

OUTLINE OF SUBMISSIONS ON EXPOSURE DRAFT

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Filed on behalf of: The Chiropractors'
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BACKGROUND

1. The Chiropractors' Association of Australia (National) Limited (**CAA**) is the peak body representing chiropractors.
2. The CAA represents over 2,700 members and is the largest chiropractic health body in Australia. It has members in all states and territories within Australia.¹

INTRODUCTION

3. These submissions relate to the Exposure Draft for the *Health Professionals and Support Services Award 2010 (HPSS Award)* which was released on 8 December 2014 (**Exposure Draft**).
4. In a statement issued on 8 December 2014², Justice Ross invited the parties to respond to the technical aspects of the Exposure Draft (**Statement**).
5. Further clarification in this regard was provided by the Fair Work Commission (the **FWC**), on 16 January 2015 and in particular, it was stated that submissions on substantive changes were not required at this stage. However, the parties were asked to identify the nature of any substantive changes they were seeking to the HPSS Award (**Clarification**).
6. These submissions are made in response to the Statement and Clarification and are divided into the following sections:

¹ Further background information about the CAA, its members, historical award coverage and other matters will be provided in the CAA's substantive submissions to be filed in this matter.

² [2014] FWC 8837

- 6.1 submissions on the technical issues arising from the Exposure Draft;
 - 6.2 an outline of the substantive variations the CAA is seeking to the HPSS Award;
and
 - 6.3 a response to the questions posed in the Exposure Draft that are of relevance to the CAA.
7. For the avoidance of doubt, these submissions are intended to provide an outline only and the CAA reserves its right to provide further submissions and evidence in relation to the above matters in due course. The CAA also reserves the right to respond to the submissions of other parties.

SUBMISSIONS

Part 1 – Technical Issues arising from the Exposure Draft

- 8. The CAA is generally supportive of the technical changes proposed by the FWC in the Exposure Draft.
- 9. The CAA notes that the Exposure Draft provides a clearer structure overall and describes conditions and monetary amounts in clearer terms, which assists in fulfilling the modern awards objective to “ensure a simple, easy to understand... modern award system”.³
- 10. The CAA is concerned that a number of technical issues remain, which have not been addressed in the Exposure Draft. These technical issues, to some extent, overlap with the substantive variations that the CAA is seeking to the HPSS Award and will be subject to further submissions and evidence to be filed in this matter, in accordance with the FWC’s directions.
- 11. The table below sets out a summary of the key technical issues arising from the Exposure Draft:

Table 1 – Technical Issues

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
3.1 – Definitions	Schedule I – Definitions	No definition of “ordinary hours”.	The absence of a definition for “ordinary hours” and the interchangeable use of that term throughout the Exposure Draft and in particular, in clauses 8 (‘Ordinary hours of work and rostering’), 18 (‘Penalty rates and shiftwork’) and 19 (‘Overtime rates’), has led to uncertainty. The term “ordinary hours” is used interchangeably

³ FW Act, s. 134(1)(g).

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>throughout the Exposure Draft (and the HPSS Award for that matter) to refer to an employee's rostered hours, the span of hours used to define a day worker and the ordinary hours which must be worked for an employee to be entitled to penalties, loadings and overtime, which has resulted in confusion.</p> <p>In this regard:</p> <ul style="list-style-type: none"> • Clause 8.2(a) of the Exposure Draft prescribes a span of "ordinary hours" for "day workers" and relevantly provides that, "<i>The ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday, unless otherwise stated</i>" (Our emphasis added). • Clause 18.1(a) of the Exposure Draft prescribes penalty rates for "ordinary hours" performed by "day workers" on Saturdays and Sundays and relevantly provides that, "<i>For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid 150% of the minimum hourly rate</i>" (Our emphasis added). • As Saturdays and Sundays fall outside of the span of hours in clause 8.2(a) for chiropractors and chiropractic assistants, it is unclear whether such employees (if required to work on a weekend) would be entitled to the penalty rate prescribed by clause 18.1 or overtime rates prescribed by clause 19 (or indeed no penalty, see below, which the CAA submits was unlikely to have been intended). • There is only one instance where clause 8 (which defines the span of hours in which "ordinary hours" may be worked) provides for ordinary hours on a Sunday (being clause 8.2(d)(i)) and this clause explicitly provides a penalty to apply in substitution for the penalty rates prescribed by clause 18.1. In other words, there seemingly cannot be "ordinary hours" for "day workers" on a Sunday, which makes clause 18.1 (insofar as it relates to Sunday penalty rates) redundant. • Clause 19 of the Exposure Draft is

