SUBMISSION TO
FAIR WORK COMMISSION

Matter No:

AM2016/31

4 YEALY REVIEW OF MODERN AWARDS

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD (MA000027) AM2014/204

MARCH 2018

SUBMISSION IN REPLY

SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS

Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Tasmania
Australian Private Hospitals Association – Victoria
Catholic Health Australia
Day Hospitals Australia
Private Hospitals Association of Queensland
Private Hospitals Association of New South Wales
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PARTIES TO THIS SUBMISSION

[1] This submission is being lodged on behalf of the Private Hospital Industry Employers' Associations (PHIEA) which includes: Australian Private Hospitals Association (APHA), the Private Hospitals Association of Queensland (PHAQ), APHA – South Australia, APHA – Tasmania; APHA – Victoria, Private Hospitals Association of New South Wales, Private Hospitals Association of Western Australia, Catholic Health Australia and Day Hospitals 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.

[2] This submission is being lodged in response to claims to vary a number of provisions within the *Health Professionals & Support Services Award 2010* (the HPSS Award) but primarily relate to the proposals advanced by the Health Services Union (HSU).

PHIEA relies on its previous written submission dated May 2017 and oral submissions of 11th December 2017. We note that the clause numbering referred to in this submission reflects the latest Exposure Draft of the HPSS Award published by the Fair Work Commission on 10 November 2017.

[3] In private hospitals that provide care for patients 24/7, the majority of employees work a variety of shifts that may be worked on day, afternoon or night shifts over 7 days of the week. Therefore, the majority of employees meet the definition of a shift worker under this award as they are not usually rostered to work their ordinary hours Monday to Friday between 6.00 a.m. and 6 p.m. which is the span of hours that currently defines a day worker.

[4] The term *day worker* was not common in the majority of previous awards applicable to private hospitals and we consider that in the context of a 24/7 operating environment, use of this term has generated ambiguity and confusion, particularly in regard to shift and weekend penalty payments.

[5] Historically, private hospitals have rostered ordinary hours 24/7 and have paid anyone who worked afternoon or night shift Monday to Friday, a penalty in addition to their ordinary rate.

A weekend penalty was paid to anyone who worked ordinary hours on the weekend traditionally this weekend penalty rate was around 50%.

However, on a literal reading of the existing Health Professionals and Support Services Award:

- Only shift workers receive an extra 15% when working ordinary hours during the periods identified in *Clause 18.4 Shiftwork* (Revised Exposure Draft 10/11/17).

- Only day workers under this award are eligible to be paid an additional 50% loading when they work between midnight Friday and midnight Sunday *(Clause 18.1 – weekend penalties day worker)* (Revised Exposure Draft 10/11/17).
- Shift workers are not eligible to receive the weekend penalty and if their ordinary hours are rostered during the traditional day shift on a Saturday or Sunday i.e. outside of the hours identified in Clause 18.4 Shiftwork, the shift worker is not eligible to receive the 15% shift penalty either. (10/11/17)

[6] In PHIEA's view, the current provisions as they apply to shift workers in 24/7 entities is contrary to the modern awards objective 1 (da) noted below:

1 (da)

The need to provide additional remuneration for:

(i) *Employees working overtime; or*
(ii) *Employees working unsocial, irregular or unpredictable hours; or*
(iii) *Employees working on weekends or public holidays; or*
(iv) *Employees working shifts*

[7] As noted in paragraph [5] of the HSU submissions of 12 February 2018, since the hearing before the Full Bench on 11 & 12 December 2017, there has been ongoing dialogue between PHIEA and HSU regarding the span of hours and related clauses and in particular some proposed amendments which would address the current anomalies and ensure that employees engaged in an entity operating 24/7, receive the appropriate shift and weekend penalties.

In paragraph [5], the HSU notes that it has contended for consolidation of all spans of hours into a single span, but as an alternative would consider two spans – one to cover private practices of all types and the other to cover most health sector workplaces, including hospitals.

[8] Should the Full Bench decide to leave the existing multiple private practice span of hours provisions unchanged, PHIEA would urge the Commission to address the anomalies which exist with the current provisions in respect to shiftworkers working in a 24/7 entity.

[9] PHIEA makes no comment regarding the private practice span of hours proposal contained within the HSU draft determination on page 17 of its submissions of 12 February 2018 – confining our comments to the draft determination as it would apply to workers employed in a 24/7 entity.

