SUBMISSION TO
FAIR WORK COMMISSION

Matter No:

AM 2014/204

HEALTH PROFESSIONALS & SUPPORT SERVICES AWARD 2010
(MA000027)

January 2015

Response to Exposure Draft
Health Professionals and Support Services Award 2014

SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS

Australian Day Hospital Association
Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Victoria
Australian Private Hospitals Association – Tasmania
Catholic Health Australia
Private Hospitals Association of Queensland
Private Hospitals Association of New South Wales
Private Hospitals Association of Western Australia

Contact: **Lucy Fisher – Executive Director**
Private Hospitals Association of Queensland
PO Box 370
Kenmore QLD 4069
Tel: (07) 3279 7600
Email: lucyf@phaq.org

PARTIES TO THIS SUBMISSION

[1] This submission is being lodged on behalf of the Private Hospital Industry Employers' Associations (PHIEA) which includes: Australian Day Hospital Association, Australian Private Hospitals Association (APHA), the Private Hospitals Association of Queensland (PHAQ), APHA – South Australia; APHA – Victoria; APHA – Tasmania, Private Hospitals Association of New South Wales, Private Hospitals Association of Western Australia and Catholic Health Australia. These organisations collectively represent approximately 95% of licensed private hospital beds in Australia and in addition, represent approximately 90% of all Free Standing Day Hospitals.

RESPONSE

[2] PHIEA makes this submission in response to the Fair Work Commission's (Commission) publication of an *Exposure Draft – Health Professionals & Support Services Award 2014* in Stage 2 of the 4 Yearly Review of Modern Awards. In accordance with the Commission's statement of 8 December 2014, our comments are limited to the technical and drafting changes proposed by the Commission.

As noted in paragraph 31 at the end of this submission, PHIEA will be lodging an application to vary Clause 24 – Span of Hours together with associated amendments to Clause 26.1 Saturday and Sunday work and Clause 29 – Shift work. PHIEA reserves the right to respond to applications to vary the Health Professionals and Support Services Award once detailed submissions have been lodged by the parties.

[3] PHIEA notes the Full Bench decision handed down by Justice Ross, President on 23 December 2014 [2014] FWCFB 9412 which in part, dealt with a number of issues common to all awards, and therefore of relevance to the *Exposure Draft – Health Professionals & Support Services Award 2014.*

These common issues are:

- *Supersession clause (clause 1.2)*
- Relationship between the Award and NES (clause 2.1)
- Retention of the current clause 2.4 (take home pay)
- Inclusion of NES summaries & pay slip provision
- Inclusion of index of facilitative provisions
- *Inclusion of the term 'ordinary hourly rates' for awards with an all-purpose allowance*
- *Inclusion of summary wages tables*
- Inclusion of examples that clarify the operation of provisions

It is noted that discussion is continuing in relation to some of these items with a final decision yet to be determined, therefore in terms of the *Exposure Draft – Health Professionals & Support Services Award 2014* (HP&SS Award) – our focus ~~will be~~ is on the remaining clauses in the draft, with the exception of the three items above in italics and underlined, on which we have made comment.

Supersession clause (Clause 1.2)

[4] In FWCFB 9412 it is stated that:

> [9] We propose to adopt the course of making variations to existing modern awards during the Review, rather than 'superseding' awards. The proposed supersession

clause contained in exposure drafts for Group 1 will be removed. We agree with the view that when varying modern awards, there is no requirement for a supersession clause.

[10] On the basis that in the ordinary course awards would be varied through the Review process rather than superseded, the ACTU submitted that a clause in the following terms be inserted as part of each variation determination.

A variation to this award does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the award as it existed prior to that variation.

[11] In our view the clause proposed reflects the position at common law and the inclusion of such a clause will make modern awards simpler and easier to understand. We will include the clause in the form proposed.

[5] PHIEA considers that in its current form the proposed wording could lead to confusion. The clause does not identify that the variations being referred to are restricted to those resulting from the review undertaken by the Fair Work Commission during this 4 Year review process to address administrative or structural issues and as such, is not intended to amend any entitlements under the award.

[6] It is suggested that the review case number be included in the clause as indicated below, as this would clearly identify which variations are being referred to. Inclusion of the case number would enable any interested persons to read the background material and associated decision to clarify the intent of the review which resulted in the variations.

It is therefore suggested that the proposed clause be amended as under:

1.2 The variation of this award in AM2014/XX (the review case number) does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the award as it existed prior to that variation.