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>problematic in that it states that only “<i>An employee who works outside their ordinary hours...</i>” will be entitled to overtime (Our emphasis added). This may be interpreted to mean that overtime is not payable unless an employee works outside of their rostered hours, even if the hours worked fall outside of the ordinary hours set out in clause 8.</p> <p>The CAA seeks the inclusion of a definition of “ordinary hours” as well as consequential amendments to other provisions of the Exposure Draft so that the term is consistently used.</p> <p>The CAA wishes to emphasise the importance of ensuring that the HPSS Award makes it clear when overtime or other penalty rates are payable.</p> <p>The proposed amendments will assist the FWC in fulfilling the modern awards objectives to ensure that modern awards are “<i>simple</i>” and “<i>easy to understand</i>”⁴ and reduce the “<i>regulatory burden</i>” employers would otherwise face in navigating and interpreting these provisions⁵.</p>
3.1 31.1	Schedule I – Definitions and 20.2	Definition of “shiftworker”	<p>The Exposure Draft (and the HPSS Award for that matter) draws a distinction between “day workers” and “shiftworkers”.</p> <p>A “shiftworker” is defined in Schedule I of the Exposure Draft as “<i>an employee who is regularly rostered to work their ordinary hours outside the span of ordinary hours of work of a day worker as defined in clause 8.2</i>” (Our emphasis added).</p> <p>This definition, which is lifted from clause 3.1 of the HPSS Award, creates uncertainty as to:</p> <ul style="list-style-type: none"> • who is a “shiftworker”; <ul style="list-style-type: none"> ○ is it someone who ordinarily works the majority of their hours outside of the ordinary hours of a “day worker” (which are 6:00am to 6:00pm, Monday to Friday); or ○ is regularly working one shift with hours that fall outside of a day worker’s span of hours sufficient? and • whether an employee can simultaneously be a “shiftworker” and a “day worker”.

⁴ FW Act, s. 134(1)(g).

⁵ FW Act, s. 134(1)(f).

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>Chiropractic businesses typically operate outside of regular business hours, with many businesses operating after 6:00pm on weeknights and/or on weekends. This means that a number of employees of chiropractic businesses are seemingly “shiftworkers”. The CAA submits that this is unlikely to have been intended and has led uncertainty.</p> <p>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. This position is reflected in section 87 of the 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.</p> <p>The CAA submits that the existing definition of a “shiftworker” in Schedule I of the Exposure Draft is inappropriate and should be replaced and consequential amendments should be made to other provisions of the HPSS Award so that the term is consistently used.</p> <p>A separate definition of “shiftworker” is prescribed in the Exposure Draft (and the HPSS Award for that matter), for the purposes of determining whether a shiftworker is entitled to an additional week of annual leave. In this regard, clause 20.2(b) of the Exposure Draft provides that, “... <i>For the purpose of the NES a shiftworker is an employee who is regularly rostered to work on Sundays and public holidays</i>” (Our emphasis added).</p> <p>In addition to the confusion that the two different definitions of “shiftworker” create, similar issues arise with the definition contained in clause 20.2(b) as arise with the definition contained in Schedule I (described above). For example, it is not clear who is considered to be a “shiftworker” for the purposes of clause 20.2(b):</p> <ul style="list-style-type: none"> • is it someone who works the majority of Sundays and public holidays? • is working one shift on a Sunday and public holiday sufficient? • does someone need to work on both Sundays and public holidays to qualify or is usually working on one (and not the other) sufficient?

