

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

21 July 2016

Re: AM2014/251 AWU reply submissions on drafting and technical issues raised in 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.¹
2. The Directions require the filing of submissions in reply to drafting and technical issues raised in Group 4A, B and C exposure drafts by 21 July 2016.
3. The following parties filed submissions on drafting and technical issues found in the exposure draft for the *Aged Care Award 2016* ('the Exposure Draft') as published on 19 May 2016:
 - Australian Workers' Union (**AWU**)
 - Health Services Union (**HSU**)
 - United Voice (**UV**)
 - Aged Care Employers (**ACE**)
 - Australian Business Industrial and the NSW Business Chamber (**ABI**)
 - Australian Industry Group (**AIG**)
4. The AWU's submissions in reply appear below.

REPLY SUBMISSIONS

Health Services Union

5. The AWU agree with the following Exposure Draft submissions of the HSU without need for further comment:
 - 5.1. Clause 2 [paragraphs 8-9]: regarding the placement of defined terms.

¹ [2016] FWC 2924.

- 5.2. Clause 2 and 18.2(a) [paragraph 16]: for the definition of 'casual ordinary hourly rate' to be deleted. This is consistent with paragraph [4] of our 06 July 2016 Exposure Draft Submission.
- 5.3. Allowances and wages tables [paragraphs 13-15]: regarding further signage in tables throughout the Exposure Draft. This is particularly helpful for tables containing both dollar and percentage amounts.
- 5.4. Clause 3.3: [paragraph 17]: regarding copies of the award and the NES – for the wording in the current *Aged Care Award 2010* ('the Award') to be retained.
- 5.5. Clause 17.5(f)(ii) [paragraph 18] for the cross-referencing error to be corrected.
- 5.6. Clause 17.6(a) [paragraph 19]: regarding the payment of wages being 'no later than pay day' – for this wording in the current Award to be retained.
- 5.7. Clause 18.3(d)(i) [paragraph 20]: regarding the motor vehicle allowance – for the wording 'not less than' in the current Award to be retained.
- 5.8. Clause 18.3(d)(iii) [paragraphs 21-22]: that the wording in the Exposure Draft potentially disentitles employees from the reimbursement altogether – and for the wording in the current Award to be retained.
- 5.9. Clause 13.2 [paragraphs 23-26]: for the placement of clause 22.2(b) of the current Award (the ordinary hours for shiftworkers) to be returned to the appropriate 'Span of hours' – clause 13.2 of the Exposure Draft.
- 5.10. Clause 15.5 [paragraphs 31-33]: regarding the rostering of sleepovers before and after shifts – for the wording 'and/or' in the current Award to be retained.
- 5.11. Clause 15.7 [paragraphs 34-36]: regarding the entitlement to overtime/release 'after completion of such work' – for this wording in the current Award to be retained.
- 5.12. Clause 21 [paragraphs 38-41]: regarding the language and appropriate span of hours for shiftworkers.
- 5.13. Clause 23.2(a)(i) and 23.2(b) [paragraphs 43-45]: regarding these annual leave provisions – for the wording 'and/or' in the current Award to be retained.
- 5.14. Clause 26.2(e) [paragraph 45]: for the Public Holidays provisions to cross-reference to the schedules setting out shift and weekend rates.

- 5.15. Clause 11.1 [paragraph s 46-47]: to delete the reference to 'fixed term'. The AWU made the same submission at paragraph [8] of our 06 July 2016 Submission.
- 5.16. Clause 7.2 [paragraphs 52-53]: regarding the incomplete table of facilitative provisions.
- 5.17. Clause 12 [paragraph 54]: regarding the HSU's proposed wording to improve the temporal logic at this clause.
- 5.18. Clause 17.1[paragraphs 55-57]: regarding an introductory sentence at the minimum wages table.
6. Clause 2 [paragraph 12]: The AWU agree that the 'ordinary hourly rate' should include a reference to the employee's Level as well as their Classification, and support the wording suggested by the HSU. At paragraph [5] of our 06 July 2016 Submission we had erroneously suggested an employee's 'Grade' also be referenced. We withdraw this aspect of our submission, as an employee's 'Grade' is not a structural term for the purposes of calculating the ordinary hourly rate. This brings our submission into line with the HSU's submission.
 - 6.1. The AWU had also suggested the term 'minimum hourly rate' be inserted into this Award at paragraph [5] of our 06 July 2016 Submission. This is necessary given that the all-purpose allowance in this award does not apply to all employees. We also note that rates of pay set out at Schedule B are based on the minimum hourly rate.
7. Clauses 14.4(c) and 30 [paragraphs 27-30]: The AWU agrees that the reference to clause 30 at clause 14.4(c) is misleading, and creates an unintended consultation burden for a temporary roster change. Clause 30 contemplates changes to an employee's 'regular roster', whereas clause 14.4(c) is a about changes to 'a [single] roster'.
8. Clause 17.7 [paragraph 37]: The AWU support the wording and paragraph structure put forward by the HSU in regards to higher duties, but suggest the proposed wording continue to refer to a 'higher wage rate' rather than a 'higher duties allowance'. We do not consider this entitlement to be an allowance.
9. Clause 23.2(a)(ii) [paragraphs 48-51]: The HSU does not consider it necessary to include a period within which to count the ten or more weekends for the purposes of allocating additional leave for shiftworkers. The AWU does not have a strong preference, but does see the merit of including a time period of 12 months as the Commission has suggested by way of example.

