary Services Award 2014*;
 - b. *Health Professionals and Support Services Award 2014*;
 - c. *Horse and Greyhound Training Award 2014*;
 - d. *Medical Practitioners Award 2014*;
 - e. *Nurses Award 2014*;
 - f. *Passenger Vehicle Transportation Award 2014*;
 - g. *Racing Industry Ground Maintenance Award 2014*;
 - h. *Road Transport and Distribution Award 2014*;
 - i. *Road Transport (Long Distance Operations) Award 2014*; and
 - j. *Storage Services and Wholesale Award 2014*.
2. These submissions also contain our outline of submissions in reply to substantive claims pursued by parties in respect of the above mentioned modern awards. They are made pursuant to the Amended Directions issues by the Fair Work Commission (**Fair Work Commission**) on 6 May 2015. These submissions should be read in conjunction with earlier submissions filed by AFEI on 28 January 2015 and 6 February 2015 in relation to Exposure Drafts in Stage 2 of the four yearly review.

Animal Care and Veterinary Services Award 2014

Exposure Draft Submissions

Clause 8.3 – Veterinary Surgeons

3. Clause 8.3 in the Exposure Draft is a reformulation of the existing clause 22.3. A number of parties, including AFEI, have raised concerns about the wording of clause 8.3 and expressed a view in favour of retaining the existing wording in the award. AFEI took this position in our submission filed on 28 January 2015 and this remains our view.

Clause 8.3(c) – Veterinary Surgeons and days off

4. We note the submissions of the Australian Workers Union (**AWU**) contending that the minimum three full days off duty includes being off duty from on-call. The AWU do not offer any reasons as to why it adopts this view. AFEI does not agree with this interpretation.
5. Clause 8.3(c) appears in a list of clauses headed ‘Ordinary hours of work and rostering’. In our submission the intention of the clauses set out therein are to regulate when and how ordinary hours are rostered only. Time spent on-call is not part of an employee’s ordinary hours (see the definitions in Schedule G of the Exposure Draft) and therefore does not bear upon the question of whether clause 8.3(c) has been complied with. In our view clause 8.3(c) means that in each fortnight the ordinary hours cannot be rostered on more than 11 days. On the minimum three days where ordinary hours are not rostered the employee may be on-call or not.

Clause 11.2(a) – applicable rate for active on-call

6. The Commission posed two questions concerning the payment regime for active on call duty. They were: *Is the payment in clause 11.2(a)(i) in addition to the allowance or instead of the \$37.76? Is the ‘relevant hourly rate’ the overtime rate or the ordinary hourly rate?*
7. The interested parties that have made submissions on this issue are in agreement that any payment for active on-call duty is in addition to the \$37.76 allowance. However, there is disagreement about whether the phrase ‘relevant hourly rate’ should be replaced by ‘overtime rate’.
8. It is the view of AFEI that the phrase ‘relevant hourly rate’ should be retained as the use of the term ‘overtime rate’ will lead to confusion in the Award. The confusion will be caused due to the fact that the overtime rate for Veterinary Surgeons in the Award is the ordinary rate.

Clause 16.2(b) – Overtime Rates (Veterinary Surgeons only)

9. The clause provides that an employer and individual employee may agree to an allowance instead of the overtime entitlements in clause 16.2(a). The clause provides that the agreed amount cannot be less than what the employee would have received for overtime under the preceding clause. Paragraph (c) goes on to provide that agreements must be recorded in writing.
10. In the Exposure Draft the Commission asked parties to address whether the award should specify how frequently the allowance is payable. In their preliminary submissions some parties agreed that the Award should do this. AFEI are opposed to this.

