

**Subject:** RE: AG2019/629 The Clinipath Laboratories Enterprise Agreement 2018  
[SEC=UNCLASSIFIED]

Good afternoon,

**RE: AG2019/629 Application for approval of The Clinipath Laboratories Enterprise Agreement 2018**

Please be advised that the above application has been allocated to Commissioner Wilson for determination.

Upon review of the application the Commissioner has asked that the below concerns please be addressed as soon as possible but not later than **close of business Tuesday, 5 February 2019**.

#### **FORMS**

1. **Union bargaining representatives:** the Form F16 lists United Voice and the HSU as bargaining representatives, however we do not appear to have received an F18 from these Unions.

#### **PRE-APPROVAL**

2. **Definition of a shiftworker per the NES:** The definition of a shiftworker provided in the Agreement at Clause 32 differs to the definition of a continuous shiftworker at clause 31.1(b) of the Award. Clause 31.1(b) of the Award indicates that for the purpose of the NES “a shiftworker is an employee who is regularly rostered to work Sundays and public holidays.” Clause 32 of the Agreement provides that “For the purpose of the NES, a shift worker is an employee who works for more than four ordinary hours on 10 or more weekends during the year in which their annual leave accrues.” The Agreement definition of a shiftworker per the NES appears to be more onerous than that provided for under the Award. As a result employees that would be entitled to an additional week of annual leave under the Award, may not receive the additional week of annual leave under the Agreement (see [Ramsay Health Care Australia v The AWU \[2012\] FWAFB 4033](#)). You are invited to consider providing an undertaking to address this concern.

#### **NES**

The following term(s) have been raised as contrary to the National Employment Standards (NES).

#### **3. Compassionate leave: Clause 35 and Schedule C**

- Clause 35.1 does not specify that the entitlement is also available in relation to a household member of the employee, as allowed under the Act at Section 97(b), and Clause 35.2 appears to suggest that a household member must be a relative, a restriction which is not contemplated under the Act.
- Clause 35.4 and Schedule C cap unpaid compassionate leave for casual employees at a total of four days and two days respectively. The effect of Section 106 of the Act is that casual employees are entitled to two days’ leave per occasion.

#### **4. Redundancy: Clause 43 and Schedule E:** Clause 43.3 provides that for part time employees the entitlement to redundancy will be based on the average hours worked over the period of service, rather than the total amount payable for the redundancy pay period worked at the employee’s base rate of pay for ordinary hours of work (s.119(2)).

Concerns relating to compliance with the NES may be able to be addressed by undertakings that the relevant clauses will operate “subject to the NES”, unless otherwise specified. For example:

“The company undertakes that the following clauses will operate subject to the National Employment Standards:

- Clause XX, in that the entitlement will [insert how clause is amended to be in keeping with NES]...

- Clause XX, in that the entitlement will [insert how clause is amended to be in keeping with NES]...”

## **BOOT**

The following issue(s) have been identified in relation to whether employees will be better off overall under the Agreement:

5. **Shift penalties:** Clause 23.1 of the Agreement provides two spans within which employees can either commence or finish their shift giving rise to an entitlement of a 115% shift penalty. The Clause provides that an employee whose rostered hours of ordinary duty finish between 8pm and 7am, or commence between 8pm and 7am will be paid a loading of 15%. The Award contains similar provisions at Clause 29.1, but provides for longer spans than those set out under the Agreement, and provides for a 15% shift penalty to employees who finish between 6pm and 8am, or commence between 6pm and 6am. As such, there are circumstances where employees under the terms of the agreement would not receive the 15% shift penalty otherwise payable under the Award and the rates of pay for a number of classifications are not high enough to compensate for this reduction.
6. **Overtime:** Clause 21.1 of the Agreement provides that for authorised hours worked beyond 38 hours a week, as averaged, or 8 hours a day (unless extended by agreement) overtime rates will be paid, 150% (for the first 3 hours) and 200% (for hours thereafter). The agreement provides a reduced penalty of 150% for the first 3 hours compared to the first 2 hours in the Award and 200% on a Sunday (see Award Clause 28.1). Furthermore, the Agreement does not appear to provide overtime for work performed outside of the ordinary span, which appears to be provided for under the Award. Depending on the frequency at which overtime is performed and the quantity of ordinary hours worked, some of the rates offered under the Agreement may not be sufficiently high to compensate for these reductions.
7. **Allowances:** The Agreement appears to provide for a less beneficial higher duties allowance at Clause 16.1, whereby employees must work more than 3 full shifts before qualifying for payment for higher duties. The Award however prescribes payment at Clause 30.1 for higher duties to support services employees for the time so worked for two hours or less, or for a full day or shift where more than two hours are worked. Some employees may not be better off overall under the Agreement depending on the frequency of this arrangement.

Please provide information on how employees will be better off overall under the Agreement taking into account these issues. You may also wish to consider undertakings to address one or more of the issues identified above.

### **Undertakings:**

If undertakings are to be provided, please ensure that they are:

- provided in a form that can be published with the Agreement (for example, as a standalone document separate to any response provided); and
- signed in accordance with the *Fair Work Regulations 2009*, in particular, regulation 2.07, which states: “For subsection 190(5) of the Act, an undertaking relating to an enterprise agreement must be signed by each employer who gives the undertaking.”

### **Note to Bargaining Representatives**

Bargaining representatives for the Agreement are requested to provide any views in relation to undertakings provided by the Employer, including whether the undertakings are supported or opposed as well as any reasons why, by **close of business Thursday, 31 January 2019** to ensure those views can be considered prior to the application being finalised.

Kind regards,

**Kate Ruhl**

Associate to Commissioner Wilson

**Fair Work Commission**

Tel: 03 8656 4538

Fax: 03 9655 0401

[Chambers.Wilson.C@fwc.gov.au](mailto:Chambers.Wilson.C@fwc.gov.au)

11 Exhibition Street, Melbourne Victoria 3000

GPO Box 1994, Melbourne Victoria 3001

[www.fwc.gov.au](http://www.fwc.gov.au)

*“The Fair Work Commission acknowledges that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander peoples. We acknowledge their continuing connection to country and pay our respects to their Elders, past, present and emerging.”*