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>For these reasons, the definition of “shiftworker” in clause 20.2(b) should also be replaced.</p> <p>The proposed amendments will assist the FWC in fulfilling the modern awards objectives to ensure that modern awards are “<i>simple</i>” and “<i>easy to understand</i>”⁶.</p>
29	18.4	Application of shiftwork loading	<p>It is unclear in some circumstances whether and when a shiftwork loading is payable.</p> <p>Clause 18.4 of the Exposure Draft provides that, “<i>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 115% of their minimum hourly rate of pay</i>” (Our emphasis added).</p> <p>The CAA submits that it is not clear whether this loading is to be applied on a shift by shift basis, or whether it is applicable to all hours worked by the “shiftworker”.</p> <p><u>By way of example, an employee works the following shifts:</u></p> <ul style="list-style-type: none"> • Monday to Wednesday: 10:00am-3:00pm • Thursday to Friday: 4:00-8:00pm • Saturday: 8:00am-12:00pm <p>Assuming that “regularly rostered to work” (as it is used in the definition of a “shiftworker” in Schedule I of the Exposure Draft) is intended to capture those employees that work the same shift weekly, it would appear that as the employee is regularly working outside of the “ordinary hours of work of a day worker as defined in clause 8.2” (i.e. after 6:00pm on Thursday and Friday and on Saturday), that they are a “shiftworker”.</p> <p>As the employee is a “shiftworker”, clause 18.4 applies. This clause seemingly provides for the payment of a shiftwork loading where the ordinary rostered hours of work of a “shiftworker” finish after 6:00pm. The employee’s shifts on Thursday to Friday finish after 6:00pm but all of their other shifts finish before 6:00pm.</p>

⁶ FW Act, s. 134(1)(g).

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>The question arises as to whether the employee is entitled to receive 115% of their minimum hourly rate of pay for:</p> <ul style="list-style-type: none"> • all shifts worked during the week; or • just those shifts that finish after 6:00pm? <p>The FWO has previously provided advice that an employee is only entitled to be paid a shiftwork loading for those shifts that finish between 6:00pm and 8:00am,⁷ however it is the CAA's submission that clause 18.4 is open to both interpretations (as the example above illustrates), which creates uncertainty.</p> <p>The CAA submits that it is also not clear whether "shiftworkers" receive any weekend penalties/loadings. Clause 18.1 provides that, "For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid 150% of the minimum hourly rate" (Our emphasis added).</p> <p>Clause 18.1 does not seemingly apply to "shiftworkers" and there is no other clause that provides a weekend penalty for "shiftworkers" (although clause 20.3 (annual leave loading) contemplates that "shiftworkers" receive weekend penalties).</p> <p>In accordance with clause 18.4, "shiftworkers" are strictly speaking only entitled to a shiftwork loading on the weekend if their shift starts between 6.00pm and 6.00am or finishes between 6.00pm and 8.00am.</p> <p>In other words, a "shiftworker" could theoretically receive less pay than other workers for work they perform on a weekend.</p> <p>Using the example above, the employee described there (Employee 1) is regularly working a Saturday morning shift.</p> <p>Another employee (Employee 2) is rostered to work on a Saturday every so often. As this is seemingly not sufficient to constitute being "regularly rostered to work outside of the ordinary hours of work of a day worker</p>

⁷ See attached Fair Work Ombudsman Opinion dated 1 June 2012.

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Explanation
			<p>as defined in clause 8.2”, Employee 2 is unlikely to be considered a “shiftworker” and therefore must be a “day worker”.</p> <p>As Employee 2 is a “day worker” they are entitled to receive a weekend penalty in accordance with clause 18.1 for all hours worked between midnight Friday and midnight Sunday.</p> <p>The CAA submits that this situation is unlikely to have been intended and that these ambiguities ought to be clarified. The CAA submits that the simplest way of doing this is to amend the definition of “shiftworker” and to make corresponding amendments to other provisions of the HPSS Award to ensure consistency.</p> <p>The proposed amendments will assist the FWC in fulfilling the modern awards objectives to ensure that modern awards are “<i>simple</i>” and “<i>easy to understand</i>”⁸ and reduce the “<i>regulatory burden</i>” employers would otherwise face in navigating and interpreting these provisions⁹.</p>
26 29	18.1 18.4	Interaction between shiftwork loadings and weekend penalties	There is ambiguity in relation to the interaction between shiftwork loadings and weekend penalties (clauses 18.1 and 18.4), as expressed above, which ought to be amended to avoid uncertainty.

Part 2 – Outline of Substantive Variations

12. On 25 November 2014, the CAA provided an outline of issues in relation to the HPSS Award (**Outline of Issues**).
13. The CAA intends to pursue variations to the HPSS Award to address the matters identified in its Outline of Issues.
14. For completeness, the CAA intends to pursue the following substantive variations to the HPSS Award:

⁸ FW Act, s. 134(1)(g).

⁹ FW Act, s. 134(1)(f).

