

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010 (AM2016/31)

REPLY SUBMISSIONS DATED 9 MARCH 2018

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1. INTRODUCTION

The Chiropractors' Association of Australia (National) Limited (**CAA**) makes these reply submissions pursuant to Directions made by the Fair Work Commission (**Commission**) dated 21 December 2017 relating to the *Health Professionals and Support Services Award 2010 (HPSS Award)*.

The CAA refers to and relies on:

- 1.1 its written submissions dated 13 February 2018 (**13 February Submissions**), 17 March 2017 (**17 March Submissions**) and reply submissions dated 22 May 2017 (**22 May Reply Submissions**);
- 1.2 its oral submissions made on 11 December 2017 (see Transcript of Proceedings 1055480 at paragraphs PN1042 to PN1065); and
- 1.3 Exhibits CAA1 (Statement of Matthew William Fisher dated 17 March 2017), CAA2 (Statement of Matthew William Fisher dated 22 May 2017), CAA3 (Draft Determination), CAA4 (Schedule 2 to the CAA Submissions, Summary of Award Coverage and Tables) and CAA5 (Letter from the Fair Work Ombudsman dated 1 June 2012).

These reply submissions primarily address variations sought by the Health Services Union (**HSU**) in their submissions dated 12 February 2018 (**HSU Submissions**).

For completeness, however, the CAA also confirms its support of:

- 1.4 rostering amendments proposed by the Aged Care Employers in their submissions dated 19 February 2018 that enable roster changes with less than 7 days' notice by agreement; and
- 1.5 meal break amendments proposed by the Australian Industry Group in their submissions dated 14 March 2017 and preserved in their submissions dated 2 February 2018.

The CAA does not comment on submissions made by other parties, such as whether the list of common health professionals is indicative or exhaustive, because those submissions do not affect the CAA.

REPLY TO HSU SUBMISSIONS

2. SPAN OF HOURS

- 2.1** The CAA supports the rationalisation of the span of hours provision, but opposes the specific claim contained in the HSU Submissions, namely to include a span of hours for private practices of 7.00am to 7.00pm, Monday to Friday and 7.00am to 12.00pm, Saturday.¹
- 2.2** The CAA submits that the current span of hours in the HPSS Award and those now pressed by the HSU are inappropriate because they disregard the traditional operating hours of most health employers covered by the HPSS Award.
- 2.3** The CAA submits that most modern awards reflect the trading hours of the relevant industry. The uncontested evidence in this case is that the usual trading hours for the chiropractic industry are between 7am to 8pm, Monday to Friday and 7am to 2pm, Saturday.
- 2.4** Furthermore, practice operating hours are largely dictated by the needs of patients to access care outside of their own usual working hours, accordingly, within this context it is necessary and appropriate that chiropractic practices (and other private practices) should be better enabled to provide these services at times that are convenient to the community (and these are the community standards and expectations that apply).
- 2.5** In other words, this variation does not resolve such issues as the HPSS Award failing to provide a “relevant” minimum safety net of terms and conditions.
- 2.6** The CAA submits that if a rationalised span of hours was to be considered, it ought to include a span of hours that reflects most industry practices. In this regard, the CAA refers to and repeats paragraph 6.3 of the 17 March Submissions and paragraph 4 of the 13 February Submissions.
- 2.7** The CAA has submitted a variation which rationalises the span of hours so that there is one span that applies to facilities which provide care on a 24/7 basis and one which applies to private practice (e.g. by expanding the current definition of “private medical, dental and pathology practice” to encompass all private practices) or all private allied health practices.
- 2.8** This alternate variation sought by the CAA would resolve the issues identified by the CAA in its 17 March Submissions and 13 February Submissions because the usual trading hours for the chiropractic industry would be encompassed in such a span.

¹ Paragraphs 11 to 50 of the HSU Submissions.

3. SPLIT SHIFTS

- 3.1 The HSU submits that split shifts are not permitted under the HPSS Award.²
- 3.2 The CAA submits that the HSU is clearly mistaken in this regard. There is no requirement in the HPSS Award for hours to be worked “continuously”. If split shifts were prohibited, the HPSS Award could have clearly contained words to that effect.
- 3.3 In fact, the uncontested evidence in this case demonstrates that split shifts were (and are) a common feature of the chiropractic industry.³
- 3.4 Accordingly, the CAA submits that what the HSU are really seeking is an entirely new requirement for hours of work to be “continuous” and to prohibit the working of split shifts. However, the HSU has not:
- 3.4.1 made specific submissions directed at the need for this variation to the HPSS Award; or
- 3.4.2 filed any evidence to support the variation.
- 3.5 In support of the change, the HSU simply argues that employers who wish to utilise split shifts may do so through enterprise bargaining.
- 3.6 The CAA refers to the 17 March Submissions and particularly paragraph 5. The Full Bench has held that the 4-yearly review is to proceed on the basis that “prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”⁴
- 3.7 Furthermore, it held that a party seeking a variation to a modern award must generally speaking mount a merit-based case in support of its claim which is accompanied by probative evidence.⁵ Notably, the Full Bench said that “significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative and, where feasible, probative evidence.”⁶ However, those changes which are obvious as a matter of industrial merit will not require the party to advance probative evidence in support of the proposed variation.⁷
- 3.8 The CAA submits that the HPSS Award enables the working of split shifts, which is supported by the fact that split shifts are common in the industry.
- 3.9 The CAA submits that the change proposed by the HSU qualifies as a “significant change”. Thus, it is incumbent on the HSU to justify the proposed change with a merit-based argument supported by probative evidence. The HSU also has the burden of satisfying the Commission that the modern awards objective is no longer being met.

² Paragraphs 46 to 47 of the HSU Submissions.

³ CAA2.

⁴ *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [24] and [60].

⁵ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [52].

⁶ *Ibid.*

⁷ *4 yearly review of modern awards – Award Flexibility* [2016] FWCFB 6178, [60]–[61].

3.10 By failing to submit any arguments or provide any evidence of the need for this variation, the HSU has not met these burdens and the Commission should not be satisfied that the change is necessary to achieve the modern award objectives.

3.11 In fact, the CAA submits that the variation sought could run contrary to the modern objectives in several ways.

For example, this variation could result in:

3.11.1 employers having to pay employees despite there being little or no work to do, which is inconsistent with the need to promote the efficient and productive performance of work (section 134(1)(d)) and is likely to increase the employment costs on business (section 134(1)(f));
or

3.11.2 an employee receiving less work (and pay) because an employer may only roster the employee for one shift rather than the two shifts available that day, which could have an impact on the relative living standards and the needs of the low paid (section 134(1)(a)).

3.12 The CAA also submits that the Commission should not accept the HSU's submission that employers who wish to utilise split shifts can do so through enterprise bargaining. This proposition, put simply, does not justify the change sought. Moreover, the CAA's uncontested evidence includes that the chiropractic industry is dominated by small and micro business and logically speaking, in such circumstances, collective bargaining is unusual and perhaps even impossible (given that there is a legislative prohibition on making an enterprise agreement with a single employee).⁸

4. WEEKEND PENALTIES

4.1 The CAA supports the variation sought by the HSU to replace the term "day worker" in clause 18.1 as this is an obvious issue under the award.⁹

4.2 If this variation is granted, the CAA submits that the HPSS Award should also make clear that weekend penalties apply in substitution for shift work or other penalties rather than in addition to those.

4.3 If, on the other hand, these variations are not granted, the CAA submits that clause 20.3 of the Revised Exposure Draft (regarding annual leave loading) should be amended to remove references to weekend penalties for shiftworkers. This amendment would ensure that the HPSS Award is "simple" and "easy to understand" by resolving the uncertainty of weekend penalty entitlements for shiftworkers.

⁸ See section 172(6) of the Act.

⁹ See paragraph 7.3 of the 17 March Submissions regarding weekend penalties for shiftworkers and Paragraphs 62 to 65 of the HSU Submissions.

