DECISION

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

(AM2016/31)

Health and welfare services

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BOOTH
COMMISSIONER CRIBB

SYDNEY, 3 DECEMBER 2018

4 yearly review of modern awards - Health Professionals and Support Services Award 2010 - substantive issues.

1. Introduction and background

[1] This Full Bench has been constituted to hear and determine substantive claims relating to the *Health Professionals and Support Services Award 2010* (HPSS Award) as part of the 4 yearly review of modern awards (the Review) conducted in accordance with s.156 of the *Fair Work Act 2009* (Cth) (the Act).

[2] This matter was heard before the Full Bench on 11 and 12 December 2017. Witness evidence was given by Mr Alexander Leszczynski on behalf of the Health Services Union (HSU); Ms Melanie Hayes and Ms Carol Tran on behalf of the Dental Hygienists Association of Australia (DHAA); Ms Eithne Irving, Ms Emma McKenny and Mr Neil Hewson on behalf of the Australian Dental Association (ADA) and Mr Matthew Fisher on behalf of the Chiropractors Association of Australia (National) Ltd (CAA).

[3] The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) tendered the witness statements of Ms N Baras and Mr M Morgan, as well as three other witness statements subject to confidentiality orders. Aged Care Employers (ACE) tendered the witness statements of Mr Mark Douglas, Mr John Favaloro, Ms Karen Foster and Ms Kalena Jefferson. None of those witnesses were the subject of cross examination.

[4] Permission to appear was granted to Ms L Doust to appear on behalf of the HSU; Mr G Boyce on behalf of the ADA and ACE; Ms J Bandara to appear on behalf of the CAA and Mr K Scott on behalf of the Australian Business Industrial and the New South Wales Business Chamber (ABI and NSWBC).

[5] Before dealing with the specific claims before us we outline the legislative context relating to the Review.

2. The legislative context

[6] Section 156 of the Act requires the Commission to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014.

[7] Subsection 156(2) deals with what must be done in the Review:

> (2) In a 4 yearly review of modern awards, the FWC:
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> (a) must review all modern awards; and
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> (b) may make:
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> (i) one or more determinations varying modern awards; and
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> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards.
>
> (c) must not review, or make a determination to vary, a default fund term of a modern award.
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> Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
> Note 2: For reviews of default fund terms of modern awards, see Division 4A.'

[8] Subsection 156(5) provides that in a Review each modern award must be reviewed in its own right. In *National Retail Association v Fair Work Commission* the Court noted the purpose of the 'in its own right' requirement is to ensure the review is 'conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations'.[1]

[9] The scope of the Review was considered in the Preliminary Jurisdictional Issues Decision. It was acknowledged in that decision that 'the Commission is obliged to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a stable modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variations'.[2]

[10] The modern awards objective is set out in s.134(1) of the Act, as follows:

> **134 The modern awards objective**
>
> *What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2 6, so far as they relate to modern award minimum wages.

> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[11] No particular primacy is attached to any of the above considerations and not all will necessarily be relevant in the context of a particular proposal to vary a modern award.[3]

[12] Section 138 of the Act provides that terms included in modern awards must be 'necessary to achieve the modern awards objective'. What is necessary will involve a value judgment based on the assessment of the considerations stated in s.134(1)(a)-(h), having regard to the submissions and evidence.[4]

[13] The modern awards objective applies to the exercise of the FWC's modern award powers which are defined to include the FWC's functions or powers under Part 2–3 of the Act. The Review function is set out in s.156, which is in Part 2–3 and therefore will involve the performance or exercise of the FWC's modern award powers.

3. The claims

[14] This decision deals with substantive claims over the following eight provisions:

1. Span of hours
2. Rostering
3. List of common health professionals
4. Translators and interpreters
5. Weekend penalties
6. Substitution of public holidays by agreement
7. New schedule for medical imaging
8. Meal breaks

3.1 Span of hours

[15] A number of claims have been made in respect to the span of hours at clause 24 of the HPSS Award.

[16] The HSU seeks to vary clause 24 of the award to provide for a single span of hours between 6am to 6pm, Monday to Friday, applicable to all day workers.[5] Alternatively, the HSU seeks two separate spans which would cover, firstly, most health sector workplaces including hospitals, with a second span to cover private practises of all types.[6] The alternative span relating to most health sectors would reflect their first proposal while the alternative span of hours for private practices would appear as follows:

(a) In addition to the above, the ordinary hours of work for a worker in private practice are between:

(i) 7.00am – 7.00pm Monday to Friday

(ii) 7.00am – 12.00pm Saturday

[17] In addition to the above, the HSU seeks the inclusion of a provision which would clarify that the HPSS Award does not allow for the working of split shifts.[7]

[18] The CAA seeks to insert a new clause which would provide for a span of hours for chiropractic practices of 7.00 am to 8.00 pm Monday to Friday and 7.00 am to 2.00 pm on Saturday.[8] In the alternative, the CAA proposes a variation which would provide two different spans, one applying to facilities that operate on a 24-hour a day, seven days a week basis and one applying to private practice.[9]

[19] Osteopathy Australia (OA) seeks either to amend clause 24.2 of the award to reflect current osteopathic practices or to insert a new clause which would define the span of hours for osteopathy practices as follows:[10]

> "The ordinary hours of work for a day worker will be worked between 7.30 am and 9.00pm Monday to Friday and between 8.00 am and 4.30 pm on Saturday."

[20] The Dandenong and Box Hill Super Clinics seek to merge clauses 24.2 and 24.3 of the HPSS Award so that the hours of work provision applicable to private medical imaging practices is also applicable to seven-day general practices.[11]

[21] Clause 24 of the HPSS Award currently provides a general span of hours of 6.00 am to 6.00 pm Monday to Friday and specific spans for private medical, dental and pathology practices, private medical imaging practices and physiotherapy practices:

24. Span of hours

24.1 Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.

24.2 Private medical, dental and pathology practices

The ordinary hours of work for a day worker will be worked between 7.30 am and 9.00 pm Monday to Friday and between 8.00 am and 4.30 pm on Saturday.

24.3 Private medical imaging practices

(a) Five and a half day practice

The ordinary hours of work for an employee will be worked between 7.00 am and 9.00 pm Monday to Friday and between 8.00 am and 1.00 pm on Saturday.

(b) Seven day practice

Where the work location of a 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.

24.4 Physiotherapy practices

In physiotherapy practices, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday and 6.00 am to 12.00 noon on Saturday.

Submissions

[22] The HSU submits that clause 24 of the HPSS Award in its current form undermines the purpose of the award modernisation process to create a simple and easy to understand system.[12] The HSU submits that it is neither stable nor sustainable to have separate spans for certain types of health and medical practices.

[23] The HSU submits that the span of hours clause in the HPSS Award should not diverge so greatly from other health awards and points to the *Nurses Award 2010* (Nurses Award), the *Aged Care Award 2010* (Aged Care Award) and the *Medical Practitioners Award 2010* (Medical Practitioners Award) as examples of modern awards that provide a single span of ordinary hours for day workers.[13]

[24] The HSU further submits that the inclusion of extended and specialised spans is contrary to s.134(1)(b) of the Act (the need to encourage collective bargaining) as it includes, in an award context, outcomes that should be the subject of bargaining.

[25] In respect to split shifts, the HSU submits that the HPSS Award does not allow the working of split shifts as there is no provision for split shifts in the HPSS Award, save that the word 'continuous' is absent from the span of hours clause.

[26] The Private Hospital Industry Employers' Associations (PHIEA) supports the HSU's claim to amend clause 24 of the Award to provide for a single span of hours subject to some amendments.[14] The PHIEA proposes that clause 24 should also include a provision that defines a shift worker as an employee who is regularly rostered to work their ordinary hours outside the single span of hours for a day worker as proposed by the HSU. The PHIEA submits that the majority of employees working in private hospitals meet the definition of a shift worker under the current HPSS Award and are not usually rostered to work their ordinary hours as defined under clause 24.1 of the HPSS Award.

[27] However, the PHIEA does not support the HSU's proposal relating to split shifts on the basis that the provision appears to be copied from the Nurses Award and makes sense in that context but not in the context of the HPSS Award; that it would be contrary to s.134(c) of the modern awards objective and that it would act as a hindrance to employees who currently perform split shift work.[15]

Submissions opposing HSU claim

[28] The ADA opposes the HSU's claim and submits that the HSU previously sought to have employees covered by the HPSS Award and the Nurses Award covered by the same modern award with the same ordinary hours of work during the award modernisation process.[16] The ADA submit that the HSU has not led any new grounds as to why the current provisions in the award are not sustainable or how the proposed variation achieves the modern awards objective.

