



siag

industrial relations : human resources : employment matters : training

3 May 2019

Commissioner Johns OAM
Fair Work Commission
Level 10 William Street
East Sydney NSW 2011

Sent by email: chambers.johns.c@fwc.gov.au

Dear Commissioner Johns,

AG2019/47: Application for approval of the Health Care (Gympie Private Hospital, Eden Rehabilitation Hospital and Mackay Rehabilitation Hospital) Health Professionals Enterprise Agreement 2018

We write on behalf of our clients, PERH Pty Ltd, trading as Eden Rehabilitation Hospital (**PERH**), NMP Hospital Pty Ltd trading as MacKay Rehabilitation Hospital (**NMP**) and Gympie Private Hospital Pty Ltd trading as Gympie Private Hospital (**Gympie**), in relation to the application for approval of the *Health Care (Gympie Private Hospital, Eden Rehabilitation Hospital and Mackay Rehabilitation Hospital) Health Professionals Enterprise Agreement 2018 (Agreement)*.

We refer to Commissioner Johns' Amended Directions of 18 April 2019 and the checklist attached to the 28 March 2019 Directions which identified a number of possible issues with the Agreement in relation to form and signature requirements, pre-approval requirements, the National Employment Standards (**NES**) and the better off overall test (**BOOT**) (collectively, the **Issues**).

PERH, NMP and Gympie address each of the Issues in the table **attached** to these submissions.

Should you require any additional information, please contact the undersigned on (03) 9644 1400.

Yours sincerely,

George Raptis
Senior Lawyer

Issue	Response
Section 1: Form and signature requirements	
<p><u>Issue 1: AWU not listed in the Form F16</u></p> <p>The AWU submitted a Form F18 in support of the Agreement, but is not listed in the Form F16</p>	<p>The AWU was not a union bargaining representative involved in the agreement making process in respect to the Agreement. The AWU was a union bargaining representative in respect to the <i>Health Care (Gympie Private Hospital, Eden Rehabilitation Hospital and Mackay Rehabilitation Hospital) Support Services Enterprise Agreement 2018 (Support Services Agreement)</i>. PERH, NMP and Gympie seeks to clarify whether or not the Form F16 identified in the Checklist is in respect to this Agreement, or the Support Services Agreement.</p>
<p><u>Issue 2: Type of agreement</u></p> <p>The response to question 1.1 of Form F16 indicates that the Agreement is a single enterprise Agreement, however Schedule 3 notes that there are three hospitals covered by the Agreement – Gympie Private Hospital, Eden Rehabilitation Hospital and Mackay Rehabilitation Hospital. Eden Rehabilitation Hospital and Mackay Rehabilitation Hospital both provided separate Form F17s, separate voting results and separate NERRs. Separate information was not provided by Gympie Private Hospital. PERH Pty Ltd T/A Eden Rehabilitation Hospital is listed as the Applicant in the Form F16 and then at question 2.3 of Form F16, both NMP Hospital Pty Ltd T/A MacKay Rehabilitation Hospital and Gympie Private Hospital Pty Ltd T/A Gympie Private Hospital are listed as employers</p>	<p>We note that since the making of the Agreement and its lodgement with the Commission, Gympie has permanently closed.</p> <p>We submit that the Agreement is a single-enterprise agreement. The Agreement covers NMP and PERH. NMP and PERH are related bodies corporate within the meaning of section 50 of the <i>Corporations Act 2001</i> (Cth), and therefore single-interest employers.</p> <p>PERH and NMP submits that the above submissions ought to resolve the signatory requirement concern identified in the Checklist. We have also filed a copy of the Agreement with an updated signatory page that refers to the specific entities covered by the Agreement (for clarity).</p>
<p><u>Issue 3: Agreement signature page</u></p> <p>The signatory requirements depend on whether the Agreement is a single enterprise Agreement or a multi-enterprise Agreement. The Agreement as lodged, was only signed by Mr John Mereau, General</p>	<p>See Response to Issue 2 above</p>