5. SHIFT WORK

- 5.1 The CAA does not (in theory) oppose the changes sought by the HSU in relation to shift work penalties (to include an afternoon shift and night shift penalty),¹⁰ however, it opposes the variation in its current drafting and submits that the proposed clause is problematic and uncertain.
- 5.2 The CAA's primary goal for participating in this review has been to ensure that the HPSS Award is unambiguous, fair to employees and employers and caters to the way the industry operates.
- 5.3 As the CAA has previously made clear, shift work as it is traditionally understood (i.e. where shifts are continuously rostered 24 hours a day for 7 days a week) is not a feature of the chiropractic industry, nor for that matter any of the other allied health professions covered by the award.
- 5.4 The CAA submits that the work performed by chiropractic employees outside of the span of hours should be properly characterised as overtime, however, instead chiropractic employees are being inappropriately captured by the shiftworker provisions of the HPSS Award. The CAA submits that this is inappropriate because such employees are clearly not working "shifts". This has led to uncertainty, increased employment costs and created greater regulatory burden.
- 5.5 The CAA submits that the CAA's members have difficulty properly characterising work after 6pm Monday to Friday and anytime on Saturdays as either overtime or as triggering a shift work loading and, in the CAA's submission, these difficulties are justified.
- 5.6 Unfortunately, the change proposed by the HSU does not resolve this issue and could create further confusion. For example:
- 5.6.1 Clause 18.4 of the Revised Exposure Draft¹¹ provides that a shiftwork loading is paid to a "shiftworker". Schedule I of the Revised Exposure Draft defines a "shiftworker" as "an employee who is regularly rostered to work their ordinary hours outside the span of ordinary hours of work of a day worker as defined in clause 8.2".¹²
- The HSU's variation uses the terms "full time and part time employee" and "casual employee" rather than "shift worker" which is likely to result in uncertainty as to when shift work loadings are payable.
- 5.6.2 In addition, given the definition of a shift worker (as set out above), it is relatively clear that the shift work penalties were not intended to apply to work within the various spans for day workers (e.g. those spans contained in clause 8.2 of the Revised Exposure Draft). However, this variation arguably (inadvertently) captures these workers.
- 5.6.3 It also seems that the HSU's proposition is that the shift loading attaches to the shift and not the shift worker (which is a proposition the CAA broadly supports), however, the CAA submits that

¹⁰ Paragraph 49 of the HSU Submissions.

¹¹ Clause 29 of the HPSS Award.

¹² Clause 3 of the HPSS Award.

the interaction between the variation proposed and the definition of a shift worker within the award has not been properly considered and needs to be before such a wholesale change to the award is made.

5.6.4 The CAA is also concerned that “unrostered” afternoon and night shifts may not be captured by this provision.

5.6.5 The variation does not use language that is consistent with the Revised Exposure Draft, e.g. because it refers to “their minimum hourly rate” rather than “the minimum hourly rate of pay applicable to their classification and pay point”.¹³

5.7 In addition to the uncertainties associated with the variation sought by the HSU, the CAA repeats its earlier submissions that the scope of the existing shift work provision is unclear. For example, the CAA asks what would an employee in the chiropractic industry who works an ad hoc shift between 12pm and 8pm on a Friday be entitled to be paid for the hours worked? Is the entire shift to be paid at ordinary rates?

5.8 Any uncertainties that exist in the various penalty rates provisions (or those they interact with) presents a potential compliance issue for chiropractic employers and there is, in our view, a real risk of employees being either underpaid or overpaid these entitlements.

5.9 It is important that employers and employees are able to clearly and easily identify and understand employee entitlements and it is the CAA’s submission that the shift work penalty entitlement ought to be clarified but not in the manner proposed by the HSU.

5.10 The CAA submits that the better view is that the requirement to pay a shiftwork loading is attached to the shift worked and not the shiftworker and that the ambiguous definition of a “shift worker” is removed, however, it should also be made clear that shift work does not apply outside of 24-hour operations (and that hours worked by “day workers” that are outside the span are overtime – which was included in Variation 2 - Draft Determination attached to the 13 February Submissions).

6. PUBLIC HOLIDAYS

6.1 The CAA supports the HSU’s submission to remove clause 23.3(b) of the Revised Exposure Draft¹⁴ and notes that such a provision appears to be prohibited under the Act.

6.2 Relevantly, subsection 115(3) of the Act provides that “a modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday...”

¹³ See paragraph 49 of the HSU Submissions and Clause 18.4 of the Revised Exposure Draft.

¹⁴ Paragraphs 66 to 73 of the HSU Submissions.

- 6.3** The *Explanatory Memorandum to the Fair Work Bill 2009 (EM)* at paragraph 458 states (in relation to subsection 115(3) of the Act) that “this means that a modern award or agreement cannot provide that a substitute day can be determined unilaterally by the employer.”
- 6.4** In the CAA’s submission, clause 23.3(b) of the Revised Exposure Draft¹⁵ is inconsistent with the Act and should be removed as per the HSU Submission.

7. OVERTIME

- 7.1** The CAA does not support the variation sought by the HSU in relation to overtime for casual employees. Clause 19.2(d) of the Revised Exposure Draft was inserted by consent of the parties and is, in the CAA’s submission, consistent with the current approach in the HPSS Award to remunerate casual employees for overtime.
- 7.2** In the CAA’s submission, the HPSS Award remunerates both permanent and casual employees in the same manner when working overtime and such an approach is appropriate if you have regard to the purpose of the casual loading (as noted in the case of the HPSS Award, to compensate a casual employee for the benefit of paid leave he or she is not otherwise entitled to).¹⁶
- 7.3** Moreover, clause 19.2(d) of the Revised Exposure Draft is consistent with the entitlement provided in the HPSS Award currently and in the CAA’s submission, the HSU has not put forward any evidence to support a variation to this position.