United Voice

10. The AWU agree with the following Exposure Draft submissions of UV without need for further comment:
 - 10.1. Clause 3.3 [paragraph 3]: as above at paragraph 5.4.
 - 10.2. Clause 2 [paragraph 16]: as above at paragraph 5.2.
 - 10.3. Clause 14.4 [paragraphs 19-20]: in regards to the deletion of the reference to 'relieving staff'.
 - 10.4. Clause 15.7 [paragraph 21]: as above at paragraph 5.11.
 - 10.5. Clause 17.6(a) [paragraph 22]: as above at paragraph 5.6.
 - 10.6. Clause 18.3(a)(i) [paragraph 23]: regarding UV's proposed wording for this clause.
 - 10.7. Clause 23.2 [paragraphs 27-29]: UV confirms 12 months is the correct period to calculate the '10 or more weekends' should the Commission decide to clarify this point (our emphasis) – see above at paragraph 9.
 - 10.8. Clause 21.2 [paragraphs 24-26]: regarding the language used to describe the span of hours for shiftwork – that the wording in the current Award should be retained. This is consistent with the HSU's preference as above at paragraph 5.12.
11. Clause 2 [page 2, paragraphs 1-5]: The wording proposed by UV for the definitions of 'ordinary hourly rate' and 'minimum hourly rate' includes reference to an employees 'grade', however this is unnecessary as explained above at paragraph 6.
12. Clause 2 [paragraph 17]: UV suggests the definition of 'all purposes' is deleted at clause 2 as it is repeated at clause 18.2—Wage related allowances. The AWU prefer the term is defined at clause 2 due to the importance of the definition and potential use in relation to the casual loading. We have suggested in our 06 July 2016 submission that the casual loading be referred to as payable for 'all purposes' at clause 11.2. The issue of repetition could instead be rectified at clause 18.2 by deleting subclause (a) and including at subclause (b) as follows:

~~(a) **All purpose allowances**~~

~~Allowances paid for **all purposes** are 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 annual leave. The~~

~~leading hand allowance (clause 18.2(b)) is paid for all purposes under this award.~~

(b) Leading hand allowance

~~(x) The leading hand allowance (clause 18.2(b)) is paid for all purposes under this award.~~

(i) A leading hand is an employee whose classification does not include supervisory responsibility and who is placed in charge of two or more employees of a substantially similar classification.

(ii) A leading hand will be paid a weekly allowance, based on the number of...

~~(iii) This allowance will be part of salary for all purposes of this award forms part of the employee's ordinary hourly rate.~~

In considering the above changes, the AWU also suggest the Leading Hand Allowance should additionally be expressed as an hourly rate. This reflects that it will form a component of the ordinary hourly rate, applies on a pro rata basis and encourages its correct use when calculating other entitlements that may only attach to a portion of an employee's weekly hours (such as payment of overtime or penalty rates).

13. Clause 11 [paragraph 18]: UV suggests the insertion of a fixed-term provision and have proposed wording. The AWU's preliminary position as set out in our 06 July 2016 Submission was to simply remove the reference to 'fixed term' at clause 11. Having considered UV's Submission, we say we do not have a strong opinion in relation to this issue, but note the limited function of such a provision given that no other clause in the award would relate to a fixed-term employee. If the term were introduced, we would ask whether all categories of employment should be included in the definition, as opposed to only casual employees.