[10] COMMENT ON HSU DRAFT DETERMINATION CONTAINED WITHIN ITS SUBMISSIONS OF 12 FEBRUARY 2018

[1] *Delete clause 8.1 and 8.2 (a) and replace as under:*

8. Ordinary hours of work and rostering

8.1 Ordinary Hours

(a) *The ordinary hour of work for a full-time employee will be:*
(i) 38 hours per week; or
(ii) 76 per fortnight; or
(iii) 152 hours over 28 days

(b) *The shift length of ordinary hours of work per day will be a maximum of 10 hours exclusive of meal breaks*

(c) *The hours of work will be continuous, except for meal breaks. Except for the regular changeover of shifts, an employee will not be required to work more than one shift in each 24 hours.**

PHIEA agrees with the changes proposed by the HSU for clauses 8.1 (a) and (b) but rejects the HSU claim in relation to 8.1 (c) (noted in red above) for the reasons articulated below.

[11] Split Shifts

As noted in paragraph 46 of its submissions, the HSU notes that

[46] *'during the course of these proceedings it became clear that there is some disagreement between parties as to whether split shifts are allowable under the HPSS Award. It is the HSU's view that split shifts are not allowable under the Award…….The HPSS Award has no provisions for split shifts, except that the word 'continuous' is absent from the span of hours clause.*

[47] *Our proposed variation seeks to make it clear that employers cannot roster employees on split shifts by providing that the hours of work are 'continuous.'*

During the making of the Modern Awards, the HSU submitted its draft *Health and Medical Services Industry Award 2010* (dated 31/10/2008) *(H&MSI Award)*

Clause 20.2 of this proposed H&MSI Award stated that:

> *With the exception of a meal interval and one additional break, if same is required by the employer, the work of each shift shall be continuous.*

PHIEA is of the view that this provision was canvassed during the making of the modern award but that the AIRC Full Bench declined to include such a clause in the HP&SS Award 2010.

[12] In contrast, again during the making of the Modern Awards, in October 2008 the ANF *(as known at the time)* submitted its *Exemplar Nursing Occupational Award* which contained the following clause:

> *Part 5 – Hours of work and related matters*
>
> *X. Ordinary hours of work*
>
> *x.2 Except for meal breaks, the hours of work on any day will be continuous.*
>
> In a footnote the ANF noted that NSW awards contained provisions for split shifts in some circumstances

Significantly, in considering the Nurses Award, the Full Bench decided to include a requirement that the hours of work will be continuous except for meal breaks, as this reflected the historical requirement in most nursing awards, except the NSW Awards.

[13] It appears the HSU has simply copied clause 8.1 (c) from the Nurses Award. However, unlike nurses working in private hospitals, who tend to be rostered on average 8 hour shifts, and who have consistent demands on their time throughout that shift, support services staff in the Food Services Department for example, have peak periods in the build up to meal times and during the delivery and collection of meal trays. Some employees, particularly those who live close to the hospital, do work split shifts, for example 4 hours in the morning over the breakfast period and 4 hours in the afternoon, to cover the evening meal period. For some employees, the ability to work split shifts enables them to balance their work and family responsibilities and this is a valued flexibility.

[14] PHIEA is of the view that including proposed clause 8.1 (c) as advanced by the HSU may be contrary to the Modern Awards Objective *1 (c) the need to promote social inclusion through increased workforce participation*, as for some support services personnel, particularly those who live in close proximity to their workplace, precluding the ability to work split shifts may deny them the opportunity to maximise their workforce participation.

[15] Unlike the former nursing awards, the awards covering health professionals and support services were significantly less homogenous and therefore PHIEA believes the AIRC Full Bench made the decision not to include a requirement for hours of work to be continuous.

The HSU has not provided a merit based argument nor any evidence to support this substantive change to include a new clause in the HP&SS Award. PHIEA does not support its inclusion as written and considers this element of the claim should be rejected.

[16] [2] Delete Clause 8.2 (b) – (e) and replace as follows:

8.2 Span of hours – private practice

(a) In addition to the above, the ordinary hours of work for a worker in private practice are between:

(i) 7.00 am – 7:00 pm Monday to Friday

(ii) 7.00 am – 12.00 pm Saturday

PHIEA makes no comment in relation to this element of the HSU Draft Determination

Penalty Rates and Shift Work

[17] [3] Delete Clauses 18.1, 18.2 and 18.4 and replace as follows:

18.0 Penalty Rates and Shiftwork

18.1 Weekend penalties

(a) For all ordinary hours worked between midnight Friday and midnight Sunday, a full time or part time employee will be paid 150% of the minimum hourly rate applicable to their classification and pay point.

