



DRAFT REPORT

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards

(AM2014/251)

AGED CARE AWARD 2010

[MA000018]

COMMISSIONER LEE

MELBOURNE, 11 SEPTEMBER 2017

4 yearly review of modern awards – Aged Care Award 2010.

[1] On the 26 July 2017 I issued a Statement which summarised the various substantive variations that the parties to these proceedings continued to press. The parties undertook to consult further with their respective memberships on the practical impact of various claims that had been made in order to facilitate possible resolution of the disputed variations sought.

[2] Parties to the proceedings were also reminded that the Directions issued by Justice Ross on 9 June 2017 for the filing of submissions including a draft variation determination were to be complied with.

[3] On 29 August 2017 a further conference was held to discuss the draft determinations that had been filed by the parties and to explore the extent of any potential agreement on the various claims made. Participants at the conference on 29 August 2017 were:

- Mr S Bull for United Voice
- Ms L Svendsen for the Health Services Union of Australia
- Mr A McCarthy for the Australian Nursing and Midwifery Federation
- Mr D Reid for Aged and Community Services Australia
- Mr K Brown for Leading Aged Services Australia
- Ms M Chan for Australian Business Industrial and NSW Business Chamber

[4] The purpose of this report is to summarise the outcomes from the conference as I understand them and to indicate any action items that various participants agreed to undertake.

[5] My understanding of the outcome, with reference to the draft determinations filed by each of the parties is as follows, noting that all references to clauses in the Exposure Draft (ED) refer to the draft published with amendments as at 10 July 2017.

Aged Care Employers (the Employers)

Outstanding matters

- Aged and Community Services Australia (ACSA) filed a draft determination (Appendix 1) that sought to delete the existing subclause 14(c) in the ED and replace it with a different provision which would, from the Employers' perspective, allow greater flexibility for agreed changes to rosters. The proposed change is opposed by the Unions. The Employers clarified that a key purpose of the proposed change is to allow for flexibility for part time employees wanting to work additional hours to their agreed hours and pattern of work in established in accordance with clause 10.2. However, it was clarified that the operation of clause 10.3 which allows for agreed variations to hours, in combination with the operation of 14.4(d) provided the flexibility sought by the Employers. The Employers had a remaining concern that the practice of swapping shifts may be inhibited by the provisions in the current ED and would consider if the draft determination for subclause 14(c) was still pressed for that reason or if there was an alternative solution. **Action Item: ACSA to advise the Fair Work Commission within 14 days if they continue to press for alteration to clause 14(c) in the ED.**

Agreed matters

- ACSA filed a draft determination (Appendix 1) that inserted a new subclause 18.3(e) titled 'On Call Allowance' and a new subclause 18.3(f) titled 'Remote Response'. The parties agreed that these draft determinations, with some further variations, should be included in the Award. The final version of the text that was agreed for both clauses is attached in Appendix 2. The final version agreed was a combination of the HSU draft determination for the 'On Call Allowance' subclause and the amended draft determination for the 'Remote Response' subclause tabled by the Employers during the conference.

Health Services Union (HSU)

Outstanding matters

- HSU have filed a draft determination (Appendix 3). Paragraphs [I] – [K] of the draft determination will have the effect of creating a right to payment of casual loadings to casual employees in addition to weekend and public holiday rates. This claim is opposed by the Employers. The HSU note that this matter was not dealt with by the Casual employment and Part-time employment decision [2017] FWCFB 3541]. HSU continue to pursue this claim and expect that it will be arbitrated. **Action Item: reference at Item 4 in summary of proposed substantive matters document being dealt with by the Part-time and Casuals Full Bench should be deleted.**
- Paragraph [G] of HSU's draft determination provides for the insertion of a new subclause 18.3(f) titled 'Phone Allowance'. After discussion, the Employers indicated they were not averse to this provision requiring provision of a mobile phone and associated charges for the purpose of being on call (but not for accessing work rosters). However, that if the employee did not want a phone provided and would prefer some form of reimbursement of an existing phone service that there would be an agreed arrangement entered into. The amended draft determination provided by the Employers is at Appendix 4. **Action Item: HSU will consider the matters raised in**

the discussion and provide a revised draft determination for consideration within 14 days.