11. In our view the Award already implicitly provides for frequency of payment by requiring parties to agree on the terms of the allowance and also to record that agreement in writing. Accordingly, it is our view that any variation to this clause would amount to a substantive variation to the Award and one which could increase employment costs (e.g. by increasing the frequency of agreed payments thereby imposing increased administrative costs). In addition, any variation might cause confusion by upsetting existing agreements about the frequency of payment.
12. Given the nature of the variation proposed by some parties only a compelling case based on the modern awards objective should satisfy the Commission. At this stage, no party has presented any such case.

Substantive Matters:

13. In submissions filed on 15 July 2015 the Australian Veterinary Association Limited (**AVA**) proposed a number of variations to the Award. These are set out in their submission under the heading 'Other proposed changes to the Award'. The proposals of the AVA should be determined by a separately constituted Full Bench.
14. The same Full Bench could also determine substantive variations proposed by APESMA, United Voice and the Veterinary Nurses Council of Australia.
15. At this stage only basic outlines of submissions have been filed by these parties in support of their proposed variations. Although we consider some suggestions of the AVA apt for further discussion between the parties with a view to reaching agreement on what the current Award means (e.g. in respect of inserting the word 'ordinary' into clause 8.3(a) and for paid study leave for part-time employees on a pro-rata basis), we are generally opposed to substantive variations absent a compelling case for change being presented.

Health Professionals and Support Services Award 2014

Exposure Draft Submissions

16. **Various Matters:** The Private Hospital Employers Association at page 8 of their submission dated July 2015, and the HSU at Appendix A to their submissions dated 16 July 2015 annexed a list of agreed matters. AFEI supports these submission.

Substantive Matters

17. AFEI notes there are a significant number of substantive claims being pursued by parties including the HSU, the Australian Physiotherapy Association, the Medical Imaging Employment Relations Group, the Chiropractors Association of Australia, the Private Hospital Industry Employer Associations and Kids Matters Occupational

Therapy Pty Ltd, which relate to, inter alia, the span of hours and provisions relating to shiftwork, overtime and penalty rates.

18. In AFEI's view, these matters are very complex and the effect of any change to this fundamental aspect of the Award could have far reaching and perhaps unintended consequences. As such, those variations relating to the span of hours, shiftworkers and penalty rates should be referred to a separate own Full Bench and would benefit from a structured conciliation led by a member of the FWC.

Horse and Greyhound Training Award 2014

Exposure Draft Submissions

19. The Australian Trainers' Association (**ATA**) filed submissions dated 15 July 2015 concerning technical and drafting issues in this Award. AFEI agrees with all submissions by the ATA except that concerning clause 6.5 (casual employment).
20. The ATA proposes a new clause 6.5(a) to address the issue raised by the Commission about the phrase 'the employment of a casual employee may be terminated at any time'. With respect, we consider the wording proposed by the ATA to be cumbersome and to create additional problems. We refer the Commission to our earlier submission of 28 January 2015 wherein we proposed a different formulation of the clause. In our view, the formulation we proposed is preferable as it removes any reference to termination of employment at all. This is consistent with most modern awards which do not provide guidance on *when* employment can be terminated.

Medical Practitioners Award 2014

Exposure Draft Submissions

21. The Australian Salaried Medical Officers' Federation (**ASMOF**) filed submissions in relation to this Award on 6 March 2015. AFEI agree with those submissions.

Substantive Matters

22. The HSU seeks to insert a new entitlement to unpaid Ceremonial Leave for employees who required by Aboriginal and Torres Strait Islander tradition to be absent from work for ceremonial purposes into the Award.
23. The HSU offers two arguments in support of the claim. Firstly, they contend that Ceremonial Leave *meets* the modern awards objective in that it will promote social inclusion through increased workforce participation. Secondly, they argue that the failure of the AIRC to include a Ceremonial Leave clause in the Award when it was

made was an oversight and is thus anomalous. The HSU has also indicated they will not be filing evidence in support of the claim *unless requested by the Commission*.