Table 2 – Nature of proposed substantive amendments

Clause – HPSS Award	Clause – Exposure Draft	Summary of Issue	Summary of proposed variation
24	8.2(a)	The current span of hours is not reflective of industry practice which generally involves the performance of work outside of traditional business hours (i.e. on weeknights and on weekends).	The CAA will seek to vary the span of ordinary hours contained in clause 8.2(a) of the Exposure Draft for chiropractic practices.
3.1 – Definitions	Schedule I – Definitions	The HPSS Award does not contain a definition of “ordinary hours”. The absence of a definition for “ordinary hours” and the interchangeable use of that term throughout the Exposure Draft and in particular, in clauses 8 (‘Ordinary hours of work and rostering’), 18 (‘Penalty rates and shiftwork’) and 19 (‘Overtime rates’), has led to uncertainty.	As above.
3.1 31.1	Schedule I – Definitions and 20.2	The definition of a “shiftworker” and the entitlements of shiftworkers are not clear.	As above.
29	18.4	It is unclear in some circumstances whether and when a shiftwork loading applies.	As above.
26 29	18.1 18.4	There is ambiguity in relation to the interaction between shiftwork loadings and weekend penalties.	As above.
N/A	N/A	The HPSS Award does not contain an annualised salary provision.	The CAA will seek the inclusion of an annualised salaries provision.

15. As identified in its Outline of Issues, the CAA supports the resolution of the issues with the HPSS Award identified by the Fair Work Ombudsman (FWO). The CAA will support and/or make applications to vary the provisions identified by the FWO to remove any uncertainty.

Part 3 – Response to questions

16. The CAA’s responses to the questions posed by the FWC in the Exposure Draft that are currently of relevance to its interests, are set out in the table below:

Table 3 – Response to questions

Question of Interest	Page Number – Exposure Draft	CAA Response
Parties are asked to provide a list of provisions that do not apply to casual employees.	8	<p>The CAA notes that a Full Bench of the FWC has indicated that this “...sub-clause and note will be removed from all exposure drafts...”¹⁰ Notwithstanding this, for completeness, the CAA submits that the following provisions in the Exposure Draft do not apply to casual employees:</p> <ol style="list-style-type: none"> 1. Ordinary hours of work – clause 8.1 and 8.2 2. Shiftwork penalties – clause 18.4 3. Overtime rates – clause 19 4. Annual leave – clause 20 5. Paid personal/carer’s leave and compassionate leave – clause 21 6. Paid public holidays – clause 23 7. Termination of employment – clause 26; and 8. Redundancy – clause 27.
Parties are asked to confirm whether this rate [the 15% shiftwork penalty] is in addition to casual loading and/or weekend penalties.	20	<p><u>Casual loading</u></p> <p>The CAA submits that the shiftwork penalty of 15% is <u>not</u> in addition to a casual loading. In other words, it is the CAA’s position that shiftwork penalties are not applicable to casual employees.</p> <p>The reasoning is as follows:</p> <ul style="list-style-type: none"> • Clause 6.4(a) of the Exposure Draft provides that “A casual employee is an employee engaged on an hourly basis...” (Our emphasis added) • Clause 6.4(e)(i) of the Exposure Draft provides that “For each ordinary hour worked, a casual employee must be paid: <ul style="list-style-type: none"> - the minimum hourly rate; and - a loading of 25% of the minimum hourly rate, for the classification in which they are employed (Our emphasis added). • Clause 18.1(b) of the Exposure Draft provides that, “A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate for all hours worked, but will not be paid the casual loading of 25%” (Our emphasis added). • Schedule I to the Exposure Draft provides that a “... shiftworker is an employee who is regularly

¹⁰ [2014] FWCFB 9412 at [69].