Aged Care Employers

14. The AWU agree with the following Exposure Draft submissions of ACE without need for further comment:
- 14.1. Clause 2 [paragraph 5]: as above at paragraph 5.2.
 - 14.2. Clause 15.5 [paragraph 7]: as above at paragraph 5.10.
 - 14.3. Clause 21.2 [paragraph]: as above at paragraphs 5.12 and 10.8.
 - 14.4. Clauses 23.2(a)(i) and 23.2(b) [paragraphs 10 and 11]: as above at paragraphs 5.13 and 10.7 – ACE prefers the word 'and' is retained in the Exposure Draft at these subclauses.

- 14.5. Clause 11.1 [paragraph 12]: as above at paragraphs 5.15 and 13 – ACE submit it is not necessary to include a definition of ‘fixed term employee’.
15. Clause 2 [paragraph 4]: ACE suggests the definition of ‘all purposes’ be deleted and utilised only at clause 18.2(b). The AWU disagree as above at paragraph 12.
16. Clause 2 [paragraph 6]: Taking into account this Award has only one all purpose allowance, ACE have proposed revised wording for the definition of ‘ordinary hourly rate’ as follows:

ordinary hourly rate means the hourly rate for the employee’s classification specified in clause 17, plus ~~any allowances specified as being included in the employee’s ordinary hourly rate or payable for all purposes [the Leading Hand Allowance specified in clause 18.2(a) if applicable].~~

The AWU are satisfied with this amendment provided it is clear at clause 17 that the leading allowance is: 1) paid for all purposes; and 2) forms part of the ordinary hourly rate. The suggestions we have made above at paragraph 12 would support ACE’s amendment in providing overall clarity between the clauses, and would satisfy our concerns over the loss of key language in the original definition at clause 2.

17. Clause 18.2 [paragraph 8]: ACE proposes the title ‘all purpose allowances’ be removed, and instead rely on the title ‘Leading hand allowance’. The AWU Agree with this course of action, but note that ACE also advocate for the deletion of the definition ‘all purposes’ at clause 2, where we would prefer it stays. ACE have also provided replacement wording for clause 18.2(a)(iii). The AWU agree the phrase at subclause (iii) should be addressed, and refer to our suggestions above at paragraph 12.
18. Clause 23.2(a)(ii) [paragraph 13]: We agree that 12 months is the intended calculation period for the purposes of ‘additional leave for shift workers’ – see above at paragraph 9. The AWU are not opposed to the wording put forward by ACE in order to reflect this.

Australian Business Industrial and the New South Wales Business Chamber

19. Clause 11.1 [paragraph 4.1]: as above at paragraphs 5.15 and 13 – we agree with ABI that it is not necessary to include a definition of ‘fixed term employee’.
20. Clause 11.3. [paragraph 4.2]: We agree, the words ‘part time’ are missing from this clause.

21. Clause 23.2 [paragraph 4.3]: We agree that 12 months is the intended calculation period for the purposes of 'additional leave for shift workers'. See above at paragraph 9.

Australian Industry Group

22. The AWU agree with the following Exposure Draft submissions of the AIG without need for further comment:
- 22.1. Clause 2 [paragraph 75]: as above at paragraph 5.2.
- 22.2. Clause 11.1(a) [paragraphs 76-78]: that the wording 'as such' featured in the current Award should be retained in the Exposure Draft.
- 22.3. Clause 15.3(a) [paragraphs 79-80]: regarding the span of hours for a sleepover – that the wording in the current Award should be retained.
- 22.4. Clause 15.5(a) [paragraphs 84-85]: regarding when a sleepover 'may' be rostered – that the word 'may' in the current Award is retained. We note that the word 'must' appears at clause 15.5 of the Exposure Draft published on 19 May 2016, but not in the Award / Exposure Draft comparison document published on 17 May 2016 – which retains the word 'may' in line with AIG's preference.
- 22.5. Clause 15.7(a) [paragraphs 86-87]: that the drafting errors be corrected to read 'receive' and 'off'.
- 22.6. Clauses 15.7(a)(ii) and 15.7(b)(ii) [paragraphs 88-91]: regarding breaks between shifts – that the words 'without loss of pay' as they appear in the current Award be retained at both these subclauses.
- 22.7. Clause 16.1(a) [paragraphs 92-93]: regarding the length of a meal break – that the wording 'not less than 30 minutes and not more than 60 minutes' in the current Award be retained.
- 22.8. Clause 17.5(f)(ii) [paragraph 99]: that the navigation error be corrected to refer instead to Schedule E – School-based apprentices.
- 22.9. Clause 18.3(a)(i) [paragraphs 112-114]: in regards to the placement of the phrase 'appropriate to the occupation'.
- 22.10. Clause 18.3(a)(ii) [paragraphs 115-116]: regarding duplication of the requirement for the employer to launder uniforms free of charge.
- 22.11. Clause 20.3 [paragraphs 121-123]: that this clause refer to clause 20.2 in addition to 20.1 given the original clause at 23.1 in the current Award comprised both Exposure Draft clauses 20.1 and 20.1 together.