Issue	Response
Manager of People and Innovation, of Health Care Australia Pty Ltd, rather than by all three employers	
Section 2: Pre-approval concerns	
<p><u>Issue 4: Late lodgement</u></p> <p>Question 2.9 of Form F17 indicates that the Agreement was made on 19 December 2018 and it was lodged on 7 January 2019. This means that the Agreement was lodged in 19 days, and not within 14 days, as required by s 185(3) of the Act. The Applicant's representative noted in their lodgement email that the application was filed slightly beyond 14 days from the date the Agreement was made due to the Christmas / New Year's period and various persons being on leave</p>	<p>The Applicant accepts the application for approval was not lodged within 14 days of the Agreement being made. At the time of filing the application electronically, the Applicant's representative addressed delay in the covering email and stated:</p> <p style="text-align: center;"><i>The application is filed slightly beyond 14 days from the date the Agreement was made due to the Christmas / New Year's period and various persons being on leave. We formally seek for an extension for the application to be validly made.</i></p> <p>Following the agreement being made on 19 December 2018, Mr Ben Waugh (Mr Waugh) of Service Industry Advisory Group (Legal) Pty Ltd (SIAG), the Applicant's bargaining representative, corresponded with Together Union, the union bargaining representative. Due to the Christmas and New Year holiday period, it was not until 3 January 2019 when SIAG provided the Agreement, and accompanying documentation, to Together to facilitate the Agreement being signed by Together. Together signed the Agreement on 3 January 2019 and returned a signed copy of the Agreement to SIAG on 4 January 2019. Mr Waugh was absent on 4 January 2019 and therefore unable to file the application. Accordingly, the application was lodged for approval on 7 January 2019 at 9:00am.</p> <p>The Applicant submits, having regard to these circumstances, as well as the Agreement having been genuinely made, the Applicant respectfully requests that the Commission exercises its discretion pursuant to section 185(3)(b) of the <i>Fair Work Act 2009</i> (Cth) to extend the time by which the application was to be made to 19 days on the basis that it is fair in all the circumstances to do so.</p>
Section 4: NES concerns	
<p><u>Issue 5: Public Holidays</u></p>	<p>NMP, PERH and Gympie confirm that pursuant to the NES precedence clause at clause 6 of the Agreement, the Employee may refuse the request to work on the public holiday if the request is not reasonable, or if the refusal is reasonable.</p>