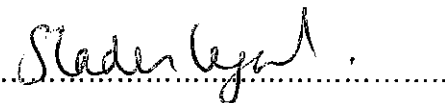
Question of Interest	Page Number – Exposure Draft	CAA Response
		<p><i>rostered to work their ordinary hours outside the span of ordinary hours of work of a day worker as defined in clause 8.2," (Our emphasis added).</i></p> <ul style="list-style-type: none"> • Clause 18.4 of the Exposure Draft provides that <i>"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 115% of their minimum hourly rate of pay."</i> (Our emphasis added). • A casual employee, being an employee engaged on an hourly basis, does not and cannot have ordinary hours of work and as such, does not meet the definition of a "shiftworker" for the purposes of the Exposure Draft. As such, they are not entitled to receive a shiftwork penalty (as such a penalty is only payable to a "shiftworker"). • Furthermore, casual employees are entitled to receive a casual loading of 25% of the minimum hourly rate for each hour worked (or a weekend loading of 75%). To allow a casual employee to receive a shiftwork loading and a casual loading (or weekend loading) would amount to 'double dipping'. <p>The CAA proposes to make further submissions dealing with the shiftworker provisions and their interaction with other definitions and provisions in the Exposure Draft in due course in the nature set out above.</p> <p><u>Weekend penalties</u></p> <p>The CAA submits that the shiftwork penalty of 15% is <u>not</u> in addition to weekend penalties. In other words, it is the CAA's position that "shiftworkers" are not entitled to receive weekend penalties.</p> <p>The CAA does however acknowledge that this is unlikely to have been intended.</p> <p>The reasoning is as follows:</p> <ul style="list-style-type: none"> • Clause 8.2(a) of the Exposure Draft provides that <i>"The ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday, unless otherwise stated"</i> (Our emphasis added). • Clause 18.1(a) of the Exposure Draft provides

Question of Interest	Page Number – Exposure Draft	CAA Response
		<p>that “<i>For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid 150% of the minimum hourly rate</i>” (Our emphasis added).</p> <ul style="list-style-type: none"> • Seemingly, only “day workers” are entitled to receive weekend penalties. Based on a literal interpretation of the Exposure Draft, an employee cannot be both a “shiftworker” and a “day worker” and as such, a “shiftworker” is not entitled to receive weekend penalties. • The CAA notes that this does have consequences which are unlikely to have been intended. An example illustrating these consequences and other uncertainties that these provisions present is set out above.
Should the provision for overtime clarify if each day is to stand alone?	20	<p>The CAA submits that this should be clarified to avoid uncertainty.</p> <p>Clause 19 of the Exposure Draft provides that “<i>An employee who works outside their ordinary hours on any day...</i>” will be entitled to overtime (Our emphasis added).</p> <p>It is not clear whether each day is to stand alone (although, the use of the words “any day” in clause 19 of the Exposure Draft does indicate that this was likely the intent), and this ought to be amended to avoid uncertainty.</p> <p>This clarification will assist the FWC in fulfilling the modern awards objectives to ensure that modern awards are “<i>simple</i>” and “<i>easy to understand</i>”¹¹ and reduce the “<i>regulatory burden</i>” employers would otherwise face in navigating and interpreting these provisions¹².</p>
Parties are asked to clarify if casual employees are entitled to overtime, and if so, what they should be paid.	21	<p>The CAA submits that casuals are not entitled to overtime.</p> <p>The reasoning is as follows:</p> <ul style="list-style-type: none"> • Clause 6.4(a) of the Exposure Draft provides that “<i>A casual employee is an employee engaged on an hourly basis...</i>” (Our emphasis added). • Clause 6.4(e)(i) of the Exposure Draft provides that “<i>for each ordinary hour worked, a casual</i>

¹¹ FW Act, s. 134(1)(g).

¹² FW Act, s. 134(1)(f).

Question of Interest	Page Number – Exposure Draft	CAA Response
		<p><i>employee must be paid:</i></p> <ul style="list-style-type: none">- <i>the minimum hourly rate; and</i>- <i>a loading of 25% of the minimum hourly rate,</i> <p><i>for the classification in which they are employed” (Our emphasis added).</i></p> <ul style="list-style-type: none">• Clause 18.1(b) of the Exposure Draft provides that, “A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate for all hours worked, but will not be paid the casual loading of 25%” (Our emphasis added).• Clause 19 of the Exposure Draft provides that “An employee who works outside their ordinary hours on any day...” will be entitled to overtime (Our emphasis added).• A casual employee, being an employee engaged on an hourly basis, does not and cannot have ordinary hours of work and as such, cannot work overtime within the meaning set out in clause 19.• Furthermore, casual employees are entitled to receive a casual loading of 25% of the minimum hourly rate for each hour worked (or a weekend loading of 75%). To allow a casual employee to receive overtime and a casual loading (or weekend loading) would amount to ‘double dipping’. <p>The CAA proposes to make further submissions dealing with overtime and other related provisions in the Exposure Draft in due course in the nature set out above.</p>



Sladen Legal
Legal Representatives of the CAA

Dated: 28 January 2015



Australian Government

Fair Work OMBUDSMAN

Reference number: 4848141

1 June 2012

Ms Jane O'Brien
lobrien@cornwalls.com.au

Dear Ms O'Brien

Thank you for your enquiry to the Fair Work Ombudsman dated 15 May 2012 and your previous enquiries regarding shift penalties.