Inclusion of the term 'ordinary hourly rates' for awards with an all-purpose allowance

[7] As noted in [2014] FWCFB 9412 of 23 December 2014, the Exposure Drafts have been prepared using the following principles:

[44] Where an award does not contain any allowances or loadings payable for all purposes, the term 'minimum weekly/hourly' rate has been used throughout

Where an award contains an allowance or loading that is payable for all purposes, the term 'ordinary hourly rate' has been used to express penalties and loadings.

A definition of 'all purposes' and 'ordinary hourly rate' has been included in the relevant awards along the following lines:

- ***All purposes*** *means the payment will be included in the rate of pay of an employee who is entitled to the allowance, when calculating any penalties or loadings or payment while they are on leave*
- ***Ordinary hourly rate*** *means the hourly rate for an employee's classification specified in clause 11.1; inclusive of the industry allowance.*

[52] In our view these issues require further consideration. We acknowledge the adoption of a general definition of 'all purposes' may not be appropriate as it may give rise to unintended consequences….We propose to provide parties with a further opportunity

to make submissions in relation to these issues in response to the revised exposure drafts.

[53] Revised exposure drafts will be issued by the end of January 2015. Interested parties will have until 4.00pm on 6 March 2014 to comment on the revised drafts

The Health Professionals and Support Services Award 2010 does not have an all-purpose allowance therefore the term 'minimum' weekly/hourly rate if adopted, will replace any reference in the existing award to the 'ordinary hourly rate'. PHIEA has identified a number of errors associated with this change which we consider have given rise to unintended consequences – where relevant these are addressed within this submission in sequential clause number order.

[8] Clause 3 – Coverage

The parties are asked to clarify whether the list of common health professionals contained in Schedule B is an exhaustive list of those covered by the award or whether it is an indicative list of examples of the types of health professionals.

Given the constant evolution of position titles and the introduction of variations to existing professional disciplines, which may be in response to changing models of care, PHIEA considers that the list of common health professionals should be regarded as indicative only and not an exhaustive list.

Clause 3.2

[9] *Clause 3.2 states*

*The **health industry** means employers whose business and/or activity is in the delivery of health care, medical services and dental services.*

This exact same clause is contained under Schedule I – Definitions.

PHIEA considers that it is unnecessary for the definition to be included twice, and that it would be more appropriate for it to remain in Schedule I – Definitions and be deleted from clause 3.2

6.4 (e) Casual employment (clause 10.4 under existing HP&SS Award)

[10] The existing clause reads:

(a) A casual employee is an employee engaged as such 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.

(b) A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition a loading of 25% of that rate will be paid instead of the paid leave entitlements of full time employees;

(c) The minimum period of engagement of a casual employee is three hours with the exception of cleaners employed in private medical practices who will be engaged for a minimum of two hours.

The proposed clause 6.4 (e) – Casual Loading reads:

Casual loading

(i) For each ordinary hour worked, a casual employee must be paid

* *the minimum hourly rate; and*
* *a loading of 25% of the minimum hourly rate for the classification in in which they are employed*

(ii) the casual loading is paid instead of the paid leave entitlements of full time employees

[11] In its current form, the proposed clause at (i) may result in detrimental changes for some casual employees, in that it states that the 25% loading is to be applied to the minimum hourly rate for the classification in which they are employed.

For example, where classifications have multiple pay points based on years of experience, the employee's minimum pay rate increases after each year of service for a full time employee, or after 1824 hours for a part time or casual employee. The clause above identifies the minimum hourly rate for the classification as the appropriate rate of pay. This is incorrect. If a casual employee has the experience necessary to be paid at a higher pay point for example – *Health Professional Employees Level 1 Pay Point 5* - then this should be the minimum rate payable to that employee, not the minimum hourly rate for the classification.

[12] PHIEA suggests that the clause could be rectified to reflect the original intent by the following amendment:

(i) For each ordinary hour worked, the casual employee must be paid

* ***the minimum hourly rate applicable to their classification and pay point; and***
* ***a loading of 25% of their minimum hourly rate.***

[13] Clause 6.4 (e) (iii) – the following provisions of this award do not apply to casual employees.

The parties are asked to provide a list of provisions that do not apply to casual employees

As noted in FWCFB 9412 of 23 December 2014 at paragraph [69]

> [69] This proposal generated significant controversy among interested parties to many of the Group 1 modern awards. We have decided that the above sub-clause and note will be removed from all the exposure drafts….

PHIEA assumes that this decision noted in para [69] above will apply to exposure drafts issued for all 4 stages and not just those in Group1 and therefore this question requesting a list of provisions that do not apply to casual employees has not been answered.