Issue	Response						
<p>Clause 22(d) provides that if an employee is required to work on a public holiday, they will be given not less than one week's notice, but there is no provision for the employee to refuse work on a public holiday, or for the employer to not unreasonably refuse the request, inconsistent with s 114 of the Act.</p>	<p>Should the Commission require it, NMP, PERH and Gympie are prepared to provide an undertaking to this effect.</p>						
<p><u>Issue 6: Personal/carer's leave and compassionate leave</u></p> <p>Clauses 24 and 26 of the Agreement appear to restrict personal/carer's leave and compassionate leave, respectively, to only members of the employee's immediate family. Whereas, sections 97 and 104 of the Act provide that an employee may take personal/carer's leave and compassionate leave in relation to a member of the employee's immediate family, or a member of the employee's household</p>	<p>NMP, PERH and Gympie confirm that pursuant to the NES precedence clause at clause 6 of the Agreement, the personal/carer's leave entitlement in clause 24 will also apply where the Employee is required to provide care or support to a member of the Employee's household who requires care or support because of a personal illness, or personal injury affecting the member; or an unexpected emergency affecting the member</p> <p>NMP, PERH and Gympie confirms that pursuant to the NES precedence clause at clause 6 of the Agreement, the entitlement to compassionate leave in clause 26 will also apply to an Employee where a member of the Employee's household:</p> <ul style="list-style-type: none"> (i) contracts or develops an acute personal illness that poses a serious threat to his or her life; or (ii) sustains a personal injury that poses a serious threat to his or her life; or (iii) dies <p>Should the Commission require it, NMP, PERH and Gympie are prepared to provide undertakings to this effect.</p>						
<p>Section 5: BOOT concerns</p>							
<p><u>Issue 7: AH Professional Level 2.1</u></p> <p>Rate of pay for AH Professional Level 2.1 is -10.12% below the corresponding award rate.</p>	<p>The classification match for AH Professional Level 2.1 under the Agreement is Health Professional Level 2, pay point 1.</p> <p>PERH, NMP and Gympie undertake that the wage rates under the Agreement AH Professional Level 2.1 will be increased as follows:</p> <table border="1" data-bbox="1010 1265 2074 1366"> <thead> <tr> <th data-bbox="1010 1265 1391 1329">Classification</th> <th data-bbox="1391 1265 1756 1329">Form commencement of Agreement</th> <th data-bbox="1756 1265 2074 1329">1 October 2019</th> </tr> </thead> <tbody> <tr> <td data-bbox="1010 1329 1391 1366">AH Professional Level 2.1</td> <td data-bbox="1391 1329 1756 1366">\$29.44</td> <td data-bbox="1756 1329 2074 1366">\$31.50</td> </tr> </tbody> </table>	Classification	Form commencement of Agreement	1 October 2019	AH Professional Level 2.1	\$29.44	\$31.50
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<p><u>Issue 8: Junior AH Assistants</u></p> <p>The classification matching provided by the Applicant, compares Junior AH Assistants in the Agreement to Support Services Level 3 and 4 employees in the <i>Health Professionals and Support Services Award 2010</i>. If the corresponding award rate is the applicable percentage of Support Services Level 3 and 4, rates of pay for Junior AH Assistants in the Agreement appear between 5.33% to 6.02% higher than the corresponding award rates. However, if the Junior AH Assistants rates in the Agreement are compared to the full Support Services Level 3 and 4 rates, the rates of pay in the Agreement are -5.20% to -36.41% below the corresponding award rates.</p>	<p>PERH, NMP and Gympie submit the classification matching for Junior AH Assistants in the Agreement is in accordance with the applicable Award percentage – having regard to the employee’s age – of the Support Services (SS) Level 3 and 4, and is as follows:</p> <table border="1" data-bbox="1077 475 1796 676"> <thead> <tr> <th>Agreement classification</th> <th>Award Rate of pay</th> </tr> </thead> <tbody> <tr> <td>Junior - 17</td> <td>60% SS Level 3</td> </tr> <tr> <td>Junior - 18</td> <td>70% SS Level 4</td> </tr> <tr> <td>Junior 19</td> <td>80% SS Level 4</td> </tr> <tr> <td>Junior - 20</td> <td>90% SS Level 4</td> </tr> </tbody> </table> <p>The below table demonstrates that junior employees are better off under the Agreement than the Award:</p> <table border="1" data-bbox="1012 810 1865 1018"> <thead> <tr> <th></th> <th></th> <th>%</th> <th>AW</th> <th>EA</th> <th>Outcome</th> </tr> </thead> <tbody> <tr> <td>Level 3</td> <td>827.6</td> <td>60</td> <td>13.07</td> <td>13.85</td> <td>EA higher</td> </tr> <tr> <td>Level 4</td> <td>837.4</td> <td>70</td> <td>15.43</td> <td>16.35</td> <td>EA higher</td> </tr> <tr> <td>Level 4</td> <td>837.4</td> <td>80</td> <td>17.63</td> <td>18.69</td> <td>EA higher</td> </tr> <tr> <td>Level 4</td> <td>837.4</td> <td>90</td> <td>19.83</td> <td>20.89</td> <td>EA higher</td> </tr> </tbody> </table>	Agreement classification	Award Rate of pay	Junior - 17	60% SS Level 3	Junior - 18	70% SS Level 4	Junior 19	80% SS Level 4	Junior - 20	90% SS Level 4			%	AW	EA	Outcome	Level 3	827.6	60	13.07	13.85	EA higher	Level 4	837.4	70	15.43	16.35	EA higher	Level 4	837.4	80	17.63	18.69	EA higher	Level 4	837.4	90	19.83	20.89	EA higher
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<p><u>Issue 9: Higher Duties</u></p> <p>Clause 18(d) of the Agreement provides a higher duties allowance for employees after working 5 or more days, whilst clause 30 of the Award provides the allowance after 2 hours is worked, which could result in employees not being better off overall.</p>	<p>Clause 30.1 of the Award provides the higher duties allowance for Support Services employees for time worked up to 2 hours, or for the full day/shift where the higher duties exceeds 2 hours.</p> <p>Clause 18(b) of the Agreement is consistent with clause 30.2 of the Award which applies to Health Professional (HP) employees. PERH, NMP and Gympie submit there is no BOOT concern for employees whose classification matches with HP Level classifications under the Award.</p>																																								