[29] The ADA submit that the multiple spans of ordinary hours in the HPSS Award provide a relevant minimum safety net as they take into account the particular characteristics of certain industries and the needs of the community as a whole. The ADA submits that the variation sought by the HSU would have the effect of either prohibiting employers in the private dental sector from engaging employees to perform work at times that they are currently engaged to perform work without engaging the employees as shift workers, or of compelling the employer to collectively bargain.[17]

[30] In respect to the HSU's submission that the current span of hours provision is inconsistent with the modern awards objective at s.134(da), the ADA refers to a number of pre-reform awards where the accepted ordinary hours of work in the private dental industry included evening work and Saturday work.[18] The ADA states that the concept of working shifts should be construed having regard to the accepted nature of the ordinary hours of work in the industry.[19]

[31] In respect to the ss.134(1)(a)-(f) criteria, the ADA relies on evidence given by Ms Irving to support the submission that persons from poorer socio-economic backgrounds are unable to access the dental services they need and that there is a greater demand for these services during evenings and on weekends than the market can currently supply.[20] The ADA submits that the HSU's proposed variation would increase the cost of operating a dental practice or would limit people's access to dental services.

[32] The CAA opposes the HSU's claim sand submits that the variation proposed by the HSU fails to meet the needs of the chiropractic industry.[21] The CAA submits that the usual trading hours for the chiropractic industry are between 7.00 am-8.00 pm, Monday-Friday and 7.00 am-2.00 pm, Saturday. In particular the CAA states that the span of hours under the HPSS Award should not be based on the span of hours in the Nurses Award as the type of work performed and the work environments of chiropractors and nurses are distinct. However the CAA does not oppose rationalisation of the span of hours to two separate spans such as a span that applies to facilities which provide care on a 24-hour-a-day, seven-days–a-week basis and one which applies to private practice or all private allied health practices.[22]

[33] The CAA further submits that the HSU's proposal regarding split shifts would import a new requirement for hours of work to be continuous. The CAA claims that split shifts are common in the chiropractic industry and that the HSU has failed to establish that the variation is necessary to achieve the modern awards objective.

[34] The Australian Federation of Employers and Industries (AFEI) oppose the HSU's proposal and submit that the HSU has not made out a case for the substantive change to the

HPSS Award.[23] However, AFEI submits that it does not oppose the CAA's proposal to rationalise the span of hours.[24]

[35] The Australian Medical Association (AMA) opposes the HSU's claim and submits that the HSU has not advanced arguments capable of satisfying the Act's criteria and therefore the exercise of variation powers under s.157 of the Act cannot be enlivened.[25] The AMA submits that the HSU's claim is an 'impracticable bid' given that the span of hours under the HPSS Award has arisen because of clearly separate and distinct health care business practices and operations.

[36] ABI and NSWBC submit that clause 24 should not be varied as proposed by the HSU as the current clause recognises the diverse patterns of usual hours of the industry at modernisation and provides for a span of hours that is tailored to and relevant to specific sectors of the industry. ABI and NSWBC are of the view that clause 24 is clear, unambiguous and capable of being readily understood by readers of the HPSS Award.[26]

[37] The Medical Imaging Employment Relations Group (MIERG) opposes the HSU's claim and submits that restricting the standard hours to Monday to Friday would have a detrimental effect on the ability of private medical imaging practices to meet the needs of patients.[27] It foreshadows that if the FWC determined to rationalise the span of hours, it would propose a variation to extend the span to 7.00 am and 9.00 pm, Monday to Sunday inclusive.[28]

CAA claim

[38] As to their own claim the CAA submits that clause 24.1 of the HPSS Award, which applies to chiropractic practices, is more limited than the span applying to private medical, dental and pathology practices.[29] The CAA's proposed variation is intended to provide for ordinary hours of work on a Saturday and shift the commencement and finishing time for ordinary hours during the week to 7.00 am to 8.00 pm.

[39] In the alternative, the CAA proposes a variation which rationalises the span of hours so there is one span that applies to facilities which provide care on a 24/7 basis and one that applies to private practice. It submits that this variation would also resolve the current limitations with the span of hours applying to the chiropractic industry.[30]

[40] The ADA and the AFEI[31] support the claim made by the CAA. The ADA also supports the claim made by the MIERG in respect to extending the span so that it operates from 7.00am to 9.00pm Monday to Sunday, as this would reflect the demand from the Australian community for health services at flexible times.[32]

[41] The HSU opposes the CAA's claim to introduce an additional span of hours specific to its sector on the basis that the claim does not meet the s.134(1)(b) objective.[33] The HSU submits that enterprise bargaining enables negotiated agreements between employers and employees which facilitate a span of hours that would meet the specific needs of the chiropractic sector without an additional span of hours in the HPSS Award.

[42] In respect to the CAA's alternative claim, the HSU opposes the claim on the basis that it would radically expand the span of hours for many private practices. The HSU submits that it is not logical that a broader collection of private practices should have greater flexibility than hospitals which operate 24/7 and the variation would allow employees to work unsociable hours of up to 9.00 pm each evening without a penalty.

Osteopathy Australia claim

[43] Osteopathy Australia submits that the current span of hours applicable to the osteopathic industry (clause 24.1) does not meet the s.134(1) objectives because:[34]

- the span does not reflect the usual operating hours of the industry which is largely driven by patient demand;
- there is an inherent unfairness in the different span of hours for similar primary care professions;
- osteopaths are being captured by the shift worker provisions of the Award, when they are not working 'shifts'; and
- there is confusion in relation to whether work after 6.00 pm from Monday to Friday and on Saturdays should be characterised as overtime or as triggering a shift loading.

Dandenong and Box Hill Superclinics claim

[44] The Dandenong and Box Hill Superclinics submitted that they operate as a private general practice, seven days a week.[35] It was submitted that the Dandenong Clinic operates from 8.00 am-10.00 pm every day and the Box Hill Clinic operates from 9.00 am-12.00 am every day. Consequently, the clinics seek a variation that the hours of work provision applicable to private medical imaging practices is also applicable to seven day general practices.

Witness evidence

[45] The HSU and the Dandenong and Box Hill Superclinics did not rely on witness evidence in support of their claims.

[46] In opposing the HSU's claim, the ADA relies on the evidence of three witnesses. Dr Niel David Hewson gave evidence from his experience as a dental practitioner and as owner of the dental practice Northland Dental.[36] Mr Hewson gave evidence that Northland Dental operates six days per week and accepts appointments on two out of every three Saturdays and Thursday evenings up to 8.00 pm due to patient demand. Mr Hewson was shown a copy of clause 24 of the HPSS Award and stated that he did not find the clause confusing. He also stated that the variation proposed by the HSU would result in a material increase in the costs associated with providing services to patients after 6.00 pm, Monday to Friday and that Northland Dental would need to consider whether it was financially viable to continue operating the practice after 6.00 pm. In respect to weekends, Mr Hewson gave evidence that Saturday appointments at Northland Dental are generally booked four or five weeks before they are to occur due to the strong patient demand for services outside of normal business hours.

[47] Emma Jane McKenny, Executive Manager People & Culture at Pacific Smiles Group Limited (Pacific Smiles), gave evidence that 66 of the dental centres operated by Pacific Smiles accept bookings from patients on a Saturday and 36 accept bookings on a Sunday, whilst almost every Dental Centre accepts bookings into the evening on at least some of the days during the week.[37] Ms McKenny gave evidence that employment costs account for approximately 54.4 percent of the operating costs for each dental centre, with consumable supplies accounting for 13.3 percent and rent accounting for approximately 14.1 percent of costs. Ms McKenny stated that approximately 684 of Pacific Smiles' employees are currently employed under the terms of the HPSS Award with the majority of these employees engaged as dental assistants.

[48] Ms McKenny gave evidence relating to the impact of the HSU's proposed variations on Pacific Smiles. Ms McKenny stated that the ability to roster a day worker to work between 6.00 am and 7.30 am, Monday–Friday will be of no benefit to Pacific Smiles as patients do not wish to see dentists before 7.30 am. The inability to roster employees after 6.00 pm without the need to pay additional shift loadings would likely result in a number of dental centres either not opening or having restricted opening hours and may also result in limitations to the times the centres can accept bookings from patients so that the last patient is seen well before 6.00 pm. If employee cost base increases, Pacific Smiles may need to increase its service fees charged to dentists which may in turn increase patient fees. Ms McKenny stated that the HSU's proposed variation to the HPSS Award will add an additional cost burden on dental practitioners in the context of slimming private health rebates.

[49] Eithne Mary Irving, Deputy CEO and General Manager of Policy at the ADA, referred to the *ADA Inc. Practice Survey conducted in 2013-2014* (ADA Practice Survey) as evidence that many dental practices are small practices with only 22 percent of practices employing dental hygienists and a lower proportion of practices employing dental therapists and dental technicians. Ms Irving stated that the largest expense in running a dental practice is employment costs followed by expenses of premises, materials and admin/professional expenses.