8. CONCLUSION

- 8.1** The CAA supports the following variations to the HPSS Award:
- 8.1.1 amendments to the weekend penalties provision proposed in the HSU Submissions to the extent that they provide weekend penalties to shift workers;
 - 8.1.2 amendments to the public holiday provisions proposed by the HSU in the HSU Submissions that remove an employer’s right to unilaterally substitute public holidays;
 - 8.1.3 rostering amendments proposed by the Aged Care Employers in their submissions dated 19 February 2018 that enable roster changes with less than 7 days’ notice by agreement; and
 - 8.1.4 meal break amendments proposed by the Australian Industry Group in their submissions dated 14 March 2017 and preserved in their submissions dated 2 February 2018.

¹⁵ Clause 31.1 of the HPSS Award.

¹⁶ Clause 6.4(e) of the Revised Exposure Draft or Clause 10.4 of the HPSS Award.

The CAA agrees that those changes are necessary to ensure that the HPSS Award, together with the NES, provide a “fair and relevant” minimum safety net for the allied health industry and submits that those variations should be made.

8.2 The CAA also supports a rationalisation of the span of hours as proposed by the HSU in the HSU Submissions, but does not agree that the variation proposed achieves the modern award objectives and accordingly submits that the variation should not be made in the form proposed. The CAA submits that an appropriate span of hours for the allied health industry is to expand the definition of “private medical, dental and pathology practice” to encompass other private health practices and is included in Attachment 1 to these Reply Submissions.

8.3 The CAA opposes the following variations to the HPSS Award:

8.3.1 amendments to the ordinary hours provisions proposed by the HSU in the HSU Submissions that effectively result in a prohibition on split shifts;

8.3.2 amendments to the overtime provisions proposed by the HSU in the HSU Submissions that introduce casual loadings on top of the overtime rates contained in the HPSS Award.

The CAA does not agree that those changes are necessary to ensure that the HPSS Award, together with the NES, provide a “fair and relevant” minimum safety net for the allied health industry and submits that those variations should not be made.

8.4 The CAA also objects to changes to the shift work provisions proposed by the HSU which would result in the introduction of an afternoon shift for reasons that include that the variation sought is unworkable and ambiguous. The CAA submits that the variation is problematic because:

8.4.1 “day workers” could be inadvertently captured by the provision;

8.4.2 the clause does not properly interact with other provisions of the HPSS Award;

8.4.3 the language used is not consistently drafted with the Revised Exposure Draft; and

8.4.4 it is unclear when and to whom shift work loadings are payable.

Accordingly, the CAA submits that the variation (in its current drafting) should not be made.

ATTACHMENT 1

PRXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Health Professionals and Support Services Award 2010
(AM2014/204)

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

[MA000027]

Health Professionals and Support Services

[MEMBERS]

[LOCATION, DATE]

4 yearly review of modern awards.

A. Further to the Full Bench decision issued by the Fair Work Commission on [date], the above award is varied as follows:

1. By adding new clauses 24.1 and 24.2 and deleting clauses 24.3(a) and 24.4 (and consequential amendments):

24.1 Span of hours for 24/7 operations

The ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday.

24.2 Span of hours for private medical, dental, pathology and health practice

The ordinary hours of work for an employee in a private medical, dental, pathology and health practice are worked between:

Day	Span of hours
Monday to Friday	7:30am to 9:00pm
Saturday	8:00am to 4:30pm

24.3 Private medical imaging – 7 day practices

Where the work location of a **private medical imaging** practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location will be between 7.00 am and 9.00 pm Monday to Sunday. Work performed on a Saturday will be paid at the rate of time and a quarter of the employee’s ordinary rate of pay instead of the loading prescribed in clause 26— Saturday and Sunday work. Work performed on a Sunday will be paid at the rate of time and a half of the employee’s ordinary rate of pay instead of the loading prescribed in clause 26.

2. By amending the definition of “private medical, dental and pathology practice” in clause 3.1 to:

*private medical, dental, pathology **and health practice** means the practice of any medical practitioner, such as medical centre, general practice, specialist practice, family practice, medical clinic, dental practice, pathology practice, **medical imaging practices (other than 7-day practices), health practices including chiropractic, physiotherapy, osteopathy, podiatry, traditional and complementary medicines, and women’s health centre or a multi-disciplinary practice, but does not include inpatient care, hospitals or hospices.***