



# 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, 9 JANUARY 2019

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

### **Introduction**

[1] On 3 December 2018 we issued a decision (December Decision) dealing with the substantive claims in relation to the *Health Professionals and Support Services Award 2010* (HPSS Award).<sup>1</sup> The December Decision determined, amongst other things, that variations to the span of hours provision, rostering provision, weekend penalties and shiftwork provision and meal break provision of the HPSS Award would be made. Wording for the new provisions was suggested and interested parties were invited to comment.

[2] Submissions were received from the Australian Business Industrial and the NSW Business Chamber (ABI and NSWBC),<sup>2</sup> the Australian Dental Association (ADA),<sup>3</sup> the Australian Industry Group (Ai Group),<sup>4</sup> the Chiropractors' Association of Australia (National) Ltd (CAA),<sup>5</sup> the Health Services Union (HSU),<sup>6</sup> the Medical Imaging Employment Relations Group (MIERG),<sup>7</sup> and the Private Hospital Industry Employer Associations (PHIEA).<sup>8</sup>

### **Submissions**

#### *Span of hours*

[3] In the December Decision we proposed the following wording for clause 24 – Span of hours of the HPSS Award:

## **“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.”<sup>9</sup>

**[4]** The ADA, the CAA, and the MIERG support the proposed wording for clause 24.<sup>10</sup> The HSU oppose the variation to clause 24.2 of the HPSS Award, submitting that it will radically increase the number of hours that physiotherapists, chiropractic and osteopathic employees can work in the evenings during the week without a penalty.<sup>11</sup> The HSU submit that if the HPSS Award is to be varied in such a manner, then the variation should be delayed or phased-in over a period of not less than three years, to minimise the detriment to employees affected by the change.<sup>12</sup>

**[5]** The CAA filed submissions in reply opposing the HSU’s delayed or transitional proposal on the basis that it would impose an additional regulatory burden and additional employment costs on businesses and the staggered implementation of the variation would involve practical difficulties.<sup>13</sup> The CAA submits that in the alternative, a shorter transitional period of six to twelve months could be implemented so there is minimal disruption to businesses and employees affected by the span of hours variation.<sup>14</sup> The ABI and NSWBC and the ADA agree with the submissions of the CAA.<sup>15</sup>

**[6]** The CAA have raised an issue with the definition of “private medical, dental and pathology practice” at clause 3 of the HPSS Award, which they claim has the predominant purpose of defining what constitutes a private medical, dental or pathology practice for the purposes of clause 24.<sup>16</sup> The CAA submits that the definition at clause 3 should be amended or removed in light of the new proposed wording of clause 24.2 of the HPSS Award. The CAA propose the following wording for clause 3:

**“private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice** means the practice of any medical practitioner, such as medical centre, general practice, specialist practice, family practice, medical clinic, dental practice, pathology practice, **physiotherapy practice, chiropractic practice, osteopathic practice** and women’s health centre, but does not include medical imaging practices, hospitals or hospices.”<sup>17</sup>

[7] The ABI and NSW BC and ADA agree with the CAA’s proposed variation to clause 3 of the HPSS Award.<sup>18</sup>

[8] We do not intend to adopt the HSU’s proposal to phase in the changes to clause 24 of the HPSS Award. However, we have decided to delay the date of operation of the change to clause 24 for a period of six months in order to reduce any adverse impact caused to affected employees, particularly those who work in the physiotherapy, chiropractic and osteopathic industry.

[9] We agree that the definition at clause 3 of the HPSS Award should be amended to take into account the variation to clause 24.2 of the Award. However, we find that the inclusion of the word “medical” in clause 3 of the CAA’s proposed definition creates some tension as we consider physiotherapy, chiropractic and osteopathic practices to be allied health practices. We have decided to remove the word “medical” from clause 3.

[10] The definition at clause 3 of the HPSS Award will read as follows:

**private medical, dental, pathology, physiotherapy, chiropractic and osteopathic practice** means the practice of any **medical** practitioner, such as medical centre, general practice, specialist practice, family practice, medical clinic, dental practice, pathology practice, **physiotherapy practice, chiropractic practice, osteopathic practice** and women’s health centre, but does not include medical imaging practices, hospitals or hospices.