- 22.12. Clauses 22.2(a) and 22.2(b) [paragraphs 124-129]: regarding wording to the preamble to these clause – to ensure payment of overtime for part-time and casual employees only attaches to those hours worked in excess of ordinary hours.
- 22.13. Clause 22.4(a) [paragraphs 130-131]: that the reference to ‘any day or shift’ be retained in the Exposure Draft.
- 22.14. Clause 22.4(a)(ii) [paragraphs 132-134]: for the words ‘ordinary working time’ to be replaced with ‘rostered ordinary hours’ – consistent with the wording in the current Award.
- 22.15. Clause 22.4(b)(ii) [paragraphs 135-137]: for the terms ‘without loss of pay’ and ‘rostered ordinary hours’ and the wording regarding ‘absence’ in the current Award – to be retained in the Exposure Draft.
- 22.16. Clause 22.6(d) [paragraphs 141-143]: in regards to when the meal allowance is paid rather than a meal provided – that the entire wording at clause 25.1(f)(ii) in the current Award replaces clause 22.6(d) of the Exposure Draft.
- 22.17. Clause 26.3(c) [paragraph 147]: that the typographical error be corrected to read ‘additional’.
- 22.18. Schedule B.1.1 [paragraph 153]: that the definition of ‘ordinary hourly rate’ be consistent with the definition at clause 2 of the Exposure Draft. In regards to the definition to be used, the AWU support the definition put forward by the HSU, as above at paragraph 6.
- 22.19. Schedule B.2.1 and B.3.1 [paragraphs 154 and 156]: that the correct penalty rate for full-time, part-time, and casual employees on Sundays is 175% rather than 200%.
- 22.20. Schedule B.2.2 and B.3.2 [paragraphs 155 and 157]: that the descriptions of shiftwork at row 2 of these tables reflect clauses 21.2(a)(i) – 21.2(a)(iv) of the Exposure Draft.
- 22.21. Schedule B.4.2, B.4.5, B.4.8 and B.5.2 [paragraphs 158, 160, 162 and 166]: regarding the inclusion of matching descriptors for ‘afternoon shift’ and ‘night shift’ as appears in Tables B.2.2 and B.3.2.
- 22.22. Schedule B.4.2, B.4.5, B.4.8 and B.5.2 [paragraphs 159, 161, 163 and 167]: that the rates payable for ordinary hours in columns 4-6 (Saturdays, Sundays and Public holidays) at each of these tables be included in the preceding respective tables titled variously ‘...ordinary and penalty rates’ – as is organisationally consistent with Tables B.2.1 and B.3.1.

- 22.23. Schedule B.5 [paragraph 164]: that the text in the schedule does not reflect clause 17.4.
- 22.24. Schedule B.5.1 - B.5.3 [paragraph 165]: that the information provided in these three tables in regards to apprentice rates is incomplete.
23. Clause 17.4(d) [paragraphs 94-96]: AIG are concerned that the disaggregation of the current clause 17.4(c) has resulted in some ambiguity at clause 17.4(d) of the Exposure Draft. The AWU agree, but can appreciate that the Exposure Draft improves upon what was a very long paragraph in the current Award. In order to resolve this issue, the AWU instead suggest the words *'with that same employer'*, or words to similar effect complete clause 17.4(d).
24. Clause 17.5(f) [paragraphs 97-98]: The AWU agree that the new heading 'Attendance at block release training' at this clause is inaccurate as these clauses refer to 'any training...' However, there is some sense in referring to the three subclauses (i) – (iii) as being about 'attendance', notwithstanding that subclause (iii) is also about performance of overtime by apprentices. The deletion of the new heading as proposed by AIG will bring clause 17.5(f) under the heading 'reduction in payment for block release training' which is also inaccurate. We suggest a new heading be agreed upon between the parties.
25. Clause 18.2(b)(i) [paragraphs 100-102]: AIG are concerned the word 'denotes' has been removed in the Exposure Draft, thereby changing the threshold for employee's excluded from the leading hand allowance. The AWU disagree that the threshold in application changes, and approve of the amendment in the Exposure Draft for the following reasons:
- 25.1. The type of employee that is not entitled to the leading hand allowance is one that has supervisory responsibility and is presumably already remunerated for that responsibility. For this reason, the removal of the word 'denotes' serves to more accurately reflect the intention of the clause. An employee with duties under a classification that merely 'denotes' supervisory responsibility might not be remunerated for those duties, and these employees are not the target for exclusion from the allowance.
- 25.2. Put another way, being 'in charge of two or more employees' clearly creates (not denotes) supervisory responsibility, and this should be remunerated for – either with the leading hand allowance, or with an employee's existing wages. The AWU submit that the drafting team for the Exposure Draft have better captured the likelihood that an employee's wages will account for the supervisory duties discussed here by removing the word 'denotes'.