- Paragraph [H] of the draft determination is a new subclause 18.3(g) titled ‘First Aid Refresher’. The Employers indicated that they needed to consult further with their membership before responding. **Action Item: Aged Care Employers are to consult with their membership and provided a response within 3 weeks.**

Agreed Matters

- HSU claim for an on call allowance has been agreed as part of the agreed determination set out at Appendix 2.
- HSU submitted a draft determination for a new sub clause 18.3(b) titled ‘Damaged Clothing Allowance’ (see Appendix 3 paragraph [H]). This has been agreed subject to a number of variations proposed by the Employers. The agreed draft determination is set out in full at Appendix 5. Consistent with agreement on this clause, HSU no longer press for the proposed variations to the uniform allowance or the laundry allowance.

United Voice (UV)

Outstanding matters

- UV propose a number of variations to the sleepover clause. A number of these proposed variations have been agreed by the parties. The sleepover clause, including the marked up agreed variations to it is set out in Appendix 6. However, a number of UV proposed variations to the sleepover clause are not agreed. The variations not agreed are set out in Appendix 7.
- UV have provided a draft determination to delete the current last bullet point at A.4 - Aged Care employee at level 4 and insert: “In the case of a Personal Care Worker, **where the employee holds** a relevant Certificate III qualification”. (emphasis added) The Employers oppose this amendment as it removes the reference to the employee being **required** to hold the qualification. This matter is likely to be arbitrated.

Agreed matters

- UV submitted a draft determination to delete the current clause 18.3(iii) and insert a new provision. That draft determination, with some amendments proposed by the Employers was agreed. The final draft determination is reflected in Appendix 8.

[6] The parties agreed that Item S19 Ceremonial Leave was now agreed but this was not reflected in the ED. The agreed version is consistent with the wording of the draft determination provided by HSU (Appendix 9). **Action item: Fair Work Commission to update ED**

Next steps

[7] Any comments on the accuracy of the draft report are to be filed by no later than **5:00pm 22 September 2017**. Upon completion of all action items by the parties I will issue a final report.



COMMISSIONER

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APPENDIX 1

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s. 156 - 4 Yearly reviews of modern awards

(AM2014/251)

Aged Care Award 2010

[MA000018]

Health and Welfare

XXXXXX Commissioner

SYDNEY [XX YYY 2017]

4 yearly review of modern awards.

A. Further to the Decision of the Fair Work Commission on [XX YYY 2017], the Aged Care Award 2010 is varied as follows:

[1] By deleting subclause 14.4(c) and inserting the following:

Seven days' notice will be given of a change in a roster. However, a roster may be altered at any time with the agreement of the employer and employee/s, or to enable the service of the organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

[2] By inserting a new subclause 18.3(e) as follows:

(e) On call allowance

(i) An employee required by an employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote response duties) will be paid an allowance of:

- (a) \$xx.xx for any 24-hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or
- (b) \$xx.xx in respect of any other 24-hour period or part thereof, or any public holiday or part thereof.

[3] By inserting a new subclause 18.3(f) as follows:

(f) Remote response

- (i) In this award, unless the contrary intention appears, remote response duties include:
 - (a) responding to phone calls, messages or emails;
 - (b) providing advice ('phone fixes')
 - (c) arranging call out/rosters of other employees; and
 - (d) remotely monitoring and/or addressing issues by remote telephone and/or computer access
- (ii) If an employee is required to perform remote response duties between 6.00am and 10.00pm in any day, the employee will be paid at the prescribed rate for the time worked, rounded up to the nearest 15 minutes.
- (iii) If an employee is required to perform remote response duties between 10.00pm and 6.00am in any day the employee will be paid at the prescribed rate for the time worked, with a minimum payment as for one hour. Where such work exceeds one hour, payment will be made at the prescribed rate for the duration of the work.
- (iv) An employee remotely responding will be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely for each day commencing from the first remote response
- (v) Any work performed pursuant to this clause will not be considered overtime for the purpose of Clause 22.4.

[4] This determination will operate from [XX YYY 2017].

28 July 2017

APPENDIX 2

[B] By inserting a new sub clause 18.2(a) as follows:

18.2(a) On call allowance

- (i) An on call allowance is paid to an employee who is required by the employer to be on call at their private residence, or at any other mutually agreed place. The employee is entitled to receive the following additional amounts:

Between rostered shifts or ordinary hours on:	\$ per 24 hour period or part thereof
Monday to Friday inclusive	\$20.72
Saturday	\$31.21
Sunday, public holiday or non-rostered day	\$36.41

- (ii) For the purpose of clause 18.2(a)(i) the whole of the on call period is calculated according to the day on which the major portion of the on call period falls.

(f) Remote response

- (i) In this award, unless the contrary intention appears, remote response duties include:
- (a) responding to phone calls, messages or emails;
 - (b) providing advice ('phone fixes')
 - (c) arranging call out/rosters of other employees; and
 - (d) remotely monitoring and/or addressing issues by remote telephone and/or computer access
- (ii) If an employee is required to perform remote response duties between 6.00am and 10.00pm in any day, the employee will be paid at the ~~prescribed~~ rate of 150% of the employee's base rate of pay for the time worked, rounded up to the nearest 15 minutes. Where the time worked by the employee exceeds two hours during this period, the employee shall be paid 200% of their base rate of pay.
- (iii) If an employee is required to perform remote response duties between 10.00pm and 6.00am in any day the employee will be paid at the ~~prescribed~~ rate of 150% of the employee's base rate of pay for the time worked for the first two hours, with a minimum payment as for one hour. Where such work exceeds one hour, payment will be made at the prescribed rate for the duration of the work. Where the time worked by the employee exceeds two hours during this period, the employee shall be paid 200% of their base rate of pay.
- (iv) An employee remotely responding will be required to maintain and provide to the employer a time sheet of the length of time taken in dealing with each matter remotely for each day commencing from the first remote response
- (v) Clause 22.4 will not apply to an employee performing remote response work where that work commences within 3 hours of the start of their shift. Any work performed pursuant to this clause will not be considered overtime for the purpose of clause 22.4.

DRAFT DETERMINATION

FAIR WORK COMMISSION

<<FileNo>> <<PrintNo>>

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Aged Care Award 2010

(ODN AM2014/190) [MA000018]

Health and Welfare

ROSS, PRESIDENT

SYDNEY, <<MONTH, YEAR>>

Review of modern awards to be conducted.

[A] Further to the Decision and Reasons for the Decision << Decision No>> in <<File No>>, it is determined pursuant to section 156(2)(b)(i) of the *Fair Work Act 2009*, that the Aged Care Award 2010 be varied as follows.

[Note because consideration of the exposure draft of this award is advanced, these draft determinations address the numbering of the current exposure draft as at 19 May 2017, republished on 10 July 2017.]

[B] By inserting a new sub clause 18.2(a) as follows:

18.2(a) On call allowance

- (i) An on call allowance is paid to an employee who is required by the employer to be on call at their private residence, or at any other mutually agreed place. The employee is entitled to receive the following additional amounts:

Between rostered shifts or ordinary hours on:	\$ per 24 hour period or part thereof
Monday to Friday inclusive	\$20.72
Saturday	\$31.21
Sunday, public holiday or non-rostered day	\$36.41

- (ii) For the purpose of clause 18.2(a)(i) the whole of the on call period is

calculated according to the day on which the major portion of the on call period falls.

- [C] By deleting the first paragraph in sub-clause 18.3(a)(iii) and replacing it as follows:

(iii) Uniform allowance

Where an employer does not provide or require employees to wear uniforms under clause 18.3(a)(i), the employer will pay the employee the lesser of:

- [D] By inserting in 18.3(a)(iv) the words 'or clothing worn by the employee' after the word uniform in the first sentence so the sentence reads:

(iv) Laundry allowance

Where the uniform or clothing worn by the employee is not laundered by or at the expense of the employer, under clause 18.3(a)(i), the employee will be paid the lesser of:

- [E] By renumbering the following sub clauses: 18.3(b) as 18.3(c); 18.3(c) as 18.3(d), and; 18.3(d) as 18.3(e).

- [F] By inserting a new sub clause 18.3(b)

18.3(b) Damaged clothing allowance

Where an employee, in the course of their employment, suffers any damaged to or soiling of clothing or other personal effects, the employer will be liable for the replacement, repair or cleaning of such clothing or personal effects provided, where practicable, immediate notification is given to the employer of such damage or soiling as soon as possible.

This clause will not apply where the damage or soiling is caused by the negligence of the employee.

- [G] By inserting a new sub-clause 18.3(f)

(e) Phone allowance

Where the employer requires an employee to use a mobile phone for the purpose of being on call or to access their work roster, the employer will either:

- (i) provide a mobile phone and cover the cost of any subsequent charges; or
- (ii) refund the cost of purchase and the subsequent charges on production of receipted accounts.

- [H] By inserting a new sub-clause 18.3(g)
- (f) First Aid refresher**
- (i) Where an employee is required to maintain first aid certification, the employer will pay full cost of the employee updating their first aid certification by:
- Reimbursing the employee registration and attendance expenses; or
 - Paying the registration and attendance costs;
- (ii) Attendance at First Aid refresher courses will be work time and paid as such.
- [I] By deleting clause 20.3 and replacing it with the following:
- 20.3 A casual employee who works on a weekend will be paid the following rates:
- (a) between midnight Friday and midnight Saturday—175% of the ordinary hourly rate; and
- (b) between midnight Saturday and midnight Sunday—200% of the ordinary hourly rate.
- 20.4 The rates prescribed in clause 20.3 will be in substitution for and not cumulative upon the casual loading prescribed in clause 11.2.
- [J] By replacing the rate at clause 26.3(a) with the following:
- 26.3(a) A casual employee will be paid only for those public holidays they work at 275% of the ordinary hourly rate for hours worked.
- [K] By deleting clauses 26.3(b) and 26.3(c) and inserting a new 26.3(b) as follows:
- 26.3(b) The rates prescribed in clause 26.3(a) will be in substitution for and cumulative upon the casual loading prescribed in clause 11.2 and weekend rates prescribed in clause 20.3.
- [L] By deleting clause 28 and replacing it with the following:
- 28 Ceremonial leave**
- An employee who is legitimately required by Indigenous tradition to be absent from work for Aboriginal or Torres Strait Islander ceremonial purposes, including for bereavement related ceremonies and obligations, will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.
- [M] The determination shall operate on and from <<date>>

APPENDIX 4

(e) Phone allowance

Where the employer requires an employee to use a mobile phone for the purpose of being on call ~~or to access their work roster~~, the employer will either:

- (i) provide a mobile phone and cover the cost of any subsequent charges; or
- (ii) enter into an agreement with the employee as to the quantum of reimbursement and the evidence requirements ~~needed~~ for reimbursement.

APPENDIX 5

Damaged clothing allowance

- (a) Where the employer does not provide or require an employee to wear a uniform, and in the course of their employment, the employee suffers any damage or soiling of personal clothing beyond what would be reasonably expected as part of the routine tasks an employee would undertake on a daily basis, the employer will be liable for the reasonable cost of replacement, repair or the cleaning of the clothing provided immediate notification is given of the damage or soiling.

This clause will not apply where the damage or soiling is caused by the negligence of the employee or where the employer has provided protective clothing/equipment to prevent such damage or soiling of the employee's personal clothing.

APPENDIX 6

DRAFT DETERMINATION

[Note as consideration of the exposure draft of this award is advanced, these draft variations address the current exposure draft as of 19 May 2017, republished on 10 July 2017.]