24. In our view, the HSU claim cannot be granted unless it is supported by evidence. In addition, the arguments presented so far are not compelling.
25. Firstly, the claim that the Ceremonial Leave clause *meets* the modern awards objective misconstrues the basis upon which Commission will vary modern awards in the Review. The Commission is proceeding in the Review on the basis that modern awards are *prima facie* already meeting their objectives.¹ In order to succeed, therefore, the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary (see s 138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the s 134 considerations having regard to the submissions and evidence directed to those considerations. Although it is obliged to consider all of the considerations of s 134, the Commission has found that “the need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation.” Whilst the extent of the case required to demonstrate change may vary the Commission has also stated that “where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”² Without this the claim must fail.
26. The argument concerning Ceremonial Leave being omitted by oversight from the Award is not plausible. In [2009] AIRC 345 at [146]-[157] the making of health services related awards was considered. It is evident from that decision, particularly at [157] that the issue of Ceremonial Leave was considered and the relevant modern awards into which Ceremonial Leave was to be included had already occurred.
27. Finally, in their submission the HSU provided a draft determination varying the Award to include Ceremonial Leave which they refer to as an ‘agreed’ proposal. We confirm that we are not party to any agreement on this issue and that we oppose the claim.

Nurses Award 2014

Exposure Draft Issues

28. AFEI is content to rely on its submissions dated 28 January 2015 in respect of the Exposure Draft matters in this Award.

¹ See [2014] FWCFB 1788 at [60]

² Ibid, see also [2015] FWCFB 4466 at [16]

Substantive Matters

29. Both the HSU and the Australian Nursing & Midwifery Federation (**ANMF**) have proposed substantive claims relating to this Award. AFEI is opposed to all and submits that a separately constituted Full Bench should be created to determine these claims if they pursued. Below is a brief outline of the basis for our opposition to *some* of the claims. We reserve the right to make complete submissions in relation to all claims once more detail/evidence is filed by the applicant unions.

Clause 9.3 – Rest breaks between rostered work

30. The ANMF claim a new penalty rate in the Award. The new penalty rate would apply in circumstances where employees do not receive the requisite break between rostered periods of work. The ANMF characterise the penalty as a sanction for breach of the Award provision. With respect, the ANMF submission is highly misguided. A breach of the minimum break between rostered shift requirements constitutes a breach of the FW Act (s 45), which is a civil penalty provision exposing employers to prosecution and fines. AFEI submit that the Commission, which exercises arbitral power in the creation of award entitlements, not the enforcement of them, should not entertain such a claim.

Clause 11 – Allowances – In charge and leading hand allowances

31. The ANMF claim new allowances for registered nurses and enrolled/assistant nurses who are appointed in-charge or as leading hands respectively. The proposed in-charge allowance could be as high as \$183.85 per week (based on a five day working week in the Draft Clause in Attachment B of the ANMF Submission dated 15 July 2015).
32. The basis for the new allowance is that the putative eligible employee is currently not being adequately compensated for work performed under the Award. On this basis the ANMF claim is clearly one that relates to the value of work of nurses with an element of supervisory responsibility. Although a claim of this nature can be made, it will take a considerable evidentiary case to prove it. We note here that because the Award is, *prima facie*, already meeting its objectives, the ANMF would need to establish either a change in work value to make out this case or prove that current rates are not properly set minimums.

Clause 14.2 – Shift Allowances

33. The HSU seeks to increase penalty rates for shift workers working on a weekend by 12.5% or 15%. The increase would be effected by extending the shift penalties which apply for certain shifts worked Monday to Friday to a weekend, where high penalties already apply.

34. In support of their claim the HSU cite a number of modern awards which they say already provide for the payment of shift allowances and weekend penalties (at the same time). Most of the modern awards listed either do not do what the HSU claim or they are not an appropriate comparator because the weekend penalties are lower than those in the Award. Only a significant evidentiary case could support this claim.

Clause 15.1 - Overtime

35. The HSU seeks to vary the current clause to remove ambiguity, however, they have not identified how the clause in question is susceptible to two or more meanings, what those meanings are, and why their revised clause is the appropriate clause to remedy the ambiguity.

