

BEFORE THE FAIR WORK COMMISSION

**NURSES AWARD 2010
(MA000034)**

4 yearly review of modern awards – Nurses Award 2014

AM2014/207

**SUBMISSION BY
AGED CARE EMPLOYERS**

15 July 2015

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Overview

1. Aged Care Employers¹ (**ACE**) make this submission in accordance with the Fair Work Commission's (**Commission**) Amended Directions issued 6 May 2015² in respect of the 4 yearly review of the *Nurses Award 2010* (**the Award**).

Variation 1 – Vary clause 8.2 of [Exposure Draft] Award – Substantive claim/variation

2. ACE propose to vary clause 8.2 of the Award, as follows:

“8.2 Rostering

- (a) Employees will work in accordance with a weekly or fortnightly roster fixed by the employer.
 - (b) The roster will set out employees' daily ordinary working hours and starting and finishing times.
 - (c) The roster will be displayed in a place conveniently accessible to employees at least seven days before the commencement of the roster period.
 - (d) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.
 - (e) Subject to clause 8.2(f), unless the employee otherwise agrees, seven days' notice of a change of roster will be given by the employer to an employee.
 - (f) The employer may alter a roster at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work due to illness or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, an alternative day off will be taken at an agreed time.”
3. ACE submit that without this variation, subject to clause 8.2(f), an employer cannot alter an employee's roster absent seven days' notice to the employee, ie even where the employee agrees to such a roster change. In respect of clause 8.2(f), such roster alteration is limited to “illness” or “emergency”.

¹ Aged Care Employers: Aged and Community Services NSW & ACT, Leading Age Services Australia NSW-ACT, Aged and Community Services Australia, Leading Age Services Australia, Leading Age Services Australia VIC, Aged and Community Services Western Australia, Aged and Community Services SA & NT, Leading Age Services Australia – QLD, Leading Age Services Australia – SA, Leading Age Services Australia – TAS, Leading Age Services Australia – WA, Aged & Community Services Tasmania, Aged and Community Services Australia (Victoria), Aged and Community Services Australia (QLD)

² <https://www.fwc.gov.au/documents/decisionssigned/html/2015FWC3148.htm>

Clearly, there are many other matters beyond just illness or emergency that an employer might require a roster to be altered. For example, an employee's car may have broken down, an employee may have abandoned duty, and an employee may have taken leave at short notice for a family matter.

4. ACE will bring witnesses from the aged care industry (who employ nurses) to highlight the many and varied ways in which employees may be absent from duty at short notice other than for reasons of illness or emergency, and why the provision of seven days' notice in such circumstances is impractical and unnecessary where another employee agrees to the roster change.

Variation 2 – New clause 11.3(b) of [Exposure Draft] Award – Substantive claim/variation

5. ACE propose that a new clause 11.3(b) be inserted into the Award, as follows:

“(b) Remote Communication Allowance

- (i) This clause applies to an employee who is on call to provide advice or assistance remotely, including via telephone, text, web chat or email.
- (ii) Where an employee is required to be on call to provide advice or assistance remotely they will receive:
 - (a) 50 percent of the on call allowance as specified in clause 11.3(a) for the relevant on call period; and
 - (b) a remote communication allowance equivalent to the employee's ordinary hourly rate of pay for time actually worked, with a minimum payment of one hour, irrespective of the number of calls/communications received during the on call period.

[Note: The on call and remote communication allowances do not apply to employees classified at Registered nurse levels 4 or 5]”

6. The intention of this variation is to provide for the payment of on call and remote communication allowances to employees who provide advice or assistance remotely. In other words, where an employee's advice or assistance via telephone, text, web chat or email is sought as opposed to the employee being physically required to return to the workplace or place of work to be “hands-on”.
7. ACE will bring witnesses from the aged care industry to identify:
 - (a) the need for a remote communication allowance in residential aged care facilities (ie as compared to existing on call return to work arrangements); and

- (b) the number of calls taken or likely to be taken by Registered nurses outside hours of work, in respect of what type of issues, and how long such calls take to resolve issue/s.

Technical/Drafting issues in Exposure Draft

8. The following submissions refer to the *Nurses Award 2010 Summary of Submissions* document (revised as at 17 March 2015) (**the Summary table**).³

Use of the term “penalty” (Items 5, 48 and 58 of the Summary table)

9. ACE rely upon their submissions dated 28 January 2015⁴ at paragraphs 6, 12 and 18.
10. The additional amounts an employee is entitled to receive for working shift work Monday to Friday and working Saturday and Sunday is variously described within the exposure draft as a loading, a penalty and an allowance. For consistency of language, ACE propose that one description (“penalty”) be used throughout the Award.
11. Annexure A to these submissions is a table prepared by ACE identifying the various uses of the terms loading, penalty and allowance under the Award.

Annual leave loading for Shiftworkers (Item 62 of the Summary table)

12. ACE rely upon their submissions dated 28 January 2015⁵ at paragraph 5.
13. It is noted that the method of calculation of annual leave loading for employees who are not shiftworkers is as confusing as it would be for employees who are shiftworkers. In other words, non-shiftworkers receive 5 weeks annual leave under the Award but only receive annual leave loading on 4 weeks.

Casual employees, overtime and weekend work (Items 20, 52 and 59 of the Summary table)

14. ACE rely upon their submissions dated 28 January 2015⁶ at paragraphs 6, 13 and 18.

Meal allowance distinction between shift and non-shift workers (Item 44 of the Summary table)

15. ACE no longer press for this variation.

Aged Care Employers
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³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Nurses-sub-summary-revised.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014207-sub-ACE-280114.pdf>

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014207-sub-ACE-280114.pdf>

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014207-sub-ACE-280114.pdf>

ANNEXURE A

Nurses Award Exposure Draft

CLAUSES CONTAINING VARIOUS COMBINATIONS OF THE TERMS – **LOADING, PENALTY/IES, ALLOWANCE/S and PREMIUM**

Conclusion

The above terms appear throughout the Nurses Award Exposure Draft. In most circumstances they are used consistently, correctly and without confusion. The single area of interchangeability leading to confusion appears to be their association with “**SHIFT**”.