[2] After the current clause 15.1 insert the following note:

Note: the provisions of 14.4 will apply to a sleepover. ~~An employee may refuse a sleepover in the circumstances contemplated by 14.4 (d) but only with reasonable cause.~~

[3] Delete the current clause 15.3 and insert:

15.3 The following conditions will apply to each night of sleepover:

- (a) The span for a sleepover will be **a continuous span of 8 hours**.
- (b) Employees will be provided with free board and lodging for each night on which they are required to sleepover.
- (c) Employees will be provided with a separate room with a bed and use of staff facilities or client facilities **where staff facilities are unavailable**.
- (d) In addition to the provision of free board and lodging for sleepovers, the employee will be entitled to a sleepover allowance of **\$44.37** for each night on which they sleep over. **This allowance is in addition to any payment for hours worked during the sleepover and the free board and lodging provided by clause 15.3 (eb).**
- (e) ~~An employee may refuse to perform work other than in an emergency. No work other than that of an emergency nature will be required to be performed during any sleepover.~~
For the purposes of this clause an emergency is any unplanned occurrence or event requiring prompt action.
- (f) An employee directed to perform work other than that of an emergency nature during any sleepover will be paid the appropriate hourly rate from the start of the sleepover to the end of the non-emergency work, or from the start of the non-emergency work to the end of the sleepover, whichever is the lesser, in addition to the sleepover allowance in clause 15.3(d).

[4] Delete the current clause 15.4 and insert:

15.4 *Payment for time worked during sleepover*

(a) In the event of the employee on a sleepover being required to perform work during the sleepover period, the employee will be paid for the time worked at the prescribed overtime rate with a minimum payment as for one hour worked. Where such work exceeds one hour, payment will be made at the prescribed overtime rate for the duration of the work.

APPENDIX 7

DRAFT DETERMINATION

[Note as consideration of the exposure draft of this award is advanced, these draft variations address the current exposure draft as of 19 May 2017, republished on 10 July 2017.]

[2] After the current clause 15.1 insert the following note:

Note: the provisions of 14.4 will apply to a sleeper. ~~An employee may refuse a sleeper in the circumstances contemplated by 14.4(d) but only with reasonable cause.~~

[3] Delete the current clause 15.3 and insert:

15.3 The following conditions will apply to each night of sleeper:

- (a) **The span for a sleeper will be a continuous span of 8 hours.** Not agreed: Employers position is for existing clause 15.3(a) to remain as per the ED.
- (b) Employees will be provided with free board and lodging for each night on which they are required to sleeper.
- (c) Employees will be provided with a separate room with a bed and use of staff facilities or client facilities **where staff facilities are unavailable.**
- (d) In addition to the provision of free board and lodging for sleepers, the employee will be entitled to a sleeper allowance of **\$44.37** for each night on which they sleep over. **This allowance is in addition to any payment for hours worked during the sleeper and the free board and lodging provided by clause 15.3 (eb).**
- (e) ~~An employee may refuse to perform work other than in an emergency. No work other than that of an emergency nature will be required to be performed during any sleeper.~~
For the purposes of this clause an emergency is any unplanned occurrence or event requiring prompt action.
- (f) An employee directed to perform work other than that of an emergency nature during any sleeper will be paid the appropriate hourly rate from the start of the sleeper to the end of the non-emergency work, or from the start of the non-emergency work to the end of the sleeper, whichever is the lesser, in addition to the sleeper allowance in clause 15.3(d).

[4] Delete the current clause 15.4 and insert:

15.4 Payment for time worked during sleeper

(a) In the event of the employee on a sleeper being required to perform work during the sleeper period, the employee will be paid for the time worked at the prescribed overtime rate with a minimum payment as for one hour worked. Where such work exceeds one hour, payment will be made at the prescribed overtime rate for the duration of the work. Not agreed: Employers position is for existing clause 15.4 to remain as per the ED.

APPENDIX 8

[4] Delete the current clause 18.3 (iii) and insert:

(ii) Any uniforms provided by the employer to an employee remain the property of the employer. An adequate number of uniforms means the number of uniforms that allows an employee to work their weekly agreed hours of work in a clean uniform, ~~without having to launder work uniforms more than once a week.~~

APPENDIX 9

[L] By deleting clause 28 and replacing it with the following:

28 Ceremonial leave

An employee who is legitimately required by Indigenous tradition to be absent from work for Aboriginal or Torres Strait Islander ceremonial purposes, including for bereavement related ceremonies and obligations, will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.