[14] Proposed clause 6.4 (c) & (d) read:

(c) Subject to clause 6.4 (d) the minimum period of engagement of a casual employee is three hours.

(d) the minimum period of engagement of cleaners employed in private medical practices is two hours.

The parties are asked to clarify whether the minimum engagements are daily minimums which can be worked in two or more occasions (i.e. in split shifts) or if these hours must be worked consecutively.

In the pre-reform awards applicable to the private hospital industry, minimum hours of work were worked consecutively, unless otherwise stipulated. On that basis, PHIEA believes that the minimum hours contained within 6.4 (c) and 6.4 (d) would be consecutive.

Clause 15.2 (a) Heat Allowance – sub clause (iii)

[15] 15.2 (a) (iii) Employees employed at their current place of work prior to 8 August 1991 working for more than one hour in the shade in places where the temperature is raised by artificial means will be paid the following amounts:

- Where the temperature exceeds 40 degrees Celsius but does not exceed 46 degrees Celsius - $0.41 per hour or part thereof; or
- Where the temperature exceeds 46 degrees Celsius - $0.49 per hour part thereof

Parties are asked to consider whether the provisions in 15.2 (a) (iii) are obsolete

As far as PHIEA is aware, in the pre-reform awards the provisions of 15.2 (a) (iii) only existed in the *Health and Allied Services Victoria Consolidated Award 1998* with nothing similar in any other award. Given that the provisions only applied to personnel who were employed at their current place of work prior to 8 August 1991 – some 23 years ago, PHIEA considers that this clause is obsolete and should be deleted.

Clause 18.1 – Weekend Penalties – Day Worker (clause 26 existing award)

[16] This clause converts 'time and a half' to '150% of the minimum hourly rate and 'double time' to '200% of the minimum hourly rate'. Without confirmation that it is the employee's minimum hourly rate that is being referred to, it could be interpreted to mean the minimum hourly rate applicable to the position classification that the employee holds.

PHIEA suggests that this could be clarified by the following underlined amendments:

(a) *For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid **150%** of **their** minimum hourly rate.*

(b) *A casual employee who works on a Saturday or Sunday will be paid **175%** of **their** minimum hourly rate for all time worked, but will not be paid the casual loading of **25%**.*

Clause 18.2 – Weekend work in private medical imaging seven day practice (clause 24.3 (b) existing award)

[17] The existing clause reads:

24.3 (b) Seven day practice

> *Where the work location of a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location will be between 7.00 am and 9.00 pm Monday to Sunday. Work performed on a Saturday will be paid at the rate of time and a quarter of the employee's ordinary rate of pay instead of the loading prescribed in clause 26—Saturday and Sunday work. Work performed on a Sunday will be paid at the rate of time and a half of the employee's ordinary rate of pay instead of the loading prescribed in clause 26.*

The proposed clause reads:

18.2 Weekend work in private medical imaging seven day practice

*(a) Work performed on a Saturday in accordance with clause 8.2(d)(i) will be paid at the rate of **125%** of the minimum hourly rate instead of the loading prescribed in clause 18.1.*

*(b) Work performed on a Sunday in accordance with clause 8.2(d)(i) will be paid at the rate of **150%** of the minimum hourly rate instead of the loading prescribed in clause 18.1.*

The introduction of the term *'the minimum rate of pay'* will introduce a significant change as identified earlier due to the minimum rate of pay potentially equating to Pay Point 1 for any classification.

This clause could be rectified to clarify the original intent by inserting the word 'employee's' as shown below:

*(a) Work performed on a Saturday in accordance with clause 8.2(d) (i) will be paid at the rate of **125%** of the **employee's** minimum hourly rate instead of the loading prescribed in clause 18.1.*

*(b) Work performed on a Sunday in accordance with clause 8.2(d)(i) will be paid at the rate of **150%** of the **employee's** minimum hourly rate instead of the loading prescribed in clause 18.1.*

Shift Work Penalties

[18] *Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am the employee will be paid 115% of their minimum hourly rate of pay.*

The parties are asked to confirm whether this rate is in addition to casual loading and/or weekend penalties

PHIEA's understanding from pre-reform awards common to the private hospital industry, is that the shift work penalty does not apply when the employee works

weekends as the employee receives the higher weekend penalty instead and not in addition to. This application is consistent with the other key modern award for our industry – the Nurses Award.

The *Exposure Draft – Nurses Award 2014* at *14.2 (d)* – below - specifies that shift penalties **do not** apply to shiftwork performed on a weekend or public holiday.