26. Clause 18.2(b)(iv) [paragraphs 103-105]: AIG prefer the wording in the current Award as the term 'pro rata' utilised in the Exposure Draft does not allow an averaging of the number of hours worked each week. We disagree, and consider the allowance being paid on a 'pro rata basis' is clear, and clearer than the lengthy and out-dated wording at clause 15.3(d) of the current Award. Payment of entitlements on a 'pro rata basis' is typical in the work place. The language, and the application of the term is well-established to mean 'proportionate'. The intention of clause 18.2(b)(iv) is to enable the leading hand allowance to be calculated in 'proportion' to what a full-time employee would receive, taking into account the number of hours an employee works. We see the wording in the Exposure Draft as enabling this function.
27. Clause 18.2(c)(i) [paragraphs 106-108]: The AWU are not sure how the wording 'per hour or part hour' could substantively change the entitlement to the nauseous allowance, but do not oppose AIG's submission that the wording in the current Award 'per hour or part thereof' be retained.
28. Clause 18.2(c)(ii) [paragraphs 109-111]: AIG have suggested that the Exposure Draft wording leaves open the construction that the nauseous work allowance could apply perpetually if nauseous work was performed 'at any point in time'. The AWU doubts that would be the case, but is not opposed to the wording 'for work performed in any week' in the current Award to be retained.
29. Clause 18.3(a)(iii) [paragraph 117]: Again, the AWU are not sure how the wording 'per shift or part shift' substantively differs from the wording 'per shift or part thereof' in relation to the uniform allowance, but do not oppose the AIG's preference for the latter.
30. Clause 18.3(a)(iv) [paragraphs 118-119]: The AWU disagree that the terms as set out at this clause in the Exposure Draft are a substantive change as claimed by AIG. The laundry allowance in the current Award at clause 15.2(c) is payable 'where such employee's uniforms are not laundered by or at the expense of the employer'. The Award does not appear to discriminate between whether the employer provided the 'uniform'; or whether the employee provided the 'uniform' and instead received a uniform allowance. The AWU considers the Exposure Draft reflects the existing clause, and does not accept the illogical construction put forward by AIG. The purpose of these allowances is clearly to ensure the provision *and* maintenance of uniforms is 'free of cost' to the employee. This is in fact explicitly stated.
31. Clause 18.3(a)(iv) [paragraph 120]: Again, the AWU are not opposed, but are not concerned with the issue noted by AIG regarding the wording 'part shift' versus 'part thereof'.
32. Clause 22.5(a) [paragraphs 138-140]: The AWU does not consider there is any risk as raised by AIG. We are not sure in what circumstances an

employee 'recalled' would be illegitimately paid under clause 22.5 of the Exposure Draft. Having said that, we are not opposed to the word 'so' being re-inserted to read 'so recalled' as appears in the current Award.

33. Clause 26.3(c) [paragraphs 144-146]: We disagree that the public holiday rate should be expressed as the 'total rate' at this clause. The use of the term 'ordinary hourly rate' is appropriate given the all-purpose allowance in this award, and is consistent with the language throughout the Exposure Draft, and consistent with the comparable clause 26.2 for full-time and part-time employees. Subclauses 26(b) and (c) already ensure the public holiday rate for casual employees is paid instead of the casual loading or any additional shift or weekend work. It is repetitive and out-dated to use the term 'total rate'.

34. Schedule B [paragraphs 148-152]: AIG have raised the valid point that the minimum hourly rates set out at tables B.2.1, B.2.2, B.3.1, and B.3.2 erroneously refer to those rates as the 'ordinary hourly rate'. The all-purpose 'leading hand allowance' at clause 18.2(b) is not built into the rates at these tables. The AWU would support the suggestion that the second row at these tables should read '*% of ordinary [minimum] hourly rate*' but short of actually setting out the ordinary hourly rates – some reference to the all-purpose allowance is necessary at each table. A reader that approaches the Schedule first, rather than the body of the Award should be able to navigate to the applicable clauses in order to calculate the correct rate.

END



Roushan Walsh
NATIONAL LEGAL OFFICER