You are seeking information regarding the the applicable penalty when the employee described works a Saturday under the Health Professionals and Support Services Award 2010 [MA000027] (Health Professionals Modern Award).

Background

The employee works the following shifts:

- Monday to Friday 4:00 pm – 8:00 pm
- Saturday 8:00 am – 12:00 pm

The employer is a chiropractic practice.

We are of the view that the employee would be considered a shiftworker.

The employee would be entitled to a shift loading while working Monday – Friday, but would not be entitled to any loading when working on Saturday.

Reasoning

Span of hours

Clause 24 of the Health Professionals Modern Award provides the span of hours for private medical, dental and pathology practices; private medical imaging practices; and physiotherapy practices. Clause 24.1 also provides a general span of hours for businesses which do not fall within one of these categories. It is our view that a chiropractic practice would not fall within the categories listed above and would therefore use the general span of hours detailed in clause 24.1. Clause 24.1 states:

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.

Shift allowances/penalties

Clause 3 of the Health Professionals Modern Award defines the term 'shiftworker' as follows:

shiftworker is an employee who is regularly rostered to work their ordinary hours outside the ordinary hours of work of a day worker as defined in clause 24.



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We have interpreted this to be a reference to an employee who performs the majority of their work outside the span of hours defined in clause 24.1. Therefore, it is our view that the employee described fits the above definition of a shiftworker.

Clause 29 of the award provides the following:

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 8.00 am, the employee will be paid an additional of 15% of their ordinary rate of pay.

Therefore, the employee is entitled a 15% loading for the shifts worked from Monday to Friday, as those shifts finish between 6.00pm and 8.00am. However, the shift performed on Saturday does not fall within the span described in clause 29. Therefore this shift would not attract the 15% loading.

Saturday penalty

Clause 26 of the award provides weekend penalties as follows:

26. Saturday and Sunday work

26.1 For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid their ordinary hourly rate and an additional 50% loading.

The weekend penalty described above is applicable to day workers only. As the employee is considered to be a shiftworker and not a day worker, they would not be entitled to the penalties described in clause 26.1.

Ordinary hours and overtime

The ordinary hours of work under the award are as follows:

23. Ordinary hours of work

23.1 The ordinary hours of work for a full-time employee will be an average of 38 hours per week in a fortnight or four week period.

23.2 Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.

Clause 28 of the Health Professionals Modern Award provides for overtime, as follows:

28. Overtime penalty rates

28.1 Overtime rates

(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:

- (i) time and a half for the first two hours; and
- (ii) double time thereafter.

(b) All overtime worked on a Sunday will be paid at the rate of double time.



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(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.

It is our view that overtime penalties would be applicable if the employee works outside their ordinary rostered hours, over 38 per week, or over 10 hours per day.

We emphasise that our views as set out above are not determinative and that a Court or tribunal asked to consider these issues may come to a different conclusion.

I trust this information has been of assistance. If you require further clarification, please contact me directly on (03) 9954 2749 between 8.00 am and 6.00 pm, Monday to Friday, quoting the above reference number.

Yours sincerely

Conrad Kotnik
Team Leader (A/g) – Fair Work Infoline
Fair Work Ombudsman

IMPORTANT: Sign up for updates about the 2012 Annual Wage Review

You can sign up for email updates about the 2012 Annual Wage Review. We'll let you know when the decision is coming, when it's announced and how you can prepare for the changes. We'll also let you know when your award has been updated in our system so you can find up-to-date obligations in PayCheck Plus and our other wage tools.

To sign up for updates, please click [here](#).

Important note: Disclaimer

FWO is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws. There are a number of factors that might affect the applicability of the information written here

These include:

- whether you have provided us with all the relevant and correct information about your situation;
- changes in your circumstances; and
- changes in the law.

It is your responsibility to comply with workplace laws that apply to you. FWO's information is not legal advice. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered.