

**SUBMISSION TO  
FAIR WORK COMMISSION**

**Matter No:**

**AM2016/31**

***4 YEARLY REVIEW OF MODERN AWARDS***

***NURSES AWARD  
(MA000034)***

***DECEMBER 2018***

**SUBMISSION IN RESPONSE TO FWCFB DECISION  
[2018] FWCFB 7347**

**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 – Western Australia  
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, APHA – Western Australia, Private Hospitals Association of New South Wales, 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 the decision handed down on 3 December 2018 - [2018] FWCFB 7347 – inviting interested parties to comment on proposed wording set out in paragraphs [72], [73], [99], [115], [144] and [160].

PHIEA's submissions are confined to wording in the four clauses noted below:

- Paragraphs [72] & [73] – *Recall to work when on call and Recall to work when not on call*;
- Paragraph [99] *Free from Duty and On Call*;
- Paragraph [144] *Meal Breaks*

[3] **Recall to work when on call and Recall to work when not on call [72 & 73]**

*[72] Proposed clause 28.5 – Recall working when on call*

- (a) An employee who is required to be on call and who is recalled to work at the workplace will be paid a minimum of three hours work at the appropriate overtime rate*
- (b) An employee who is required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.*

*[73] Proposed clause 28.6 – Recall to work when not on call*

- (a) An employee who is not required to be on call and who is recalled to work at the workplace after leaving the employer's premises will be paid a minimum of three hours work at the appropriate overtime rate.*
- (b) An employee who is not required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.*

[4] The Nurses Award covers personnel working in a range of environments with the two major sectors being hospitals and aged care but the requirements for nurses to work

away from the workplace via electronic communication in these two sectors is very different.

- [5] In the residential aged care sector or home care services environment, there are often circumstances where nursing personnel may be recalled to work, either when on call or not on call, but where the work may be performed via electronic means, rather than a physical return to the workplace. It is our understanding from prior discussions with the Aged Care Employers, that the most common reason for a recall using electronic communication away from the workplace, is to provide clinical advice or assistance regarding a resident or client's care, to less experienced employees. In circumstances such as this, it is entirely appropriate that employees should be adequately compensated.
- [6] Conversely in the private hospital sector, there is always an onsite nurse in charge who is available to answer clinical questions or who would contact the patient's treating doctor if an urgent medical opinion or assessment was considered necessary and therefore it would be rare for a private hospital nurse to be contacted at home for queries relating to the clinical care of a patient.

Notwithstanding the above, there are of course occasions where a nurse may be contacted at home to address a simple query which may have arisen since the person concluded their shift – for example: A call from a colleague to ask where they put the drug cabinet key because it cannot be found; A call to clarify an entry in a patient's chart which is not particularly legible; A call to see whether they could work the morning shift rather than the afternoon shift etc. In the absence of a definition of '*required to perform work*', PHIEA is uncertain whether the intent of the proposed new clause is to capture any contact with an employee who is not physically at the workplace, including for general queries such as those we have outlined, or whether '*required to perform work*' is intended to have a more narrow application and be directly related to the provision of advice or assistance relating to patient, resident or client care.

- [7] In the private hospital sector, any recalls to work must be authorised by the person in charge or their nominee, but there is no indication in the proposed clause as to who is authorised to '*require an employee to perform work via electronic communication away from the workplace*? Does the clause permit any employee to make the call?
- [8] PHIEA considers that the wording in clause 28.5 (b) and 28.6 (b) lacks clarity and potentially could have two quite different interpretations with significantly different financial outcomes as under:

### **Interpretation 1**

- (a) Once a requirement to perform work electronically away from the workplace has been triggered, an employee will be paid a minimum of one hours work at the appropriate overtime rate. If multiple electronic requests are received within the same hour and concluded within that same hour, the overtime payment would still be a minimum of one hour.

Or

## Interpretation 2

- (a) Each separate call/electronic request attracts a minimum payment of one hour at the appropriate overtime rate regardless of when the request was made. For example, if 10 requests were made within one hour, potentially 15 hours of overtime would be payable despite the work being conducted within one hour.

Whilst PHIEA does not believe Interpretation 2 is the correct interpretation, this is not clear in the current wording.