#### *Weekend and Shift penalties*

[11] In the December Decision we stated that we would consider any wording provided by the PHIEA in relation to the PHIEA’s proposal to differentiate between permanent and casual employees performing shift work.<sup>19</sup> The PHIEA proposes to amend 18.4 of the HPSS exposure draft by inserting a new clause 18.4(b) as follows:

“A casual employee who works shift work as defined in clause 29.1 will be paid 140% of the minimum hourly rate applicable to their classification and pay point but will not be paid the casual loading of 25%”<sup>20</sup>

[12] The PHIEA also proposed wording to clarify that shift penalties would not be applicable to work performed on weekends and public holidays where other payments apply. The PHIEA proposed a new clause 18.4(c) in the following manner:

“The shift penalties prescribed in this clause will not apply to shiftwork performed by any employee on Saturday, Sunday or Public Holidays where the extra payments prescribed in clause 18.1 – weekend penalties or clause 23 – public holidays apply.”<sup>21</sup>

[13] We accept the PHIEA’s submissions. Clause 18.4 of the exposure draft correspondence to clause 29 of the current Award. Clause 29 will therefore read as follows:

## **29. Shiftwork**

- 29.1** Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid an additional loading of 15% of their ordinary rate of pay.
- 29.2** A casual employee who works shift work as defined in clause 29.1 will be paid an additional loading of 40% of their ordinary rate of pay but will not be paid the casual loading of 25%.
- 29.3** The shift penalties prescribed in this clause will not apply to shift work performed by any employee on Saturday, Sunday or Public Holidays where the extra payment prescribed in clause 26 – Saturday and Sunday work and clause 32 – public holidays, apply.

[14] In the December Decision, the Full Bench proposed the following wording for clause 18.1(a) of the HPSS exposure draft:

### **“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.”<sup>22</sup>

[15] Clause 18.1(a) of the HPSS exposure draft translates to clause 26.1 of the current Award. We note however that, in amending clause 26.1 of the current Award, our intention was to *only* adopt the proposal put forward by the HSU to substitute “day worker” with “full-time and part-time employees”. It was not our intention to make any other variation to the wording of clause 26.1 of the current Award.

[16] Therefore, the amendments to clause 26.1 of the current Award will be made in the following the manner:

- 26.1** For all ordinary hours worked between midnight Friday and midnight Sunday a **full-time or part-time employee** will be paid their ordinary hourly rate and an additional 50% loading.

## Conclusion

[17] No changes to the proposed wording of the span of hours, rostering or meal break provisions as set out in the December Decision<sup>23</sup> will be made. Accordingly we intend to give effect to our December Decision in respect to these provisions.

[18] The MIERG has requested that the HPSS Award title be amended to “Health Professionals and Support Services Award 2019” and that clause 1.2 of the Award state that the Award will commence on 1 January 2019. We see no basis for the change and will not vary the Award title or commencement clause.

[19] A determination will be issued in conjunction with this decision and come into operation on and from 9 January 2019, except in relation to clause 24 where the date of operation will be 9 July 2019.



## VICE PRESIDENT

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<sup>1</sup> [\[2018\] FWCFB 7350](#).

<sup>2</sup> ABI and NSWBC [submission](#) – 21 December 2018.

<sup>3</sup> ADA [submission](#) – 20 December 2018.

<sup>4</sup> Ai Group [submission](#) – 7 December 2018.

<sup>5</sup> CAA [submission](#) – 5 December 2018; [submission in reply](#) – 14 December 2018.

<sup>6</sup> HSU [submission](#) – 7 December 2018.

<sup>7</sup> MIERG [submission](#) – 12 December 2018.

<sup>8</sup> PHIEA [submission](#) – 7 December 2018.

<sup>9</sup> [\[2018\] FWCFB 7350](#) at [62].

<sup>10</sup> ADA [submission](#) – 20 December 2018 at [2]; CAA [submission](#) – 5 December 2018 at [2.5]; MIERG [submission](#) – 12 December 2018.

<sup>11</sup> HSU [submission](#) – 7 December 2018 at [3].

<sup>12</sup> Ibid at [6].

<sup>13</sup> CAA [submission in reply](#) – 14 December 2018.

<sup>14</sup> Ibid at [4.2].

<sup>15</sup> ABI and NSWBC [submission](#) – 21 December 2018 at [1.3]; ADA [submission](#) – 20 December 2018 at [4].

<sup>16</sup> CAA [submission](#) – 5 December 2018 at [2.5].

<sup>17</sup> Ibid at Attachment 1.

<sup>18</sup> ABI and NSWBC [submission](#) – 21 December 2018 at [1.2]; ADA [submission](#) – 20 December 2018 at [3].

<sup>19</sup> [\[2018\] FWCFB 7350](#) at [159].

<sup>20</sup> PHIEA [submission](#) – 7 December 2018 at [2].

<sup>21</sup> Ibid.

<sup>22</sup> [\[2018\] FWCFB 7350](#) at [160].

<sup>23</sup> [\[2018\] FWCFB 7350](#) at [62], [77], [185].