> ***Clause 14.2 (d) of the Exposure Draft - Nurses Award 2014***
>
> *The shift penalties prescribed in this clause will not apply to Shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 16 – Saturday and Sunday work and clause 18 – Public Holidays applies.*
>
> ***Clause 14.2 (f) of the Exposure Draft - Nurses Award 2014***
>
> *Shift allowances for a casual employee will be calculated in accordance with clauses 6.4 (d)*

[19] With regard to casuals – *clause 6.4 (d)* of the *Exposure Draft - Nurses Award 2014* provides some clarity and reflects the methodology that has historically been applied to employees within the private hospital industry.

> ***6.4 (d) – Exposure Draft – Nurses Award 2014***
>
> *A casual employee will be paid shift allowances calculated on the minimum rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.*

PHIEA suggests that there would merit in adopting similar clauses in the *Health Professionals and Support Services Award* to clarify the basis of these calculations.

Clause 19.1 – Overtime Rates (clause 28 existing award)

[20] The proposed overtime rates clause – clause 19.1 reads:

> *Overtime rates*
>
> *(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:*
>
> *(i) 150% of the minimum hourly rate for the first two hours and;*
> *(ii) 200% of the minimum hourly rate thereafter*
>
> *(b) All overtime worked on a Sunday will be paid at the rate of 200% of the minimum hourly rate*
>
> *(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 18.4*

Once again the term '*the minimum hourly rate'* contained in (a) (i) & (ii) and (b) above could result in a lesser payment being made than was originally intended as '*the minimum hourly rate'* could be interpreted to mean Pay Point 1 for the relevant classification for that employee, rather than the applicable pay point for that employee which may, for example, actually be Pay Point 5.

[21] ***To rectify any unintended consequences, PHIEA would suggest that the clause be amended as under:***

Overtime rates

(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:

*(i) 150% of **their** minimum hourly rate for the first two hours and;*
*(ii) 200% of **their** minimum hourly rate thereafter*

*(b) All overtime worked on a Sunday will be paid at the rate of 200% of the **employee's** minimum hourly rate*

(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 18.4

(d) Part-time employees

Where agreement has been reached in accordance with clauses 6.3 (b) or (c) a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause

[22] ***The parties have been asked whether the provision for overtime should clarify if each day stands alone***

PHIEA is not aware of any confusion that this clause has caused.

For private hospitals caring for patients 24/7, it is possible that an employee's overtime may commence on one day and finish the next, if they are working night shift for example. In this case, the overtime worked is continuous and calculated accordingly.

To calculate each day as a single period of overtime would disadvantage the employee and mean that in circumstances where a night shift employee may have already worked two or more hours of overtime and were now accruing payment at 200%, come midnight, they would then be paid the next two hours at 150% before reverting back to 200%. PHIEA considers that this would not be a reasonable basis of calculation and that overtime which straddles two days should be considered continuous and paid accordingly.

19.2 Rest period after overtime

[23] **Proposed Clause:**

The proposed clause converts reference to '*double time'* in the current modern award to *'200% of the minimum hourly rate for their classification'* as under:

19.2 Rest period after overtime

(a) An employee working overtime is entitled to 10 consecutive hours off duty between the termination of work on one day and the commencement of work on the next day, without loss of pay for ordinary hours.

(b) If, on the instructions of the employer, an employee referred to in clause 19.2(a) does not receive 10 consecutive hours off duty, the employee is entitled:

***(i)** to be paid at a rate of **200%** of the minimum hourly rate for their classification until being released from duty; and*

***(ii)** upon being released from duty, to be absent until they have had at least 10 consecutive hours off duty, without loss of pay for ordinary working time occurring during their absence.*

As previously identified, to clarify which minimum hourly rate is being referred to and to ensure there are no unintended consequences, PHIEA would propose the following amendment:

19.2 (b)

***(i)** to be paid at a rate of **200%** of the **employee's** minimum hourly rate for their classification until being released from duty; and…*

20.3 Annual Leave Loading

[24] Proposed clause 20.3 reads:

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

*(a) an employee, other than a shift-worker, will be paid an annual leave loading of 17.5% of their **ordinary rate of pay;***

(b) a shift worker will be paid the higher of:

*(i) an annual leave loading of 17.5% of their **ordinary rate of pay**; or*
(ii) the weekend and shift penalties the employee would have received had they not been on leave during the relevant period.