[9] PHIEA questions why payments are being made to the nearest 15 minutes when the period extends beyond one hour? We acknowledge that historically, 15 minute blocks were popular with manual payroll processing but now that payroll is calculated electronically and minutes are paid within the various pay systems, time worked can be accurately captured negating the need for a rounding mechanism. PHIEA believes that reference to rounding to the nearest 15 minutes should be removed

[10] In summary, whilst acknowledging the appropriateness of a payment to staff who are required to perform work via electronic communication away from the workplace, PHIEA considers that the current wording lacks guidance regarding:

- who may authorise the request to the employee
- the definition of 'work' which would trigger an entitlement to this payment and
- the clarity in specifying the precise calculation of the payment obligation

### ***PHIEA would propose the following amendments to clause 28.5 (b) and 28.6 (b)***

#### 28.5 (b)

An employee who is required to be on call and who is **requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client**, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. ~~An employee who is required to perform work for longer than one hour, will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.~~

**Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.**

## 28.6 (b)

An employee who is not required to be on call and who is **requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client**, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. ~~An employee who is required to perform work for longer than one hour, will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.~~

**Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.**

### [11] **Free from Duty and On Call**

In paragraph [99] of FWCFB 7347, the Full Bench proposes the following wording for clause 21.4 and has invited interested parties to file submissions in relation to the wording:

*21.4 Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, such days off must be consecutive. For the purposes of this sub-clause, duty includes time an employee is on call.*

Clause 21.4 has been amended to include the sentence: *For the purpose of this sub-clause, duty includes time an employee is on call.*

Private hospitals which operate 24/7, need the ability to call employees back to work if unexpected absences occur within the rostered team or if patient demand should increase unexpectedly.

- [12] Nurses and midwives can only be placed on the on-call roster when they are not rostered to work – i.e. out of hours and on their days off, so removing days off, introduces a rostering restriction that may not meet patient needs.

PHIEA acknowledges that managing fatigue is critically important for both staff and patient safety, however we are concerned that in the absence of any flexibility, it could prove extremely challenging in periods of peak demand, to guarantee a roster of suitably experienced on call staff.

- [13] In considering amendments to *clause 23. Rest breaks between rostered work* the Full Bench noted at paragraph [114].*...the employee's agreement should be obtained to reduce from 10 hours as the employee will be in the best position to manage their own fatigue."*

In the private hospital sector, many nurses are willing to nominate for an on call roster, despite this occurring on their day off. PHIEA concurs with the Full Bench's view that *'the employee will be in the best position to manage their own fatigue'*.

- [14] PHIEA would like to suggest a modification to the proposed clause 21.4 which would permit employees to manage their own fatigue in this situation by allowing them to participate in an on call roster on their day off if they wanted to. This mutual agreement would also give the facility greater flexibility when ensuring the on call rosters are staffed by suitably experienced personnel in the interests of patient safety.

***PHIEA would propose the following modification to clause 21.4 – Free from duty***

21.4 *Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, such days off must be consecutive. For the purposes of this sub-clause, unless otherwise agreed between the employer and the employee, duty includes time an employee is on call.*

[15] **Meal Breaks**

PHIEA notes the proposed amendments to clause 27.1 Meal Breaks but would like to suggest a modification to part (c) of the clause proposed by the Full Bench, which relates to an employee being required to remain available during a meal break but is free from duty and paid at ordinary rates for a 30 minute meal break. Currently, the clause is silent as to how this ordinary time payment is to count when overtime is being calculated.

***The suggested amendment is highlighted in red below:***

27.1 (c)

Where an employee is required by the employer to remain available during a meal break but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. **This period will not count as time worked when calculating ordinary hours for the purposes of overtime or penalties.** If the employee is recalled to perform duty during this period, the employee will be paid overtime for all time worked until the balance of the meal break **is taken.**

- [16] Draft Determinations for the four amendments PHIEA has proposed follow as Attachment 1

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## **FAIR WORK COMMISSION**

# **DRAFT DETERMINATION**

*Fair Work Act 2009*

s.156 – 4 Yearly Review of Modern Awards

## **Nurses Award 2010**

(AM2016/31) MA000034

Health and Welfare Services

[MEMBERS]

[Location, Date]

Further to the Full Bench decision issued on 3 December 2018 the above award is varied by:

**[1] Amending the proposed clause 28.5 (b) – Recall to work when on call – and replacing with a revised clause 28.5 (b) as under:**

28.5 (b) An employee who is required to be on call and who is requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.

**[2] Amending the proposed clause 28.6 (b) – Recall to work when on call – and replacing with a revised clause 28.6 (b) as under:**

28.6 (b) An employee who is not required to be on call and who is requested by the person in charge of the work area or their delegate, to provide clinical advice relating to a specific patient, resident or client, via electronic communication away from the workplace, will be paid a minimum of one hours work at the appropriate overtime rate. Multiple electronic requests made and concluded within the same hour shall be compensated within the same one hour's overtime payment.

**[3] Amending the proposed clause 21.4 – Free from duty – and replacing with a revised clause 21.4 as under:**

21.4 Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28 day cycle. Where practicable, such days off must be consecutive. For the purposes of this sub-clause, unless otherwise agreed between the employer and the employee, duty includes time an employee is on call.

**[4] Amending the proposed clause 27.1 (c) – and replacing with a revised clause 27.1 (c) as under:**

27.1 (c) Where an employee is required by the employer to remain available during a meal break but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. This period will not count as time worked when calculating ordinary hours for the purposes of overtime or penalties.  
If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break is taken.