

**AWARD STAGE, GROUP 2 MODERN AWARDS
MA000027 – HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010**

FWC MATTER NO: AM2014/204

OUTLINE OF SUBMISSIONS IN REPLY

Date of document: 21 August 2015

Solicitor's code: 13655

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INTRODUCTION

1. The Chiropractors' Association of Australia (National) Limited (**CAA**) makes this outline of submissions in reply (**Reply Submissions**) in accordance with the directions issued by the Fair Work Commission (**Commission**) dated 6 May 2015.¹
2. This Reply Submission concerns the Exposure Draft for the *Health Professionals and Support Services Award 2010* (**HPSS Award**) which was released on 8 December 2014 and responds to submissions made by other interested parties.
3. We continue to rely upon our submissions of 28 January 2015 and 15 July 2015.
4. For the avoidance of doubt, this Reply Submission is intended to provide a summary only and the CAA reserves its right to provide further submissions and evidence in relation to these matters in due course.

RESPONSE TO SUBMISSIONS

Span of Hours

5. The Health Services Union (**HSU**) seeks a single span of hours applicable to all workers covered by the HPSS Award.² The CAA does not oppose the rationalisation of the span of hours provision contained in the HPSS Award, however, we reject the proposal that the current span of hours (in clause 8.2(a)) is appropriate. The HSU

¹ [2015] FWC 3148.

² Submissions of the Health Services Union dated 16 July 2015 (**HSU Submissions**), items 79 to 92.

contends that the span of hours should be defined as “those hours within which work is performed by non-shift workers and during what are broadly regarded as *normal working hours*” (our emphasis) and yet it puts forward a very limited span of hours that disregards the “normal” operating hours of most health employers covered by the HPSS Award.³

6. In particular, we note that chiropractic practices (like other allied health services) perform work outside of traditional business hours (i.e. on weeknights and on weekends) and the CAA submits that if a rationalised span of hours was to be considered, it ought to include a span of hours that reflects industry practices.

Annualised Salaries

7. The Australian Industry Group (**AIG**) filed submissions on the issue of annualised salaries.⁴ The CAA generally supports the submissions made by the AIG on this issue, with the proviso that the CAA’s primary position is that an annualised salaries provision should not be restricted in its application to specific classifications. There are numerous modern awards that contain annualised salaries provisions that apply to all classification levels within those awards, including lower-level clerical and administrative classifications. We can see no reason why administrators within the allied health industry should be differentiated from administrators in the private sector and be denied the benefit of an award term that permits annualised remuneration.

Minimum Engagement

8. The common position adopted by the Australian Workers’ Union (**AWU**) and the HSU is that minimum engagements cannot be worked in two or more occasions (i.e. split shifts).⁵
9. However, we submit that the HPSS Award is not clear in this regard.
10. The HSU itself admits that the current drafting of the HPSS Award gives rise to questions about rostering split or broken shifts.⁶
11. Split shifts are common in the chiropractic industry. There are many chiropractic practices that operate a morning and an afternoon shift and it is the CAA’s view that

³ Ibid, item 84.

⁴ Submissions of the Australian Industry Group dated 15 July 2015 (**AIG Submissions**), item 4.2.

⁵ Submissions of the Australian Workers Union dated 15 July 2015 (**AWU Submissions**), items 5 to 7; HSU Submissions, items 31 to 40.

⁶ HSU Submissions, item 74.

the current HPSS Award enables this to occur. There is no requirement in the HPSS Award (as it stands) that hours must be worked continuously.

Overtime

12. Both the AWU and the HSU adopted the position that casual employees are entitled to overtime as clause 19.1 of the HPSS Award refers to “**an employee** who works outside their ordinary hours on any day...” (emphasis added).⁷ As a casual employee is “an employee”, the AWU and HSU both submit that the clause clearly applies to casual employees.⁸
13. However, the CAA rejects that proposition and submits that a casual employee’s entitlement to overtime is not so plainly obvious. The CAA refers to its outline of submissions dated 28 January 2015. As noted, clause 19 of the HPSS Award provides that “an employee who works outside **their** ordinary hours on **any day**...” will be entitled to overtime (our emphasis).
14. A casual employee (being an employee engaged on an hourly basis)⁹ does not and cannot have ordinary hours of work and accordingly cannot work overtime within the meaning set out in clause 19.
15. The HSU also seeks to vary clause 19 to include a higher overtime rate for overtime performed on Saturday.¹⁰
16. In our view, this variation is not necessary to achieve the modern award objectives and we oppose the HSU’s proposed amendment. Modern awards were not intended to increase costs for employers. The chiropractic industry is dominated by small business and the viability of practices is sensitive. This variation will unnecessarily increase operating costs for chiropractic employers.

Shift work

17. The HSU proposes to vary clause 18.4 of the HPSS Award so that shift work penalties apply in addition to any other penalty, allowance, overtime, weekend or casual rates of pay.¹¹

⁷ AWU Submissions, items 8 to 10; HSU Submissions, items 41 to 44.

⁸ AWU Submissions, item 10; HSU Submissions, item 44.

⁹ Clause 6.4(a) of the HPSS Award.

¹⁰ HSU Submissions, items 110 to 115.

¹¹ HSU Submissions, items 93 to 99.

18. The CAA considers this to be a significant departure from the current HPSS Award and we note that this proposition is inconsistent with the usual position – namely, that penalty rates are not cumulative. Most industrial instruments prescribe limitations on the extent to which any extra rates may accumulate when two or more rates operate at the same time.
19. The CAA has previously expressed its wish to emphasise the importance of ensuring that the HPSS Award makes it clear when overtime or other penalty rates are payable.
20. We submit that the HSU's proposed amendment does not make clear when shiftwork penalties are payable.