CAA

[50] Matthew William Fisher, CEO of the CAA, gave evidence in relation to a survey commissioned by the CAA.[38] The survey reported that 82.51 percent of CAA members who completed the survey were regularly trading outside the current span of ordinary hours in the HPSS Award. The survey indicated that a large factor dictating the trading hours of the chiropractic industry was patient demand for flexible appointment times and employees requesting flexible working hours. Mr Fisher also referred to a review conducted by the CAA of its members' websites. Mr Fisher stated that the review supported the findings of the survey that the overwhelming majority of its members' standard operating hours are outside the span of hours in the HPSS Award. The review indicated that 98.81 percent of CAA members open their practices at 7.00 am or later and 82.68 percent close between 6.00 pm and 8.00 pm. In respect to weekends, Mr Fisher stated that the review demonstrated that 71 percent of chiropractic practices were open Saturdays.

Consideration

[51] We appreciate that the span of hours in the HPSS Award affects employees' earnings and employment opportunities, employers' cost base and potentially the price of services and/or the willingness of services to open. The modern awards objective concerning the living standards of employees (s.134(1)(a)), workforce participation (s.134(1)(b)) and the efficiency, productivity and costs of employers (s.134(1)(d), s.134(1)(f)) must be balanced as we consider the range of proposals put forward in relation to span of hours.

[52] We consider that a strong case would need to be mounted to support the contraction of the default span of hours. We do not consider the case that has been made by the HSU to be strong. No witness evidence supported this claim. We do not accept the submission to the effect that in the absence of a single span of hours the award is not simple and easy to understand.

[53] We accept the HSU's submission that a single span of hours appears in the Nurses Award, the Aged Care Award and the Medical Practitioners Award (except Senior Doctors) however our obligation to consider what is 'necessary' to achieve the modern awards objective in the HPSS Award means we must take into account the particular circumstances of the employers and employees covered by the HPSS Award.

[54] We do not agree with the HSU's submission that the inclusion of extended and specialised spans is contrary to s.134(1)(b) of the Act (the need to encourage collective bargaining).

[55] Having considered the submissions and evidence before us we do not propose to adopt the claim by the HSU for a span of ordinary hours of 6.00 am – 6.00 pm Monday to Friday for all employees.

[56] We acknowledge the HSU's alternative proposal for two separate spans. We consider that there is force in the submissions of CAA and OA to the effect that that the default span of ordinary hours of 6.00 am – 6.00 pm Monday to Friday does not reflect their contemporary operating hours that are designed to meet the needs of the community. It appears to us to be out of step with the scheme of the HPSS Award not to include these two sectors in the exceptions applicable to private practices.

[57] In the absence of submissions and evidence from the general medical practice sector as a whole we are not persuaded that general medical practices opening seven days a week should have the same span of hours as for private medical imaging. We do not propose to make the changes sought by Dandenong and the Box Hill Super Clinics.

[58] We are attracted to the rationalisation of the spans of hours to improve the simplicity of the HPSS Award, however we would not be comfortable changing the span of hours for private medical imaging without a strong case being made out. Accordingly we do not adopt the alternative proposal from the HSU for two spans, but we think that the spirit of their proposal for a separate span for private practices is embodied in our conclusion.

[59] We have settled upon a scheme with four different spans: one for medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices; one for private medical imaging opening on five and a half days per week; one for private medical imaging opening seven days per week, and a default span of hours for employers and employees not otherwise specified above.

[60] In relation to the submissions of the HSU and the PHIEA concerning split shifts we agree with the HSU that the HPSS Award does not expressly provide for split shifts. We note the absence of the word 'continuous' as referred to by the HSU. Whilst not put forward as a claim before us we express the view that the HPSS Award does not permit split shifts.

[61]

In relation to the PHIEA submission regarding the definition of shift workers, we consider that clause 29 of the HPSS Award addresses shift work and that it is not necessary to adopt the PHIEA proposal.

[62] We propose that clause 24 will read as follows:[39]

24. Span of hours

24.1 Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.

24.2 Private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practices

The ordinary hours of work for a day worker will be worked between 7.30 am and 9.00 pm Monday to Friday and between 8.00 am and 4.30 pm on Saturday.

24.3 Private medical imaging practices

(a) Five and a half day practice

The ordinary hours of work for an employee will be worked between 7.00 am and 9.00 pm Monday to Friday and between 8.00 am and 1.00 pm on Saturday.

(b) Seven day practice

Where the work location of a 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.

[63] Interested parties are directed to file submissions directed at the proposed wording of clause 24.

3.2 Rostering

[64] The ACE seek to vary clause 8.3 of the HPSS Award exposure draft (clause 25 of the current award), in order to allow the variation of rosters by mutual consent without the need to provide seven days' notice.[40]

[65] The variation sought by ACE is highlighted in red below:

> **25. Rostering**
>
> **(a)** The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.
>
> **(b)** Unless the employee otherwise agrees, seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.
>
> **(c)** Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

Submissions

[66] ACE submits that without the variation it proposes, an employer cannot alter an employee's roster in the absence of seven days' notice to the employee.[41] It submits that the current provision limits roster alterations to 'illness' or 'emergency' when there exist other circumstances where a roster may need to be altered at short notice.

[67] The PHIEA, ABI and NSW BC and CAA support the variation.[42]

[68] The HSU opposes the variation and submits that it is not required to meet the modern awards objective.[43] The HSU submits that the proposed variation might lead to situations where employees do not want a last minute roster change, but feel pressured to 'agree'.[44]

Witness evidence

[69] ACE relies on four witness statements to support its claim. Each witness gave evidence that their employees were employed under an enterprise agreement.

[70] John Favaloro, Human Resources Manager at Living Care, gave evidence that he would consider the requirement to give seven days' notice of a roster change restrictive because of the nature of the work performed at the organisation which may require staff on hand at short notice for a variety of reasons such as unplanned leave, non-attendance of staff, unexpected surges in resident care, the need to backfill staff undergoing training and unanticipated recruitment delays.[45]

[71] Karen Foster, Director, People and Culture at Feros Care, gave evidence that Feros Care would find a provision requiring the employer to give seven days' notice of a roster change restrictive and unworkable.[46] Ms Foster also identified a number of reasons used by employees who have advised that they will be absent from work on short notice that were beyond personal/family illness or emergency.

[72] Kalena Jefferson, General Manager, People and Culture at Southern Cross Care, gave evidence that the requirement for an employer to give employees seven days' notice of a roster change (notwithstanding any agreement to the roster change by the employee) is restrictive.[47] Ms Jefferson stated that the provision is unworkable as it may result in shifts not being covered when employees do not attend work which would leave nursing cover at unacceptably low levels. She also stated that in the absence of permanent staff, agency staff or casual workers may have to be used to cover employees on short notice.

[73] Mark Douglas, Human Resources Manager at Carrington Centennial Care Ltd (Carrington), gave evidence in his witness statement that he would find the rostering provisions under the Nurses Award restrictive and unworkable if they were to apply to Carrington.[48] Mr Douglas stated that short notice absences that are not a result of illness or emergency occur on a regular basis and it is common for Carrington to backfill positions using permanent employees, as casuals are often utilised to fill annual leave absences. Mr Douglas claimed that if employee absences were not filled on short notice it would mean the workload of remaining staff would increase. This could result in work related injuries as the temptation by employees to take 'short cuts' is increased where the workload is increased.

Consideration

[74] ACE seeks, in effect, to be able to ask an employee to agree to a change in the roster within the seven day period before the commencement of the roster period. We have considered the HSU's submission concerning the possibility that an employee may feel pressured to agree to a change to the roster within the seven day period and we agree with it.

[75] However, based on the evidence before us we consider that the clause should provide the employer with the flexibility to change a roster to fill a gap created by an unplanned absence. We consider that the current wording is too restrictive and that absences occurring as a result of the use of personal leave, carers leave and domestic violence leave should enable the employer to change the roster within the 7 day period before the commencement of the roster period. This is because these leave entitlements may be accessed by the employee on short notice and the employer may not become aware of the use of such leave until after the leave has commenced.

[76] We do not propose to make the change sought by ACE. We will remove the words "on account of illness" from clause 25(b) and insert the words "pursuant to clauses 33 – Personal/carers' leave, compassionate leave; 35 – Ceremonial leave and 36 – Leave to deal with Family and Domestic Violence."

[77] We propose that clause 25 will read as follows:

25. Rostering

(a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

(b) Seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty pursuant to clauses 33 – Personal/carers' leave, compassionate leave; 35 – Ceremonial leave and 36 – Leave to deal with Family and Domestic Violence, or in an emergency, or in an emergency.

(c) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

[78] Interested parties are directed to file submissions in respect to the proposed wording of clause 25.