Accordingly, AFEI is opposed to the proposed amendment.

Clauses 15.5, 15.6 and 21.4 – Recall to Work Overtime

36. The ANMF propose multiple variations concerning recall to work overtime. The effect of the proposals are to vary what constitutes recall to work so that employers are required to make significant overtime payments to employees that answer phone calls when on-call or otherwise. In addition, the ANMF propose to create an unworkable situation wherein employees must be provided a minimum 10 hour break between the cessation of an on-call period and normal duties resuming.
37. The ANMF also propose to introduce additional annual leave entitlements for employees that are on-call for a minimum number of occasions each year. The additional annual leave could be up to one week, which for a shift worker might extend their annual leave entitlement to seven weeks’.
38. We consider all of the ANMF proposals in relation to recall to work overtime and/or on-call likely to have a significant and unreasonable effect on employment costs. Given the nature of the changes sought, only a very significant evidentiary case could support it.

Passenger Vehicle Transportation Award 2014

39. AFEI is content to rely on its earlier submission filed 6 February 2015 in respect to the Exposure draft for this Award. In addition, we support the submissions of the Australian Public Transport Industrial Association dated 21 August 2015 in reply to the submissions of the AWU.
40. In relation to the substantive claims made by the Transport Workers Union (**TWU**) we consider it essential that those claims be dealt with by a separate Full Bench of the Commission. AFEI will oppose those claims.

Racing Industry Ground Maintenance Award 2014

41. AFEI relies on its earlier submissions filed in relation to this Award on 6 February 2015.
42. AFEI is of the view that the relatively small number of outstanding issues in this Award will be capable of resolution before the Full Bench on 7 and 8 October and a separately constituted Full Bench need not be convened to hear claims relating to this Award.

Road Transport and Distribution Award 2014 and Road Transport (Long Distance Operations) Award 2014

43. AFEI supports the submissions of the Australian Industry Group (**Ai Group**) filed on 4 March and 15 July 2015 in respect of these modern awards.

Storage Services and Wholesale Award 2014

Exposure Draft Issues

44. AFEI relies upon its earlier submission dated 28 January 2015. Subject to the additional comments cited below, we also support the submissions filed by Ai Group on 28 January, 4 March and 15 July 2015.

Clause 8 – Altering the spread of ordinary hours

45. The Shop Distributive and Allied Employees' Association (SDA) filed submissions relating to the operation of the *facilitative* provision in clause 8, which allows the daily span of hours to be altered by up to one hour at either end of the spread.
46. In the submission the SDA acknowledge that the provision is *facilitative*, that is, one which allows for the ordinary operation of the Award to be varied in some way by agreement. In our view it would be an unreasonable reading of a *facilitative* provision to restrict its operation in the manner contended by the SDA. If that had been the intention of the clause it would have been drafted in some other way. In this context, we submit that reliance by the SDA on a similar but narrower provision in the *Graphic Arts, Printing and Publishing Award 2010* is misguided. In our view the drafting of the provision there actually lends weight to our view that the provision in the Award should not be construed narrowly as contended for by the SDA, for, it is quite obvious that if that was the intention, the Award clause would have been expressly framed as such.

47. In addition, we submit that contrary to the view put the SDA, the use of the word 'either' in this facilitative provision does not 'clearly' indicate that the flexibility it offers is limited to one end of the span of hours only. In our submissions, bearing in mind that the clause is intended to be facilitative, a fair reading of the clause is one which maximises its potential for both employers and employees.
48. We further submit that the SDA have mischaracterised the effect of the facilitative provision as one which strips away entitlements. The provision is one that can only be engaged by agreement and one which does not change the number of ordinary hours an employee can work in a day. In this respect it does not strip away entitlements at all.

Substantive Matters

49. AFEI supports the proposed variations by Ai Group.

AFEI

1 September 2015