Definition of 'Shiftworker'

21. The CAA refers to its submissions dated 15 July 2015. The CAA noted that historically a shiftworker has been someone employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week and who works those shifts. The CAA further noted that this position is reflected in section 87 of the *Fair Work Act 2009* (Cth) (**FW Act**) which provides a definition of "shiftworker" for the purposes of determining if an award/agreement free employee qualifies for the shiftworker additional annual leave entitlement.
22. The CAA submitted that the existing definition of a "shiftworker" in Schedule I of the HPSS Award was inappropriate and should be replaced and consequential amendments be made to other provisions of the HPSS Award so that the term was consistently used.
23. In our view, the issue with this definition lies with the fact that the HPSS Award covers both private practices and hospitals. The major difficulty with the HPSS Award covering both private practice and hospitals is that they are distinct and have very different needs. By trying to cover the field, neither private practices nor hospitals are adequately accommodated. The unfortunate drafting of the shiftwork provision has meant that those employees who work past 6pm in private practice are (inappropriately) captured by the shiftwork provisions rather than such work being subject to an evening penalty or similar. We submit that this is an error or oversight in the drafting of the HPSS Award, and propose that this error might be rectified by replacing clause 18.4 with the following:

“18.4 Shiftwork Penalties

- (a) *This clause will only apply to persons specifically employed as shiftworkers under this award.*
- (b) *This clause does not apply to an employee who is employed as a day worker and who does additional hours or overtime.*
- (c) *For the purposes of this clause, **shiftwork** means a rostered shift finishing between 6.00pm and 8.00am or commencing between 6.00pm and 6.00am.*
- (d) *Any rostered shiftwork performed by a shiftworker will be paid at the rate of 115% of their minimum hourly rate of pay for that entire shift.”*

and, updating the definition of a ‘shiftworker’ in Schedule I as follows:

“Shiftworker means an employee who is engaged as such and who may be required to work shiftwork in accordance with a roster.”

- 24. We submit that this definition effectively resolves the anomaly of day workers effectively being treated as shiftworkers in private practices (who it could not be said operate under traditional shiftwork systems).
- 25. A number of other parties have also advanced claims to vary the definition of a ‘shiftworker’. The CAA has concerns with some of the other parties’ proposals to vary the definition of a shiftworker, which are briefly set out below.
- 26. The AWU has sought to vary the definition of a ‘shiftworker’ by deleting the words ‘in accordance with a roster’. The CAA considers this proposal to be confused as the current definition does not contain those words.
- 27. The HSU has put forward a definition of a ‘shiftworker’ as “an employee who is engaged as such and who is required to work shifts which may include ordinary hours outside the span of hours of a day worker as defined in clause 8.1”.¹² In our view, this definition is inappropriate because it is a further use of the term “ordinary hours” which we have previously submitted is confusing (because of its various meanings within the HPSS Award).
- 28. The Medical Imaging Employer Relation Group (**MIERG**) also seeks to vary the definition of a ‘shiftworker’ in Schedule I to “an employee who is regularly rostered to work their ordinary hours in a continuous 24/7 shift work system.” In our view, such a definition could lead to confusion over who is a day worker and who is a shiftworker (as seemingly every employee in a 24/7 shift work system is a shiftworker according to this definition).

¹² HSU Submissions, items 67 to 72.

Definition of Shiftworkers – Annual Leave

29. The MIERG and the HSU have sought to vary the definition of a 'shiftworker' for the purposes of the National Employment Standard (**NES**) entitlement to additional annual leave.
30. In this regard:
- 30.1 the MIERG submits that a shiftworker should be defined as "an employee who is regularly rostered to work in a continuous 24/7 shift work system."¹³
- 30.2 the HSU submits that a shiftworker should be defined as "an employee who works for more than four ordinary hours on 10 or more weekends and/or public holidays."¹⁴
31. The CAA does not agree with the proposed changes sought by MIERG because in our view the proposed definition is not appropriate. Such a definition effectively captures any employee working within a 24/7 shift work system (even those working "day shift"). The additional weeks' leave is generally recognised as compensation for employees who are required to work Sundays and public holidays.
32. The CAA opposes the submission made by the HSU. We note that this submission is basically identical to a previous submission made by the HSU in the 2012 Review which was rejected. In fact, this particular clause of the HPSS Award has been agitated on a number of occasions. Notably, the HPSS Award (when it was made) provided additional leave entitlements for employees who worked for more than four ordinary hours on 10 or more weekends. This definition was amended on at least two occasions, including in the 2012 Review.¹⁵ Relevantly, in the 2012 Review, the reference to a requirement to work "four ordinary hours on 10 or more weekends and/or public holidays" was removed and clause 20.2 (formerly clause 31.1) was given its current form. The HSU appealed this decision. Notably, a Full Bench of the Commission upheld Vice-President Watson's decision to vary clause 31.1 of the HPSS Award to its current definition.¹⁶ In other words, a Full Bench has previously rejected the proposition put forward by the HSU in this regard. The CAA sees no reason for the Commission to once again agitate this point.

¹³ Submissions of the Medical Imaging Employer Relation Group (**MIERG Submissions**) dated 15 July 2015, pages 12 and 15.

¹⁴ HSU Submissions, items 100 to 109.

¹⁵ *Health Professionals and Support Services Award 2010* [2010] FWA 3724.

¹⁶ *Health Professionals and Support Services Award 2010* [2013] FWCFB 5551, [77] to [100].

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Dated: 25 August 2015