3.3 List of common health professionals

HSU claim

[79] The HSU submits that Schedule A and B of the HPSS Award should be amended to clarify that the List of Common Health Professionals (the List) contained in Schedule C is an indicative list and not an exhaustive list. [49]

DHAA

[80] The DHAA opposes the HSU's claim and submits that the List in Schedule C of the HPSS Award is exhaustive.[50] The DHAA is of the view that any variation to the HPSS Award in line with the HSU's claim may result in ambiguity in relation to occupations that are currently considered award-free. The DHAA proposed the following variation to clause 4.1(b) of the current award:[51]

> "4.1(b) Clause 15 has application only to the occupations specified in Schedule C – List of Common Health Professionals"

Australian Dental and Oral Health Therapists Association (ADOHTA)

[81] The ADOHTA seeks to insert the profession of Oral Health Therapist in the List.[52]

Submissions

HSU

[82] The HSU submits that the List can logically only be treated as indicative when considered in the context of the HPSS Award.[53] The HSU states that the term 'health professional employee' is not defined in the HPSS Award and that its meaning should be derived from the ordinary meaning of those words. The HSU further submits that the use of the word 'common' in the title of Schedule C implies that there are other health professionals which fall within the scope of the classifications in Schedule B that are not identified in the list.[54]

[83] Relying on the witness evidence of Mr Alex Leszczynski, the HSU points to a number of examples which it claims suggest that to treat the List as exhaustive would lead to confusion, uncertainty and inconsistency.[55] One of the examples used is that the list includes a 'Child Psychotherapist' but does not list the more general term of 'Psychotherapist'. Another example referenced is that an employee classified as 'Remedial Masseur' would be covered by the HPSS Award, but an employee performing the same job with the same qualifications but classified as 'Massage Therapist' would not be covered by the HPSS Award. The HSU claims that such a result contradicts the modern awards objective of equal remuneration for work of equal and comparable value.[56]

[84] The HSU submits that the health professional sector is marked by constant change and to regard the list as exhaustive would lead to undesirable consequences such as the removal from award coverage of new and emerging health professionals' classifications. Relying on examples identified in Mr Leszczynski's witness statement, the HSU outlines a number of examples of professions that have evolved, diverged or changed their titles over time. For example, they submit that 'Child Life Therapists' are not listed in Schedule C, while 'Play Therapists' are listed. Based on Mr Leszczynski's witness statement, the HSU claims that both of these professions used to be referred to as 'Play Therapists' until as recently as November 2014 when the Australian Association of Hospital Play Specialists resolved to change their name to the Association of Child Life Therapists Australia and to call their practitioners 'Child Life Therapists'.[57] The HSU submits that the List must be clarified as being indicative as otherwise the HPSS Award will be stuck with the health professional nomenclature of a particular point in time, and would become quickly out of date.[58]

[85] The HSU submits that Schedule B of the *Aged Care Award 2010* and Schedule B of the *Banking, Finance and Insurance Award 2010* are examples of industry-based awards where the classification descriptors are not treated as exhaustive. The HSU submits that Schedule C of the HPSS Award should be treated in a similar fashion.[59]

[86] The HSU submits that if the List is treated as indicative, future employers and professional groups will retain the capacity to persuade the FWC as to why a particular professional group should fall outside coverage, having regard to the principle in s.134(1)(g) of the Act. Any such application may then be considered on its own merits.

ADOHTA

[87] The ADOHTA submits that the Oral Health Therapists occupation should be included in the List as its members have experienced problems in the private practice realm as a consequence of the omission of the occupation from the List.[60]

[88] The ADOHTA submits that recognition of the occupation by the Dental Board of Australia (DBA) did not occur until after the HPSS Award was made and that is why the occupation was left off the List. The ADOHTA submits that Oral Health Therapists now constitute approximately 24 percent of the non-dentist registrants on the DBA.

[89] The ADOHTA requests that Oral Health Therapists are included on the List regardless of the ruling in the matter of whether the List is exhaustive or indicative.

DHAA

[90] The DHAA opposes both the HSU's claim and the ADOHTA's claim and submits that no modern award covers the occupations of dental hygienist and Oral Health Therapists and any variation to the HPSS Award should not result in ambiguity with regard to the current award-free status of these occupations.[61]

[91] The DHAA points to a number of modern awards which they claim contain exhaustive lists of occupations in a similar fashion to the Health Professionals Award including the *Aboriginal Community Controlled Health Services Award 2010*, the *Ambulance and Patient Transport Industry Award 2010,* the *Animal Care and Veterinary Services Award 2010*, and the *Broadcasting and Recording Entertainment Award 2010*.

[92] In opposing the HSU's claim that the modern awards objective is not served by treating the List as exhaustive, the DHAA submits that the opposite is the case as certainty and simplicity is achieved by defining the List as exhaustive.

[93] As to its own claim, the DHAA submits that clause 15 should be varied to ensure that claims asserting that the List is ambiguous are quashed permanently.[62]

Ai Group

[94] Ai Group opposes the HSU's claim submitting that pursuant to clause 4.1 of the HPSS Award it covers 'health professional' employees falling within the classifications listed at clause 15 (minimum weekly wages for health professional) on an industry and occupational basis.[63] Ai Group submits that although the term 'health professional' is not expressly defined in the HPSS Award, it must take its meaning from the Statement at clause B.2 of Schedule B which provides "*A list of common health professionals which are covered by the definitions is contained in Schedule C—List of Common Health Professionals*." Ai Group state that the term 'health professional' must therefore be read to include the professions listed at Schedule C and that only those professionals identified by the List are covered by the HPSS Award.

[95] To support the view that the List is exhaustive, Ai Group relies on a decision made by the Australian Industrial Relations Commission (AIRC) to remove the profession Dental

Hygienist from the List. Ai Group states that if the List was not exhaustive, the decision made by the AIRC would be "superfluous".[64]

[96] In response to the examples given by the HSU, Ai Group submits that the use of different job titles within an enterprise to those used in an award does not impact upon award coverage and regard must be had to whether an employee performs the work of any one of the 'health professionals' included in the List. Ai Group further submits that the absence of a reference to certain occupations or the inclusion of certain occupations on the List are a result of the formulation of the List during the award modernisation process and any 'ambiguity or uncertainty' may be remedied through an application under s.157 or s.160 of the Act.

[97] Ai Group submits that the variation sought by the HSU would make it difficult to identify the boundaries of the HPSS Award's coverage and is inconsistent with s.134(1)(g).

Aged Care Employers

[98] ACE opposes the HSU's claim and support the position put by the Ai Group on the issue.[65]

ADA

[99] The ADA opposes the HSU's claim and submits that there are material differences in the language used in paragraphs B.1 (classification descriptions for support services employees) and B.2 (classification descriptions for health professionals) of Schedule B of the HPSS Award, which indicate that the List is exhaustive.[66] The ADA submits that the descriptions at each classification level under paragraphs B.1 commence with the sentence "indicative roles at this level are" and then proceed to detail occupations covered by the respective classification levels. However, the introductory paragraph of paragraph B.2 provides "a list of common health professionals which are covered by the definitions is contained in Schedule C – List of Common Health Professionals". The ADA submits that the rules of interpretation require the Commission to accept that the HPSS Award was drafted with the intention that paragraphs B.1 and B.2 contain classifications that were intended to operate in a different manner.

[100] The ADA sets out some relevant history of the making of the modern HPSS Award and submits that the HSU previously proposed an award in 2008 and 2009 that covered the whole of the health industry and health occupants. The ADA submits that the AIRC did not make an award in the form proposed by the HSU.

[101] The ADA also referred to a Decision of the AIRC to have the profession of 'dental hygienist' removed from Schedule C of the HPSS Award as supporting the claim that the List is exhaustive. The ADA submits that there is nothing contained within the HPSS Award which expressly excludes dental hygienists from its coverage, other than the fact that the occupation is not included in the List.

[102] The ADA further submits that the coverage of the HPSS Award is clear and unambiguous and the fact that an employee is given a different title, despite performing the

same work as an occupation that is included in the List, does not mean that the HPSS Award does not cover the employee.

[103] The ADA also submits that the HPSS Award will not be 'stuck' at a particular point in time as claimed by the HSU, as the Act contains various mechanisms which ensure that modern awards remain current. Examples identified by the ADA include the 4 yearly review of modern awards and the ability of the FWC to vary awards at its own initiative or by application.

AFEI

[104] The AFEI opposes the HSU's claim.[67] It submits that if the List were to be varied, it should remain exhaustive but could be expressed to include specific professionals as well as professionals that are 'logically and substantially' employed in the same or similar profession to the principal category.[68]

Witness evidence

HSU

[105] Alex Leszcynski, Senior Industrial Officer at the HSU, gave evidence that the nomenclature used to describe health professions is changing and expanding all the time and that new health professions are also emerging. Mr Leszcynski gave examples of recent health professional occupations that do not appear in the current list of common health professionals in Schedule C of the HPSS Award though some of the occupations are or may be covered by the HPSS Award. Leszcynski also provided an example in relation to the occupation of Clinical Coder, claiming that this was a newly emerged health profession. Leszcynski claimed that Clinical Coders and Health Information Managers often work side by side with each other and the distinction between the two professions has become blurred. Leszcynski claimed that in Victoria both professions are referred to as Health Information Managers however, the List in Schedule C of the Award includes the profession of Health Information Managers but does not include the profession of Clinical Coders.

[106] In the hearing conducted on 11 December 2017, Mr Leszcynski gave evidence in relation to the difficulties he had encountered in enterprise bargaining as a result of the List.[69] He referred to the occupation of massage therapists as an example and said that one of the issues that arose during negotiations for an enterprise agreement was whether Massage Therapists are covered by the HPSS Award. Mr Leszcynski stated that the List does not refer to Massage Therapists but does refer to Remedial Masseuses. He stated that there were then issues related to whether Massage Therapists could be considered the same as Remedial Masseuses for the purposes of award coverage.