Issue	Response
	<p>Employees under the Agreement classified as AH Assistant, Clinical Data Co-Ordinator and Assistant Clinical Coder (in training) are comparably classified as SS Level employees under the Award. NMP, PERH and Gympie will provide an undertaking in the following terms:</p> <p style="text-align: center;"><i>Any Employee classified as AH Assistant, Clinical Data Co-Ordinator and Assistant Clinical Coder (in training) engaged in any duties carrying a higher wage rate than the classification in which they are ordinarily employed in any one day or shift will be paid at the higher wage rate for:</i></p> <p style="text-align: center;"><i>(a) the time so worked for two hours or less; or</i></p> <p style="text-align: center;"><i>(b) a full day or shift where the time so worked exceeds two hours.</i></p>
<p><u>Issue 10: Span of ordinary hours and shiftworkers</u></p> <p>Clause 13(b)(ii) of the Agreement implies that the span of hours is Monday to Friday 7am to 7pm, as shiftwork penalties are paid to employees where their ordinary rostered hours of work of an employee finish between 7pm and 7am or commence between 7pm and 7am, Monday to Friday. Whereas, under the Award, the span of hours is 6am to 6pm and employees who work shiftwork and would otherwise be covered by the award, would receive a 15% shift penalty for work finishing between 6pm to 8am. If an employee was to finish a shift between 6pm-7pm under the award, they would receive a 15% penalty for the entire shift, however, under the Agreement they wouldn't receive a shift penalty unless they finished their shift after 7pm. Modelling indicates that employees with rates of pay closer to the corresponding award rates (less than 13%), would not be better off under the Agreement if they do not receive a shift penalty for work finished between 6pm and 7pm.</p>	<p>Health Care will provide an undertaking to ensure that the shift penalty rates apply in relation to a shift that finishing after 6pm (not 7pm).</p>
<p><u>Issue 11: Schedule 2 and clause 10 – Wages</u></p>	<p>The reference in clause 10(b) to “any payment made to the employee”, is a reference to the rate of pay paid to the Employee by NMP, PERH and Gympie for hours of work.</p>

Issue	Response
<p>Schedule 2 sets out the wages for the life of the agreement. Clause 10(b) provides that the wage increases shall be absorbed into any payment made to the employee beyond the minimum rates contained in the agreement. It is unclear what other payments will be made to employees and the monetary amount of the payments and as such, it may result in employees not being better off overall.</p>	<p>If an Employee is in receipt of rates of pay that are higher than the minimum rates contained in the Agreement, then the following arrangements apply:</p> <ul style="list-style-type: none"> • in accordance with clause 10(c) of the Agreement, the wage increases referred to in clause 10(a) will apply to the Employee's actual rate of pay, subject to the Employee's rate of pay not exceeding the corresponding classification rate of pay in the relevant year set out in the <i>Health Care (QLD Private Hospitals) Health Professionals Enterprise Agreement 2017 (AE428547)</i>; and • if the rate of pay falls below the Modern Award rate, the Employee's rate of pay will default to the minimum Modern Award rate, in accordance with clause 10(d) of the Agreement. <p>Clause 10(d) is express that the rate cannot be below the Award. Therefore, PERH, NMP and Gympie submit there is no BOOT concern.</p>