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

18.2 Public holidays

Payment for public holidays is in accordance with clause 23.1

18.3 Shift work penalties

(a) For the purposes of this clause:

(i) Afternoon shift means any shift commencing on or after 12:00 noon and finishing after 6:00 pm on the same day; and

(ii) Night Shift means any shift commencing on or after 6:00 pm and finishing before 7:30 am on the following day.

(b) Shift penalties

(i) Where a full time or part time employee works a rostered afternoon shift between Monday and Friday, the employee will be paid 112.5% of their minimum hourly rate.

(ii) Where a full time or part time employee works a rostered night shift between Monday and Friday the employee will be paid 115% of their minimum hourly rate.

(iii) A casual employee who works a rostered afternoon shift between Monday and Friday will be paid 137.5% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(iv) A casual employee who works a rostered night shift between Monday and Friday will be paid 140% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(v) The provisions of this clause do not apply where any employee commences their ordinary hours of work after 12:00 noon and completes those hours at or before 6:00 pm on that day.

(vi) The shift penalties prescribed in this clause will not apply to shift work performed by any employee on Saturday, Sunday or public holidays were the extra payment prescribed by clause 18.1 Weekend Penalties work and clause 23 Public holidays applies.

[18] **PHIEA makes no comment in relation to the proposal to delete existing clause 18.2 of the Exposure Draft – Weekend work in Private Medical Imaging seven-day practice; however does support the proposal in respect of revised wording for 18.1 and existing clause 18.4 (renumbered 18.3 in the HSU's submission - 12 February 2018) as reproduced above.**

It should be noted that there is a discrepancy in the numbering between the text outlined in paragraphs [62] and [65] on pages 13-14 of the HSU submission dated 12 February 2018.

Paragraph [62] states *Amend clause 18.4 shiftwork penalties and renumber as 18.3; Renumber clause 18.3 Public Holidays as 18.2.* However, in the draft determination attached to the HSU submission, there is no reference to the Public Holidays clause and existing clause 18.4 – shiftwork penalties, has been numbered 18.2 rather than 18.3 as per the text in paragraph [65]

Overtime for Casuals (19.2. (d)

Delete the following words in sub-clause 19.2 [d] and the casual loading in clause 6.4 (e)

[19] In paragraph 74 of its February 2018 submission, which relates to clause 19.2 (d) overtime for casuals, the HSU states:

> *"The HSU has not agreed to any such amendment and opposes the adoption of the clause 19.2 (d) as it appears in the Exposure Draft."*

With respect, this statement from the HSU is fundamentally incorrect.

[20] As members of the Full Bench would be aware, a number of Commission facilitated conferences were held before Commissioner Roe during 2015 and 2016 – reports from which are listed on the FWC website. The aim of these conferences was to attempt to minimise the number of substantive issues which would need to be referred to the Full Bench for resolution.

One issue which was resolved as a consequence of these conferences and subsequent discussions between the parties was the issue of overtime; when it should be paid and the rate of remuneration.

In Commissioner Roe's report dated 30 October 2015, he noted on page 3:

> *[26] Confirmed that the issue of whether or not the overtime clause applies to casuals and whether or not each day stands alone for overtime are substantive issues which are disputed. Parties agreed to discuss further and report back within 14 days if there is any prospect of consensus.*

In accordance with the above, the parties duly held further discussions and agreement was reached regarding a proposed revised overtime clause.

[21] On behalf of the parties, on 18 November 2015 (uploaded to FWC website on 4/12/2015), the HSU lodged a submission to the Fair Work Commission (copy attached) in matter number AM2014/204, signed by Leigh Svendsen, Senior National Industrial Officer which confirmed that the parties had agreed to a revised overtime clause.

An extract from the HSU submission dated 18/11/2015 is reproduced below:

> *Overtime*
>
> *2. The HSU has had several discussions with both employer parties and other union parties to the current proceedings concerning appropriate wording for the overtime clause with a view to clarifying overtime entitlement for casual employees.*
>
> *3. Following these discussions* ***the parties provide the following agreed clause to the Commission*** *(emphasis added)*
>
> *19.1 Overtime is paid in the following circumstances:*
>
> *a) Where a full time employee:*
> *(i) works in excess of their ordinary hours;*
> *(ii) works in excess of 10 hours per shift;*
>
> *b) Where a part time employee:*
> *(i) works in excess of their ordinary hours, except where agreement has been reached in accordance with clauses 6.3(c); and/or*
> *(ii) works in excess of 10 hours per shift; and/or*
> *(iii) works in excess of an average of 38 hours per week in a fortnight or four week period.*
>
> *c) Where a casual employee:*
> *(i) works in excess of 10 hours per shift; and/or*
> *(ii) works in excess of 38 hours per week or 76 hours in a fortnight .*
>
> *d) Where an employee is deprived of part of their break between shifts as required by clause 19.3 (renumber existing 19.2 to 19.3).*

19.2 An employee who works overtime shall be paid the following rates based on the minimum hourly rate for their employment classification:

a) Monday to Saturday - 150% for the first two hours and 200% thereafter;
b) Sunday - 200%;
c) Public Holidays - 250%;
d) Overtime rates under this clause will be in substitution for and not cumulative upon the penalties and loadings prescribed in clause 18 - Penalty rates and Shiftwork and the casual loading in clause 6.4(e)

[22] The following extract from a Full Bench decision issued on 10 October 2016 [2016] FWCFB 7254 confirms the decision to adopt the agreed changes as set out in the Commissioner's reports as under:

2.7 Health Professionals and Support Services Award 2010

[98] We propose to adopt all of the agreed changes set out in the Commissioner's reports, which are reflected in the revised exposure draft published on the Commission's website on 4 December 2015

[23] As evidenced by the various extracts noted, it is apparent that the HSU did agree to the changes which are contained in the current Exposure Draft and specifically in relation to clause 19.2 (d) which specifies that overtime rates under this clause will be in substitution for and not cumulative upon the penalties and loadings prescribed in clause 18 - Penalty rates and Shiftwork and the casual loading in clause 6.4 (e).

[24] In paragraph [75] of its submission, the HSU states that it considers that casual loading is payable as well as overtime rates and sites the Penalty Rates decision [2017] FWCFB 1001 (Penalty Rates Decision) as justification for its position that casuals working overtime should also receive casual loading.

In paragraph [78] the HSU states that the Full Bench indicated support for the 'default approach' suggested by the Productivity Commission whereby the *'rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.*

[25] PHIEA disagrees with the HSU's assessment and considers that the comment has been taken out of context. When reviewing the relevant paragraphs noted below it is clearly apparent that the discussion is confined to penalty rates for weekend work – there is no mention of overtime.

[334] *The Productivity Commission recommended that modern awards be amended to ensure that casual loadings are applied to penalty rates in the same way across all awards. It stated:*

'For neutrality of treatment, the casual loading should be added to the penalty rate of a permanent employee when calculating the premium rate of pay over the basic wage rate for weekend work. This would make an employer indifferent, at the margin,

between hiring a permanent employee over a casual employee. It would also be consistent with the desirability of 'equal pay for equal' work.'

[335] *The PC Final Report sets out the three methods currently used for determining the rate of pay for casual employees in the modern awards relevant to the penalty rates case. Each method arrives at a different rate of pay for casual employees during times when weekend penalty rates apply. The methods are set out below.*

- *the 'default' approach where the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees;*
- *casual loading applies to the rate of pay once penalty rates are applied to the ordinary/base wage; and*
- *in some instances, casual employees do not receive a loading as well as the penalty rate, so their rate of pay on weekends is the same as permanent employees.*

[337] *The PC Final Report argued that, in order for employers to be indifferent or neutral (at the margin) in choosing between a permanent and casual employee, 208 the 'default' method should be preferred. As we observe later, the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer's leave, notice of termination and redundancy benefits.*

[338] *For our part we would observe that the 'default' approach is also consistent with one of the considerations we are required to take into account in determining whether a modern award satisfies the modern awards objective, in that it provides a casual loading that is simple and easy to understand, consistent with s.134 (1)(g) of the FW Act.*

[26] In paragraph [77] the HSU maintains that when the health related awards were created, the FWC intended casuals to be paid overtime and casual loading and quotes the following paragraph from the *Award Modernisation Decision [2009] AIRCFB 345*.

> *Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.*

In PHIEA's opinion, the point being discussed in this decision was the formula to apply when a penalty applied to a casual employee and not, as the HSU maintains, confirmation that a casual employee should be paid overtime and casual loading.

We have reviewed the transcripts in relation to the hearings associated with this decision and can find no specific mention of overtime entitlements for casuals. However, the formula discussed in this decision has been used in Exposure Drafts to clearly show the payment a casual is to receive for working shifts or weekends for example – e.g. 175% of their minimum hourly rate for all time worked on a Saturday or Sunday but will not be paid the casual loading of 25%.

This formula explained that the weekend or shift penalty was to apply to the ordinary rate with the casual loading then added back in – i.e. the casual loading was not be multiplied by the shift or weekend penalty.

[27] In paragraph [76] of its submission, the HSU notes the following principles recognised by the Full Bench in the Casual Employment Case [2017] FWCFB 3541 as under:

a. Casual workers who work in excess of ordinary hours in a single day, or over 38 hours per week in a particular week or on average over the course of a roster cycle, are subject to the same disabilities as full time employees – that is, fatigue and a general restriction of opportunities to engage in family, social, community and other activities; and
b. The standard casual loading of 25% in modern awards does not include any element of compensation for the disabilities associated with working overtime.

Consistent with 'a' above, the agreed revised overtime clause which is contained in the current Exposure Draft of the HP&SS Award, clearly states that a casual working in excess of 10 hours per shift or works in excess of 38 hours in a week or 76 hours in a fortnight is entitled to paid for overtime hours worked.

PHIEA concurs that the standard casual loading of 25% does not include any compensation for overtime, however we disagree with the conclusion apparently drawn by the HSU that 'b' above is evidence that a casual should be paid casual loading in addition to the overtime penalty.

[28] Clause 6.4 (e) of the HP&SS Award Exposure Draft clearly indicates that for each ordinary hour worked a casual employee must be paid the minimum hourly rate applicable to their classification and pay point and a loading of 25%.

Importantly, 6.4 (e) (ii) notes that the casual loading is paid instead of the paid leave entitlements of full time employees.

> **6.4 Casual loading (e)**
>
> **(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,
>
> applicable to the classification and pay point in which they are employed.

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

Personal/Carer's leave and Annual Leave accrue on ordinary hours worked by a permanent employee. A full time employee will accrue 4 weeks annual leave and 2 weeks personal/carer's leave per year.

A part time employee will accrue a proportion of the full time entitlement based on the number of ordinary hours they work.

If a permanent employee should work overtime, these overtime hours DO NOT attract additional annual leave or personal/carer's leave accrual. Therefore, if a casual employee works overtime, they are not entitled to an additional 25% loading in lieu of paid leave entitlements accruing to a permanent employee, because the permanent employee is NOT accruing these entitlements when working overtime.

[29] It was the agreed position of the parties when the amendments to clause 19.2 were proposed, that all employees, regardless of whether they are full time, part time or casual should be paid the applicable overtime penalty based on the minimum hourly rate for their classification.

The HSU has previously confirmed in writing its agreement to the wording of the overtime clause in the current Exposure Draft. PHIEA rejects the recent arguments put forward by the HSU in support of its claim to further amend clause 19.2 (d) and strongly opposes the proposal to remove the words… '*and the casual loading in clause 6.4 (e).*

Public Holidays – Removal of clause 23.3 (b)

[30] The HSU is seeking to remove clause 23 (b) which states:

> *Where there is no agreement, the employer may substitute another day but not so as to give an employee less time off work than the employee would have had if the employee had received the public holiday.*

At paras 72 & 73 of its submission of 17 March 2017 – the HSU states:

[72] *"It is our view that s 115(2) of the NES permits a term allowing for substitution of a public holiday by agreement only. However, clause 23.3 (b) allows for substitution of a public holiday to be imposed on an employee by an employer."*

[73] *"The term is therefore inconsistent with s 55(2) (a) which provides that a modern award may include a term only that it is expressly permitted to include under the NES. Consequently, it has no effect, as per s 56, '[a] terms of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.'*

PHIEA agrees with the interpretation provided by the HSU and therefore concurs that sub-clause 23.3(b) should be removed so that any substitution of a public holiday must be by agreement between the employer and employees.

SUBMISSION BY AGED CARE EMPLOYERS

[31] ACE propose to vary clause 8.3 of the Award to include the words "*Unless the employee otherwise agrees,* in clause 8.3(b) as detailed below.

> *"**8.3 Rostering***
>
> *(a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.*
>
> *(b) Unless the employee otherwise agrees, seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.*
>
> *(c) 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."*

PHIEA supports the inclusion of the words "*Unless the employee otherwise agrees" in Clause 8.3 (b)* for similar reasons to those noted by John Favaloro & Karen Foster in paragraphs 6 and 7 of their witness statements filed by Aged Care Employers on 4 August 2016 in support of the variation.

APESMA application to vary the HP&SS Award to include Translators and Interpreters in the Common List of Health Professionals

[32] PHIEA relies on its submission of May 2017 in relation to this application, but notes that it will be attending a FWC Conciliation Conference scheduled for 15 March 2018 and reserves its right to make further submissions if necessary following this conference.

[END OF SUBMISSION]