DHAA

[107] Dr Melanie Hayes, President of DHAA, Senior Lecturer at the University of Melbourne and Dental Hygienist at Mitcham Dental Care, gave evidence in her witness statement that it was in the best interest of DHAA's members to preserve the award-free status of dental hygienists and oral heath therapists.[70] Dr Hayes referred to a petition on

change.org which contained 1,450 signatures supporting the award-free status of dental hygienists and Oral Health Therapists.

[108] Carol Tran, Oral Health Therapist, stated in her witness statement that she believed employees engaged as Oral Health Therapists and Dental Hygienists would be disadvantaged if they became covered by the HPSS Award.[71] She stated that her ability to negotiate favourable wage rates with her employer would be compromised if her profession became subject to award coverage.

Consideration

[109] During the award modernisation process the Full Bench of the FWC issued a Statement dealing with issues relating to awards at Stage two of the award modernisation process. At this stage, exposure drafts of 26 modern awards had been published for comment, including the exposure draft for the HPSS Award. In respect to the coverage clause of the HPSS Award, the Full Bench made the following comments: [72]

> "[78] The exposure draft of the Health Professionals and Support Services Industry and Occupational Award 2010 is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally. At this stage we have not attempted to attach particular professions or skills to any particular pay point. We invite the parties to examine this and provide advice during the consultations. We have attached as Schedule B to the award a list of common occupation names which should also be considered.
>
> …
>
> [81] In relation to both nursing and health professionals the exposure drafts cover employers whether they are in the health industry or not. Employers who provide nursing or other professional health services under contract would be covered in relation to their employees in the relevant classifications."

[110] A large number of submissions were received from interested parties in response to the publication of the exposure draft. For example, the APESMA made submissions with the view that Schedule B was not intended to be exhaustive and the occupation 'biomedical engineer' should be added to Schedule B of the award so that it was clear that this occupation is covered by the HPSS Award.[73] The APESMA also submitted that the occupations of 'scientist' and 'pharmacist' should not be included in Schedule B as these professions were already covered by other awards.

[111] In a similar vein, the ACTU made submissions in respect to the issue of Schedule B including 'scientist' and 'pharmacist' on the List.[74] The ACTU submitted that the coverage of scientists should be limited to 'medical scientists' and 'pharmacist' should be removed from the Schedule. Ai Group supported the submissions of the ACTU and APESMA in respect to 'scientists'. [75]

[112] The final resultant HPSS Award that was published on 26 March 2010 contained the profession 'medical scientists' instead of 'scientists' however retained the occupation of 'pharmacist'. There does not appear to be a decision or statement issued by the FWC in regards to whether Schedule C as it was renumbered, was intended to be indicative or exhaustive.

[113] Our preliminary view is that it is undesirable to constrain the coverage by reference to an inflexible list of occupations, the names of which and/or work performed may change over time as advances in the health profession occur.

[114] We note that to support the view that the List is exhaustive, Ai Group relied on a decision made by the AIRC to remove the profession 'Dental Hygienist' from the List. Ai Group stated that if the List were not exhaustive, the decision made by the AIRC would be "superfluous". The ADA echoes the substance of that argument. We agree with the inherent logic of this submission however we consider that the decision of the Full Bench should be reconsidered in light of developments in the health profession.

[115] On 24 December 2009, the Commission issued a decision in relation to an application made by the Dental Hygienists Association of Australia Incorporated (DHAA) to vary the HPSS Award to remove the reference to Dental Hygienist from Schedule C.[76] The grounds advanced by the DHAA in support of their application largely related to the fact that dental hygienists have not historically been covered by industrial instruments, apart from in Victoria, and award coverage would result in certain disadvantages to the occupation. The FWC granted the application, observing that no other organisation or person had made any submission on the application.

[116] In a separate and non-related application (AM2010/31), made by the Victorian Hospitals' Industry Association (VHIA), the ADA submitted that it disagreed with the decision to remove reference to 'Dental Hygienists' from Schedule C and claimed it was not notified of the DHAA's application in order to voice its opposition.[77] The ADA submitted that the decision has led to confusion within dental practices as dental hygienists were previously covered by awards and were included in the new modern HPSS Award. The decision dealing with VHIA's application did not deal with the ADA's submissions.

[117] The ADOHTA submits that the occupation Oral Health Therapist should be included in the List. It says that the recognition of the occupation by the Dental Board of Australia occurred after the award was made in 2010. In contrast the DHAA submits that the occupations of dental hygienist and Oral Health Therapists are award-free and, in effect, should remain so.

[118] We consider that this debate highlights an anomaly in the coverage of the HPSS Award.

[119] We are fortified in this view by a decision of the Commission issued on 28 January 2010, dismissing an application made by the CAA seeking to remove the occupation of 'chiropractors' from the HPSS Award.[78] The CAA submitted that chiropractors have historically been award-free and the creation of modern awards was not intended to cover

persons who have traditionally been award-free. The HSU opposed the CAA's application arguing that chiropractors should have the same safety net as other health professionals.

[120] The Commission dismissed the application on the basis that the award modernisation process did not preclude the extension of awards to work performed that is of a similar nature to work that has historically been regulated by awards.[79] The Commission found that the occupation of 'chiropractor' can be regarded as similar in character to other occupations covered by the HPSS Award such as physiotherapists.[80]

[121] We note that the occupations Dental Therapist, Dental Hygienist and Oral Health Therapist are all covered by a recent award of the *Industrial Relations Commission of NSW – Health Employees Oral Health Therapists (State) Award 2018*.[81]

[122] The occupations are defined as follows:

> "Dental Therapist" means a person appointed as such and who possesses an approved qualification of proficiency in theory and technique in preventative and operative dental care of children. A dental therapist must hold the relevant registration from the Dental Board of Australia.
>
> "Dental Hygienist" means a person appointed as such and who possesses an approved qualification of proficiency in theory and technique in dental hygiene. A dental hygienist must hold the relevant registration from the Dental Board of Australia.
>
> "Oral Health Therapist" means a person appointed as such and who holds the relevant registration from the Dental Board of Australia as an Oral Health Therapist or both the registrations of dental therapist and dental hygienist.

[123] We also note the definition of Oral Health Therapist on the website of the ADA as follows:

> "Oral Health Therapists (combined dental therapists and hygienists) are registered oral health practitioners who provide primary oral health care for children and adults. This includes examining and diagnosing dental decay and gum diseases and providing routine dental treatments. They also work to promote oral health and provide preventive dental services among individuals and the broader community."[82]

[124] It is apparent that the occupation of Oral Health Therapist combines the skills of the two other occupations. It appears anomalous to us to have one of these occupations covered by the HPSS Award and not the other two.

[125] Since the issue has not been fully argued before us, nor has there been any consideration of the NSW award, we consider it appropriate to defer consideration of this matter, to allow for any interested parties to make submissions, and to conduct subsequent hearings.

[126] We will issue a timetable for submissions and a hearing date in 2019 to address the coverage of the HPSS Award.

3.4 Translators and interpreters

[127] The APESMA originally sought a variation to the HPSS Award such that the occupations 'Translator' and 'Interpreter' would be included in the List.[83] However, on 3 April 2018, the APESMA amended its application seeking instead to extend the coverage clause of the HPSS Award to include Translators and Interpreters rather than including the occupations in the List in Schedule C.[84]

[128] The APESMA also proposes to vary classification definitions in Schedule B to insert the occupation of 'Translator' into the Award and use the descriptors 'NAATI credentialed' and 'non-NAATI credentialed' instead of 'Interpreter (unqualified)' and 'interpreter (qualified)'.

[129] The changes sought by APESMA are set out in red below:

> **"4.1 This industry and occupational award covers:**
>
> **(a)** employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14—Minimum weekly wages for Support Services employees and 15—Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;
>
> **(b)** employers engaging a health professional employee falling within the classification listed in clause 15.
>
> **(c)** employers throughout Australia engaging employees performing the indicative roles NAATI credentialed Interpreter or NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.
>
> (d) employers throughout Australia engaging employees performing the indicative roles non NAATI credentialed Interpreter or non NAATI credentialed Translator, falling within the classification B.1.5. Support Services employee – level 5 listed in Schedule B.
>
> …
>
> **Schedule B** - Classification Definitions; B.1.5 Support Services employee—level 5 – by deleting "Interpreter (unqualified)" and inserting "non NAATI credentialed Interpreter" and also inserting "non NAATI credentialed Translator";
>
> **Schedule B** - Classification Definitions; B.1.7 Support Services employee—level 7 – by deleting "Interpreter (qualified)" and inserting "NAATI credentialed Interpreter" and also inserting "NAATI credentialed Translator".
>
> …
>
> **Clause 3** - Definitions and interpretation – Insert "NAATI means National Accreditation Authority for Translators and Interpreters Ltd" after the definition of "My Super product" and before the definition of "NES"."

Submissions

[130] The APESMA relies on the submissions it filed for its original application in advancing its amended application.[85]

[131] The APESMA submits that the existing award coverage of interpreters is inadequate given the nature of the work performed by interpreters. For example, interpreters may perform interpreting services in a health industry setting at a given time of day and then perform interpreting services in a different industry setting at a later time. The APESMA claim that in these circumstances the interpreter would only be covered by the HPSS Award when performing services in the health industry setting and not any other industry setting.[86]

[132] The APESMA submit that it considered whether translators and interpreters could be covered by the *Professional Employees Award 2010* (Professionals Award) and the *Miscellaneous Award 2010* (Miscellaneous Award). However, the APESMA found that the Professionals Award limits coverage to employees performing professional engineering and professional scientific duties or employees in the IT industry, quality auditing industry or telecommunication services industry; whereas the APESMA claims that the Miscellaneous Award restricts its coverage to employees who are not covered by any other modern award.

[133] In respect to s.134(1)(a), the APESMA relies on 2011 Census data and its own survey data in support of its submission that translators and interpreters are one of the lowest paid classes of employees in the Australian workforce.

[134] In respect to s.134(1)(b), the APESMA submits that the inclusion of award coverage of interpreters and translators would allow such employees to better engage in collective bargaining.

[135] In respect to s.134(1)(c), the APESMA submits that the variation sought will provide consistency of award coverage for members of the profession to avoid the situation whereby practitioners "fall through the cracks"[87] of award coverage if they take interpreting jobs that are outside the health industry.

[136] In relation to s.134(1)(d)-(e), the APESMA submits that award coverage would provide protection for interpreters and translators as health professionals to ensure the ongoing viability and sustainability of flexible work practices as well as ensure a set of minimum conditions even where these occupations are working outside the health industry setting. It submits that s.134(1)(da) is a neutral consideration in the matter.

[137] In relation to s.134(1)(f), the APESMA claims that it does not anticipate that the variation sought will have any impact on employment costs or productivity other than to provide a greater level of certainty and consistency for both business and government agencies around award coverage of interpreters.

ABI and NSWBC

[138] ABI and NSWBC oppose the APESMA's amended application on the basis that the proposed variation is: inconsistent with the structure of the modern award system; is unnecessary as an adequate safety net already exists and, inconsistent with the modern awards objective as it will result in the application of a potentially unfair and irrelevant safety net of terms and conditions to these employees.[88] ABI and NSWBC also considered the relevance of the operation of on-hire provisions in modern awards submitting that there may be some circumstances in which interpreters and translators will be covered by the modern award which covers the industry in which the 'agency' or 'host' business is performing work. ABI and NSWBC further submit that the *Miscellaneous Award 2010* (Miscellaneous Award) may apply to interpreters and translators in circumstances where there is no modern or enterprise award which currently applies.

PHIEA

[139] The PHIEA opposes both the original and amended applications made by the APESMA and submits that translators and interpreters do not meet the occupational definition of the term 'health professional'.[89] However, as these occupations provide support services to the health industry it submits that they should be classified in the support services stream of the award when performing work in the health industry.

[140] The PHIEA do not object to the APESMA's claim seeking to expand the definitions in Schedule B to include translators, however it opposes the change to the current wording of 'unqualified/qualified' on the basis that it may present as a barrier to progression to higher classifications for interpreters/translators who have qualifications and skills that are satisfactory to the employer however do not seek NAATI certification.

Ai Group

[141] Ai Group opposes the APESMA's claim and contends that APESMA's submissions do not address why the HPSS Award does not provide an appropriate safety net for interpreters and translators nor do they address whether s.156(3) is relevant to these proceedings.[90] Ai Group also submits that the APESMA had not provided sufficient evidence to support the proposition that the variation is necessary to meet the modern awards objective.

Aged Care Employers

[142] ACE opposes the APESMA's original claim and supports the submissions and positions of Ai Group, ABI and NSWBC and the PHIEA on the matter.[91]

Witness evidence

APESMA

[143] Ms Niki Baras, a casual interpreter employed by Alfred Health gave evidence that the industry has undergone a lot of change primarily as a result of outsourcing.[92] Ms Baras stated that the conditions of interpreters and translators have diminished over the years such that it is now standard for interpreters to be engaged for 90 minute periods with no payment being made for travel time or reimbursement of the expenses involved. She also stated that the

expenses associated with the occupation have increased such that it cannot be considered a viable or sustainable career path for graduates seeking to enter the work force. Ms Baras stated that one factor that has contributed to this situation has been a lack of coverage for interpreters and translators by industrial instruments.

[144] Ms Baras gave evidence that she did not believe she could be covered by the Miscellaneous Award 2010 as her occupation and work duties do not fit within the classification structure and definitions set out in that award. She stated that the HPSS Award was the most appropriate award as it contains reference to 'Interpreter (qualified)' in the classification Support Service Employee – Level in Schedule B.

[145] Michael Morgan, Managing Director of Amigos: Interpreters & Translators, gave evidence that approximately 70 to 80 per cent of the interpreting work performed by the agency's workers is in the health industry.[93] Mr Morgan stated that if there was one award that governed NAATI accredited interpreters, the agency would be able to operate in the confidence that there was one legal instrument dictating the minimum terms under which they must employ the interpreters and translators while also having the certainty that their competitors would also be bound to employ in accordance with the same instrument. It would also provide administrative benefits with the requirement of only needing to keep track of one modern award.

Consideration

[146] The evidence suggests that translators and interpreters are often employed by businesses established to provide translation and interpreting services to other businesses. We accept that employees of these businesses are very often deployed in the health sector. We do not consider that to be a good reason for this award to cover these employees when they are not working in the health industry.

[147] We note that Schedule B Classification Definitions of the HPSS Award contains Interpreter (unqualified) in Support Services Employee - level 5 and Interpreter (qualified) in Support Services Employee - level 7. We consider that it is clear that by virtue of clause 4 of the HPSS Award, it currently covers interpreters when they are employed by an employer in the health industry.

[148] Another eight modern awards make a reference to the occupation or activity of interpreter either as a classification or in relation to the employee's entitlement to an allowance.[94]

[149] We consider that it is desirable for there to be unambiguous award coverage for the occupations of 'translator' and 'interpreter'. However we consider that this would best be determined by a separate and careful consideration of the appropriate award or awards to cover these occupations and the appropriate rate of pay to be payable, which may require a consideration of work value or at least classification. We propose to refer this to the President for his consideration.

3.5 Weekend and Shift penalties

[150] The HSU has proposed a number of amendments to clause 18 of the HPSS Award exposure draft (clauses 24.3, 26 and 29 of the current award). Clause 18 of the exposure draft reads:

> **18. Penalty rates and shiftwork**
>
> **18.1 Weekend penalties—day worker**
>
> **(a)** For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid 150% of the minimum hourly rate applicable to their classification and pay point.
>
> **(b)** A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate applicable to their classification and pay point for all time worked, but will not be paid the casual loading of 25%.
>
> **18.2 Weekend work in private medical imaging seven day practice**
>
> **(a)** Work performed on a Saturday in accordance with clause 8.2(d)(i) will be paid at the rate of 125% of the minimum hourly rate applicable to their classification and pay point instead of the loading prescribed in clause 18.1.
>
> **(b)** Work performed on a Sunday in accordance with clause 8.2(d)(i) will be paid at the rate of 150% of the minimum hourly rate applicable to their classification and pay point instead of the loading prescribed in clause 18.1.
>
> **18.3 Public holidays**
>
> Payment for public holidays is in accordance with clause 23.1.
>
> **18.4 Shiftwork penalties**
>
> Where the ordinary rostered hours of work of a shift worker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid 115% of the minimum hourly rate of pay applicable to their classification and pay point.

[151] The HSU has proposed the following amendments:

1. Amend clause 18.1 of the exposure draft to clarify that shift workers also receive penalty rates for weekend work.

2. Remove clause 18.2 of the exposure draft which provides an entitlement of 125% for Saturday work and 150% for Sunday work for employees engaged in private medical imaging seven day practices. This would result in such employees receiving the higher weekend penalties in clause 18.1.

3. Amend clause 18.3 of the exposure draft to include an afternoon shift penalty of 12.5%, in line with the afternoon shift penalty in the *Nurses Award 2010* (Nurses Award).[95]

Submissions

HSU

[152] The HSU submits that a literal reading of clause 26.1 of the current award does not allow for any weekend penalties for shift workers and contradicts s.134(1)(da) of the Act. The HSU submits that the use of the words 'day workers' in the provision was an oversight in the drafting of the award, and that it should have said 'full-time or part-time employees' instead.

[153] In respect to clause 24.3(b) of the current award, the HSU submits that the clause currently provides for lower weekend penalties to apply to private medical imaging seven day practices. The HSU submits that the differentiation between rates payable for working a weekend shift based on the number of days a practice operates is inconsistent with the modern awards objective at ss.134(1)(b), 134(1)(e) and 134(1)(g).

[154] In respect to clause 29 of the current award, the HSU proposes this variation on the basis that the proposed change to the span of hours provisions would result in a number of employees being considered shift workers where they were previously considered day workers. The HSU submits that the variation proposed is in line with the provisions of the Nurses Award.

PHIEA

[155] The PHIEA supports the HSU's claim in relation to weekend penalties.[96] The PHIEA submits that the variation proposed would ensure that any employee who works between midnight Friday and midnight Sunday would be entitled to the applicable weekend penalty for their classification and pay-point.

[156] In respect to shift penalties, the PHIEA supports the HSU's claim as far as it relates to businesses which operate 24/7 on the basis that it would ensure that any employee working these shifts Monday to Friday would receive the extra penalties. The PHIEA submits that the variation would also provide clarity that shift penalties are not applicable to work performed on weekends and public holidays where other such payments apply. However, the PHIEA suggests an amendment to the HSU's proposal to clarify that different penalties apply to permanent employees and casual employees who perform shift work.

ADA

[157] In respect to shift penalties, the ADA submits that the span of ordinary hours for day workers should not be varied in the manner proposed by the HSU. [97] However the ADA does not oppose the variation of shift work penalties proposed by the HSU as it would result in the reduction of penalty rates payable to employees in certain circumstances, for example, an employee working an afternoon shift would receive a loading of 12.5 percent instead of the current award loading of 15 per cent.[98]

MIERG

[158] The MIERG supports the claim that clause 26.1 should be varied to include shift workers.[99] However the MIERG opposes the HSU's claim to vary the weekend penalties applying to private imaging practices. It submits that such practices are increasingly working normal hours beyond 6.00am-6.00pm on weekend days and weekends and changes to penalty rates have the potential to significantly impact practices.

Consideration

[159] In relation to point one of the HSU's proposed amendments outlined at [151], clause 18.1 of the exposure draft of the HPSS Award refers to "day worker" and "casual employee". The HSU submits that the wording should be "full-time and part-time employees" in lieu of the words "day worker". PHIEA submit that shift penalties would not be applicable to work performed on weekends and public holidays where other payments apply. We agree with these submissions and will change the HPSS Award accordingly. In relation to the PHIEA's proposal to differentiate between permanent and casual employees performing shift work we would consider any wording provided by the PHIEA following this decision.

[160] We propose clause 18.1(a) of the exposure draft of the HPSS Award will read as follows:

> **18.1 Weekend penalties full-time and part-time employees**
>
> (a) For all ordinary hours worked between midnight Friday and midnight Sunday a full-time or part-time employee will be paid 150% of the minimum hourly rate applicable to their classification and pay point.

[161] In relation to point two of the HSU's proposed amendments outlined at [151], we see no reason why there should be a difference between the entitlement of employees in seven day private medical imaging practices and other employees covered by the HPSS Award and we intend to eliminate this difference by removing the exception.[100]

[162] In relation to point three of the HSU's proposed amendments outlined at [151], we note that the relevant provision appears in clause 29 of the Award as follows:

> **29. Shiftwork**
>
> Where the ordinary rostered hours of a shift worker finish between 6.00pm and 8.00am or commence between 6.00pm and 6.00am, the employee will be paid an additional loading of 15 % of their ordinary pay.

[163] This entitlement appears in 18.4 and C.1.1 of the exposure draft of the HPSS Award in a different form but is identical in effect.

[164] The notion of an "afternoon shift penalty" has no place in the HPSS Award at present. The HSU's submission was based on our adoption of the span of hours proposed by them. We

have not adopted this span of hours. No other submissions or witness evidence have given us reason to change the current provision.

[165] Interested parties are invited to file submissions in respect to the proposed wording of clause 18.1(a).

3.6 Substitution of public holidays by agreement

[166] The HSU propose to vary clause 23.3(b) of the HPSS Award exposure draft (clause 32 of the current award) on the basis that it is not consistent with the NES as it allows for the unilateral substitution of a public holiday to be made by the employer without the agreement of the employee.

[167] The issue of awards containing a term which provides for the substitution of public holidays by either majority agreement, or unilaterally by an employer, was referred to the Plain Language Full Bench (AM2016/15) on the 15 March 2018.[101] Consequently, we do not propose to deal with this issue.

3.7 New schedule for medical imaging

[168] The MIERG requests the addition of a new Schedule to the HPSS Award, Schedule M – Medical Imaging.[102] MIERG submit that the new schedule will set out the separate pay and conditions of employees in private medical imaging practice.

Submissions

MIERG

[169] The MIERG seeks a variation to insert a new Schedule M in the HPSS Award.[103] The Schedule is based on the pre-modern *Medical Imaging Employment Relations Group and Health Services Union of Australia Consent Award*. In support of the variation, the MIERG submits that private medical imaging has a history of making consent awards by agreement with the HSU and that the Schedule will assist in negotiating flexible working conditions to meet the needs of employees, their families' and the practice.[104]

[170] The MIERG did not provide any evidence in support of their claim.

HSU

[171] The HSU opposes the MIERG's claim submitting that inserting a schedule based on a pre-modernisation award dismisses the entire award modernisation process which was intended to streamline and simplify the award system.[105]

[172] The HSU submits that the claim does not meet the modern awards objective at s.134(1)(g) in that it creates unnecessary complexity in the award.[106]

[173] The HSU further submits that the award flexibility provision of the HPSS Award already provides for a method to vary the application of certain terms of the award to meet the needs of the employer and individual employees.[107]

Consideration

[174] We do not propose to adopt the MIERG proposal to insert a new Schedule to the Award, Schedule M – Medical Imaging that would set out the separate pay and conditions of employees in private medical imaging practice.

[175] We see no reason why this sector should be treated as special and have a schedule of its own. The submission that this was the case in the pre-modern award does not persuade us.

3.8 Meal breaks

[176] Ai Group proposes inclusion of a facilitative provision in clause 27.1 of the current award to enable the five hour maximum period before an unpaid meal break is taken to be extended to six hours by agreement between the employer and an individual employee or by agreement with the majority of employees.[108]

[177] The changes sought by Ai Group are highlighted below in red:

> **"27.1 Meal breaks**
>
> (a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.
>
> (b) The time of taking the meal break may be varied by agreement between the employer and employee.
>
> (c) An employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer. "

Submissions

Ai Group

[178] Ai Group submits that clause 27.1(a) does not provide an ability to vary the number of hours that must be worked by an employee to trigger an entitlement to a meal break and is therefore inflexible in operation.[109]

[179] Ai Group submits that the proposed variation is specifically designed to address circumstances in which an employee seeks to work a five-and-a-half- to six-hour shift. This situation may arise, for example, for parents who wish to be able to drop off or pick up their children from school. Ai Group referred to the Australian Workplace Relations Study First Findings Report (AWRS Report) which was produced by the FWC's research department on 29 January 2015. Ai Group submitted that the AWRS Report found that employees who

participated in the study were most satisfied with having flexibility to balance work and non-work commitments above other aspects of their current jobs.[110]

[180] Ai Group further submits that the variation proposed is consistent with s.65 of the Act and that it is arguable whether clause 27.1(a) of the HPSS Award undermines s.65 by precluding an employer from agreeing to a request made under s.65.

[181] Ai Group also references other modern awards which contain provisions that enable agreement to be reached as to the period of time that must be worked to trigger an entitlement to a meal break. In this respect, Ai Group refer to the *Children's Services Award 2010,* the *Hospitality Industry Award 2010*; the *Manufacturing and Associated Industries and Occupations Award 2010;* the *Textile, Clothing, Footwear and Associated Industries Award 2010,* the *Pharmaceutical Industry Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010*.

PHIEA, ABI and NSWBC, CAA and HSU

[182] The PHIEA supports Ai Group's claim and submits that the variation would provide some necessary flexibility to enable the timing of the break to be modified to accommodate any unexpected operational demands.[111] The HSU, ABI and NSWBC and the CAA support the above variation to clause 27.1 and support the submissions made by Ai Group. [112]

Consideration

[183] Ai Group proposes the inclusion of a facilitative provision in clause 27.1 of the current HPSS Award to enable the five hour maximum period before an unpaid meal break is taken to be extended to six hours by agreement between the employer and an individual employee or by agreement with the majority of employees.

[184] We agree that an employee may wish to work a shift of six hours or less without taking a meal break and we will vary the HPSS Award to provide for this. However we are not attracted to the scheme of the arrangement being available by agreement with the majority of employees. We consider that flexibility in the taking of meal breaks should be dealt with on a case by case basis which allows an individual employee to address their own work/life balance concerns and not have the will of the majority imposed upon them. We are satisfied that the proposed change is consistent with this concept.

[185] We propose that clause 27.1 will read as follows:

27.1 Meal breaks

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.

(b) The time of taking the meal break may be varied by agreement between the employer and employee.

(c) An employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.

[186] Interested parties are invited to file submissions in respect to the proposed wording of clause 27.1.