In the clauses of the Award set out below (in colour) the same entitlement is variously described as:

“**shift penalty**”; “**shift loading**”; “**shift allowance**”; and “**shift premium**”.

6.4 Casual employment*

6.4 (d) 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.

14.2 Shift penalties*

(a) Where an employee works a rostered afternoon shift between Monday and Friday, the employee will be paid a **loading** of 112.5% of their minimum hourly rate.

(b) Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a **loading** of 115% of their minimum hourly rate.

(c) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

(d) 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.

(e) The provisions of this clause will not apply to Registered nurse levels 4 and 5.

(f) Shift **allowances** for a casual employee will be calculated in accordance with clause 6.4(d).

15 Overtime Penalty Rates

15.1(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend **premiums** prescribed in clause 14—Shiftwork and clause 16—Saturday and Sunday work.

17.5 Annual leave loading

(b) a shiftworker will be paid the higher of:

(i) an annual leave loading of **17.5%** of ordinary pay; or

(ii) the weekend and shift **penalties** the employee would have received had they not been on leave during the relevant period.

18.6 Additional leave days by mutual agreement

(b) Payment for any days taken as leave, accrued in accordance with clause 18.6(a) will be at the employee's ordinary rate of pay, excluding shift and/or weekend **penalties** and annual leave loading.

CLAUSES CONTAINING “LOADING/S”

4. Award flexibility

4.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of, are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) **penalty** rates;

(d) **allowances**; and

(e) leave **loading**.

6.4 Casual employment

6.4 (b) casual **loading**

6.4 (b) (i) a **loading** of 25% of the minimum hourly rate

6.4 (b) (ii) The casual **loading** is paid instead of annual leave, paid person/carer's leave, notice of termination, redundancy benefits and other entitlements of full-time or part-time employment.

6.4 (d) 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.

14.2 Shift penalties

(a) Where an employee works a rostered afternoon shift between Monday and Friday, the employee will be paid a **loading** of 112.5% of their minimum hourly rate.

(b) Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a **loading** of 115% of their minimum hourly rate.

(c) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

(d) 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.

(e) The provisions of this clause will not apply to Registered nurse levels 4 and 5.

(f) Shift **allowances** for a casual employee will be calculated in accordance with clause 6.4(d).

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18.6 Additional leave days by mutual agreement

(b) Payment for any days taken as leave, accrued in accordance with clause 18.6(a) will be at the employee's ordinary rate of pay, excluding shift and/or weekend **penalties** and annual leave **loading**.

CLAUSES CONTAINING “PENALTY” and/or “PENALTIES”

4. Award flexibility

4.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of, are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) **penalty** rates;

(d) **allowances**; and

(e) leave **loading**.

6.4 Casual employment

(d) 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.

15.1 Overtime **penalty rates**

15.1 (b) Overtime **penalties** as prescribed in clause 15.1(a) do not apply to Registered nurse levels 4 and 5.

15.2 (b) The employee may take one hour of time off for each hour of overtime plus a period of time equivalent to the overtime **penalty** incurred.

Schedule B.1.1 Nursing Asst Full-time and part-time employees—ordinary and **penalty** rates

Schedule B.1.3 Nursing Asst Casual employees—ordinary and **penalty** rates

Schedule B.2.1 EN Full-time and part-time employees – ordinary and **penalty** rates

Schedule B.2.3 EN Casual employees—ordinary and **penalty** rates

Schedule B.3.1 RNs Full-time and part-time employees—ordinary and **penalty** rates

Schedule B.3.3 RNs Casual employees—ordinary and **penalty** rates

Schedule B.4.1 Nurse Prac. Full-time and part-time employees—ordinary and **penalty** rates

Schedule B.4.3 Nurse Prac. Casual employees—ordinary and **penalty** rates

Schedule B.5.1 Occupational Health Nurse Full-time and part-time employees—ordinary and **penalty** rates

Schedule B.5.3 Occupational Health Nurse Casual employees—ordinary and **penalty** rates

Schedule D – 2014 Part-day public holidays

D.1 (e) Excluding annualised salaried employees to whom clause D.1(f) applies, where an employee works any hours between 7.00 pm and midnight they will be entitled to the appropriate public holiday **penalty** rate (if any) in this award for those hours worked.

14.2 Shift **penalties**

14.2 (d) 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.

15.1 Overtime **penalty rates**

(b) Overtime **penalties** as prescribed in clause 15.1(a) do not apply to Registered nurse levels 4 and 5.

17.5 (a) (ii) the weekend and shift **penalties** the employee would have received had they not been on leave during the relevant period.

18.6 (b) Payment for any days taken as leave, accrued in accordance with clause 18.6(a) will be at the employee's ordinary rate of pay, excluding shift and/or weekend **penalties** and annual leave **loading**.

CLAUSES CONTAINING “**ALLOWANCE/S**”

6.4 (d) 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.

11 Allowances

Allowance/s is used correctly throughout clause 11 and there is no confusion

12.2 Higher duties **allowance** does not apply to Registered nurse levels 4 and 5.

14.2 (f) Shift **allowances** for a casual employee will be calculated in accordance with clause 6.4(d).

15.7 On call **allowance**

An employee who is required to be on call may be entitled to an **allowance** in accordance with clause 11.3.

Schedule C – Summary of Monetary Allowances

Allowance/s is used correctly throughout Schedule C and there is no confusion.