Given the Commission's decision to refer to the *'minimum rate of pay'* in awards which do not have all purpose allowances, the words *'ordinary rate of pay'* as highlighted in bold above, should be replaced with the words '*their minimum rate of pay.'*

Clause 23 – Public Holidays (Clause 32 in existing award)

[25] The existing clause 32 reads:

Public holidays are provided for in the NES. This clause contains additional provisions.

The proposed clause 23 reads:

23. Public holidays

***23.1** Public holiday entitlements are provided for in the NES. **The NES provides a paid day off on each public holiday, except where reasonably requested to work.** For the full NES public holiday entitlement see ss.114 – 116 of the Act.*

23.2 *A casual employee who does not work on a public holiday is not entitled to a paid day off.*

23.3 *Any employee required to work on a public holiday will be paid 250% of **the** minimum hourly rate for all time worked.*

The underlined sentence in 23.1 above is misleading. The NES does not provide a paid day off on each public holiday, except where reasonably requested to work. Other reasons exist which may mean that the employee would not be provided with a paid day off on each public holiday. For example, where the employee is absent on leave without pay or is not rostered to work, they may not be entitled to be paid for the public holiday. **This sentence should be removed.**

[26] ***23.2*** *"A casual employee who does not work on a public holiday is not entitled to a paid day off"* is a new clause, and one which PHIEA considers should be deleted. By specifically mentioning that casuals are not entitled to a paid day off, by default, it could be interpreted as meaning that all non-casual staff are entitled to a paid day off unless rostered to work, regardless of any other considerations relating to that employee's situation such as extended leave without pay for example. **To avoid any potential for misinterpretation, PHIEA would suggest that 23.2 be removed.**

[27] At **23.3** reference to **<u>the</u>** minimum hourly rate should be changed to **<u>their</u>** minimum hourly rate to ensure the employee is correctly paid and does not receive the rate applicable to the minimum pay point for their classification, such that 23.3. should read:

> ***23.3*** *Any employee required to work on a public holiday will be paid 250% of **their** minimum hourly rate for all time worked.*

Schedule C – Summary of Hourly Rates

[28] Some of the *Summary of Hourly Rates* tables, although not all, refer to 'ordinary and penalty rates' in the table heading. For consistency of terminology, the word *'ordinary'* should be replaced with '*minimum'* wherever it appears in a table heading e.g C1.1; C1.3; C2.1; C2.3.

It would seem more logical if the tables were in ascending order from minimum rate, shift work penalty, through to the highest penalty rate, such that in each table the Public Holiday column is the last one on the right hand side of the table, rather than the current format where the shift work column is on the extreme right.

Inclusion of NES Summaries

[29] PHIEA concurs with the concerns raised by other employer groups in the Group 1A & 1B Exposure Drafts proceedings, concerning the inclusion of notes and references to the NES and other legislative provisions in the Modern Award which is a legal instrument and notes the Full Bench decision [2014] FWCFB 9412 – paragraph [35]

> [35] At the hearing on 18 November 2014, the Commission foreshadowed an approach whereby it would publish two documents – the legal instrument, being the modern award as reviewed, and an annotated version of each modern award. The legal instrument would not contain summaries of NES entitlements or links to various legislation, such as the proposal in relation to payslips. The second document will be an annotated version of each award, published by the administrative arm of the

Commission and will contain summaries of NES entitlements and links to various legislative provisions. Interested parties will be consulted as to the terms of annotated awards to be published by the Commission.

[30] The *Exposure Draft – Health Professional & Support Services Award 2014* also contains summaries of NES entitlements and references to legislative provisions. It is assumed that the above decision will flow through to all Modern Awards, and not just those listed in groups 1A & 1B, however if this is not the intent, PHIEA would strongly propose that such references be removed from the *Exposure Draft – Health Professionals and Support Services Award 2014.*

[31] As noted in paragraph [2], PHIEA will be lodging an application to vary *Clause 24 – Span of Hours* with associated amendments to *Clause 26.1 Saturday and Sunday work* and *Clause 29 Shift work*.

In brief, the Health Professionals and Support Services Award does not accommodate the rostering of a 24/7 business. The award identifies two types of worker – a day worker and a shift worker. However private hospitals may not have employees classified exclusively as either a day worker or a shift worker, but may roster the same employee on a variety of day, afternoon or night shifts.

In its current format, this award does not clearly identify what an employee employed in a 24/7 business such as a hospital, who is both a day worker and a shift worker, is to be paid on afternoon or night shifts or on weekends.

PHIEA's application to vary will propose a span of hours clause for Private Hospitals operating 24/7 with associated amendments to Clauses 26.1 and 29, which we consider will provide appropriate clarity.

END OF SUBMISSION