Conclusion

[187] We have decided to change the HPSS Award and the exposure draft in a number of ways. Interested parties are invited to file written submissions in relation to the proposed wording set out above at [62], [77], [160] and [185]. These submissions should include a draft determination setting out the variations proposed in the abovementioned paragraphs. Submissions should be forwarded to amod@fwc.gov.au by **4.00 pm on 7 December 2018**, with any responses to be filed by way of email to amod@fwc.gov.au by **4.00 pm on 14 December 2018.**

The matter may be listed for conference or hearing at the initiative of the Full Bench or at the request of the parties. If the matter does not proceed to conference or hearing it may be concluded on the papers after our consideration of the parties' submissions.

VICE PRESIDENT

Appearances:

Ms L *Doust* on behalf of the Health Services Union of Australia;

Mr G *Boyce* on behalf of the Australian Dental Association and Aged Care Employers.

Ms J *Bandara* to appear on behalf of the Chiropractors Association of Australia.

Mr K *Scott* on behalf of the Australian Business Industrial and the New South Wales Business Chamber (ABI and NSWBC).

Hearing details:

2017.

Sydney.

December 11 and 12.

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[1] [2014] FCAFC 118, at [85].

[2] [2014] FWCFB 1788.

[3] [2017] FWCFB 1001at [115].

[4] [2014] FWCFB 1788 at [36].

[5] HSU Submission – 17 March 2017 at para 38.

[6] HSU Submission – 12 February 2018 at para 5.

[7] Ibid at para 46.

[8] CAA Submission – 17 March 2017 at paras 6-6.3.11.

[9] CAA Submission in Reply – 9 March 2018 at para 2.7.

[10] Osteopathy Australia Submission – 22 May 2017 at para 5.1.

[11] Dandenong and Box Hill Superclinics Submission – 4 August 2017.

[12] HSU Submission of 17 March 2017 at para 41.

[13] Medical Practitioners Award 2010 – exception is senior doctors.

[14] PHIEA Submission of 19 May 2017 at para 8.

[15] PHIEA Submission of 12 March 2018 at paras 11-15.

[16] ADA Submission in reply - 9 June 2017at para 123.

[17] ADA Submission in reply - 9 June 2017 at para 114-117.

[18] Ibid at paras 125-131.

[19] Ibid at para 129.

[20] Witness Statement of Eithne Mary Irving – 23 May 2017.

[21] CAA Submission in Reply – 22 May 2017 at para 2.1-2.5.

[22] CAA Submission – 13 February 2018.

[23] AFEI Submission – 8 December 2017 and AFEI Submission in Reply – 19 March 2018 at paras 14-24.

[24] Ibid para 25.

[25] AMA Submission in Reply – 18 June 2018.

[26] ABI and NSWBC Submission - 3 May 2017 at para 10.1-10.4 and ABI and NSWBC Submission - 1 March 2018 at para 4.2

[27] MIERG Submission in Reply - 9 June 2017 and MIERG Submission in Reply - 1 February 2018.

[28] Ibid at para 16.

[29] CAA Submission – 17 March 2017 at paras 6.1-6.1.7.

[30] CAA submission in reply – 9 March 2018 at paras 2.7-2.8.

[31] ADA Submission in Reply – 12 March 2018 at para 38; AFEI Submission in Reply – 19 March 2018 at para 25.

[32] ADA Submission in Reply – 12 March 2018 at para 38.

[33] HSU Submission in Reply – 22 May 2017 at paras 15-21.

[34] Osteopathy Australia Submission in Reply – 22 May 2017 at para 4-6.

[35] Dandenong and Box Hill Superclinic Submission – 4 August 2017.

[36] Witness Statement of David Hewson of 9 June 2017.

[37] Witness Statement of Emma Jane McKenny of 23 May 2017.

[38] Unworn Witness Statement of Matthew William Fisher of 17 March 2017.

[39] See [157] of this Decision for the reason why the full content of clause 24 is not here rewritten, i.e. the Full Bench has determined to eliminated the exception in this clause to the payment of penalty rates to employees in 7 day private medical imaging practices

[40] ACE Submission – 15 July 2015 at paras 2-5.

[41] Ibid at para 3.

[42] PHIEA Submission of 19 May 2017 at para 27; ABI and NSWBC Submission in Reply – 21 March 2018 at paras 6.1-6.5; CAA Submission in Reply – 9 March 2018 at para 8.1.3.

[43] HSU Submission in Reply – 19 March 2018 at para 32.

[44] Ibid para 32; Transcript 11 December 2017 at PN946.

[45] Witness Statement of John Favaloro of 1 August 2016.

[46] Witness Statement of Karen Foster of 25 July 2016.

[47] Witness Statement of Kalena Jefferson of 26 July 2016.

[48] Witness Statement of Mark Douglas of 1 August 2016.

[49] HSU Submission – 17 March 2017 at paras 4-37.

[50] DHAA Submission - 22 May 2017.

[51] Ibid page 4.

[52] ADOHTA Submission – 28 February 2017.

[53] HSU Submission – 17 March 2017 at para 4-37.

[54] Ibid at para 9.

[55] Ibid at paras 10-15.

[56] Ibid at para 11.

[57] Ibid at para 20.

[58] Ibid at para 25.

[59] Ibid at paras 26-28.

[60] ADOHTA Submission – 28 February 2017.

[61] DHAA Submission in Reply – 14 March 2018.

[62] Ibid at page 4.

[63] Ai Group Submissions – 8 June 2017 at paras 27-32.

[64] Ibid at para 35.

[65] ACE Submission in Reply – 9 June 2017 at para 3.

[66] ADA Submission in Reply – 9 June 2017.

[67] AFEI Submission in Reply – 19 March 2018.

[68] Ibid at paras 26-36.

[69] Transcript 11 December 2017 at PN1330 -1333.

[70] Witness Statement of Dr Melanie Hayes of 9 June 2017.

[71] Witness Statement of Carol Tran of 9 June 2017..

[72] [2009] AIRCFB 50 at [78] and [81].

[73] APESMA Submission – 13 February 2009.

[74] ACTU Submission - 13 February 2009 at 228-233..

[75] Ai Group Submission – 13 February 2009 at 262-266.

[76] [2009] AIRCFB 948.

[77] ADA Submission – 8 April 2010 at 2.

[78] [2010] FWAFB 324.

[79] Ibid at [5].

[80] Ibid.

[81] Health Employees Oral Health Therapists (State) Award 2018, clause 2.

[82] See https://www.adansw.com.au/Careers/Oral-Health-Therapist

[83] APESMA submission – 15 March 2015.

[84] APESMA submission – 3 April 2018 at para 6.

[85] APESMA Submission – 3 April 2018 at para 2; APESMA Submission 17 March 2017; APESMA Submission – 15 March 2015.

[86] APESMA submission – 3 April 2018 at para 2.

[87] APESMA Submission 17 March 2017 at para 53.

[88] ABI and NSWBC Submission in Reply – 11 May 2018.

[89] PHIEA Submission in Reply – 12 March 2018 at para 32; PHIEA Submissions in Reply – 19 May 2017 at paras 28-34.

[90] Ai Group Submission in Reply – 8 June 2017 at paras 91-107.

[91] ACE Submission in Reply – 9 June 2017 at para 2.

[92] Witness Statement of Niki Baras of 28 November 2017.

[93] Witness Statement of Michael Morgan of 31 October 2017.

[94] *Aged Care Award 2010*; *Amusement Events and Recreation Award 2010*; *Australian Capital territory Public Sector Enterprise Award 2016*; *Australian Government Industry Award 2016*; *Australian Public Service Enterprise Award 2015*; *Christmas Island Administration Enterprise Award 2016*; *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015 and Parliamentary Departments Staff Enterprise Award 2016*.

[95] HSU Submission – 17 March 2017 at para 49.

[96] PHIEA Submission in Reply – 19 May 2017 at para 17.

[97] ADA Submission in Reply – 12 February 2018 at para 80.

[98] Ibid at para 83.

[99] MIERG submission in reply – 21 February 2018 at paras 17-22.

[100] See [59] of this Decision.

[101] Statement [2018] FWC 1501.

[102] See MIERG Submissions – 12 May 2017, 22 May 2017, 23 May 2017 and 9 June 2017.

[103] MIERG Submissions – 12 May 2017, 22 May 2017 and 23 May 2017and 9 June 2017.

[104] Ibid.

[105] HSU Submission in Reply – 22 May 2017 at paras 8-14.

[106] Ibid.

[107] Ibid.

[108] Ai Group Submission - 14 March 2017 at para 2.

[109] Ibid at paras 14-17.

[110] Ai Group Submission - 14 March 2017 at paras 27-30.

[111] PHIEA Submission in Reply – 19 May 2017 at para 15.

[112] HSU Submission and Witness Statement – 17 March 2017 at paras 80-82; ABI and NSWBC Submission in Reply – 21 March 2018 at paras 5.1-5.3; CAA Submission in Reply – 9 March 2018 at para 8.1.4.