



IN THE FAIR WORK COMMISSION

Matter No: AM2014/204

Title: Modern Award Review 2014

Health Professionals and Support Services Award
2010

SUBMISSIONS ON THE EXPOSURE DRAFT TECHNICAL AND DRAFTING MATTERS AND OUTLINE OF SUBMISSIONS ON SUBSTANTIVE CLAIMS

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Introduction

1. The Health Services Union (HSU) makes these submissions on the technical and drafting issues related to the Exposure Draft Health Professionals and Support Services Award 2014 released by the Fair Work Commission (the Commission) on 8 December 2014, and outlines its submissions in relation to its substantive claims being pursued, in accordance with the Statement issued by Justice Ross on 30 March 2015¹ and amended directions issued on 6 May 2015².
2. The HSU relies upon its submissions concerning the Exposure Draft, which were filed on 28 January 2015. Those submissions did not address the 23 December 2014 Full Bench decision³.
3. The HSU also notes the Full Bench Decision of 13 July 2015⁴, and more specifically the sections that relate to general drafting and technical issues common to multiple exposure drafts. Whilst there have been no changes made to this Exposure Draft at this stage the HSU expect that the Health Professionals and Support Services Award Exposure Draft will be varied to reflect these Decisions and as such makes no submissions concerning the matters addressed by the decisions. If the Commission requires submissions on these matters the HSU is happy to provide them.
4. The HSU further notes and relies upon the comments included at the commencement of the Exposure Draft, which state *'This exposure draft does not seek to amend any entitlements under the Health Award but has been prepared to address some of the structural issues identified in modern awards.'*

Technical and drafting issues relating to the exposure draft

5. These submissions deal with the technical and drafting issues in two parts:
 - a) First, they outline the issues which have been agreed by the parties;
 - b) Second, they identify the issues in relation to which the parties have not reached agreement, outline the HSU's position, and articulate the arguments it contends support the adoption of the HSU's position.

Agreed Matters

6. Following initial submissions and submissions in reply concerning the Exposure Draft, conferences before Commissioner Bissett on 3 February and 14 April 2015, and further

¹ [\[2015\] FWC 2194](#)

² [\[2015\] FWC 3148](#)

³ [\[2014\] FWCFB 9412](#)

⁴ [\[2015\] FWCFB 4658](#)

discussions by teleconference, the parties have reached agreement on some of the technical and drafting issues.

7. These agreed matters have been outlined in Appendix A of this submission.
8. Given the parties' agreement, the HSU does not intend to make any further submissions in relation to these matters, which relate primarily to the Exposure Draft, except if such submissions are sought by the Commission, whether at the final hearing of this matter or otherwise.
9. There are additional submissions concerning the only substantive claim included in the table later in these submissions.

Outstanding matters

List of common health professionals

10. The first question posed in the exposure draft, following clause 3.1, is whether the list of common health professionals contained in Schedule B is an exhaustive list or an indicative list.
11. The HSU contended in its submissions⁵ filed 28 January 2015 and in its submissions filed on 4 March⁶, that the List of Common Health Professionals can only logically be treated as indicative. That approach is consistent with:
 - a) A logical common sense approach;
 - b) The overall scheme and objectives of the *Fair Work Act* (the FW Act);
 - c) The approach that has been taken by the Commission in making modern awards; and
 - d) A proper understanding of the *Health Professionals and Support Services Award 2010 (the HPSS Award)*; and
 - e) The coverage of predecessor awards.
12. The HPSS Award is expressed, at clause 4.1(a) to cover employees in the classifications listed a clause 15. Clause 15 refers to "Health Professional Employees", Levels 1 to 4.
13. The term "health professional employee", is not defined in the Award. The ordinary meaning of those words then informs the meaning of the phrase in the context of the Award. It is a phrase of broad scope, apt to describe persons who work in the health industry, exercising skills which generally require tertiary training and/or qualification. The definitions of the health professional classifications in Schedule B are a comprehensive system of classifications appropriate to cover *all* professional roles.

⁵ [HSU Submissions 28 Jan 15](#)

⁶ [HSU Submissions 4 Mar 2015](#)

14. Against that background the list of “common” health professionals must be seen as an indicative list only. The use of the term “common” implies that there are other health professionals which fall within the scope of the classifications, which not identified on the list. Given that different titles or descriptions may attach to roles which are, in substance, described in the current Schedule C, it would be perverse to regard the Schedule as anything other than indicative.
15. To regard Schedule C as exhaustive would have undesirable and anomalous consequences, including the removal from award coverage of health professionals who have hitherto been regarded as covered by the HPSS Award, and the need for frequent applications to be made to add further professional roles to the list as technology and therapeutic practice develop those roles. There can be no rationale for treating one type of health professional as covered by the award, and another as outside the scope of its benefits. Conversely, by treating the list as indicative only, the modern award objective at s.134(1)(g) of the *Fair Work Act 2009 (the Act)*, that is “*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*” is achieved.
16. This is particularly the case in a field marked by constant change. For example, although the term “Art Therapy” had its origins in the United States and United Kingdom in the 1940s, it wasn’t until the 1990s that Australian universities commenced offering post-graduate programs in art therapy, which led to the recognition of the profession and the establishment of Australian National Art Therapy Association (ANATA) the predecessor to the current professional body ANZATA (Australian and New Zealand Arts Therapy Association⁷).
17. Further, some professions change their name. What were once “Medical Record Administrators” are now generally known as “Health Information Managers” or “Clinical Coders”. “Play Therapists” are now known in some quarters as “Child Life Therapists”. Equally, “Radiographers”, might now be described either by that title, or by reference to their area of medical imaging specialisation. A change of nomenclature should not result in a change of coverage.
18. Health and health professionals, including doctors and nurses, are constantly changing in response to advances in understanding of the human body, health, wellness and diseases processes. Each of the substantial advancements in our understanding has led to new specialists practising within a newly defined scope of practice and in new or advance treatment options.
19. Modern award classification descriptors in industry-based awards are ordinarily not exhaustive. They list some examples of positions that might be included at a pay point or classification level (for example, see Schedule B to the *Aged Care Award 2010* or Schedule B to the *Banking, Finance and Insurance Award 2010*). Otherwise the level descriptors incorporate criteria such as entry levels for a specific level of qualification, mandatory qualification, level of independent decision-making, supervisory requirements, leadership/ management of others etc.

⁷ [ANZATA website](#)

20. Health professionals, however titled and in whichever discipline, range from entry level employees in their first jobs, indeed some will still be completing the pre-registration requirements under the Health Practitioners Regulation laws, through to those in senior management positions. The classification structure within the HPSS Award is apt to cover all levels of role.
21. If the Commission accepts the submissions by several of the employer groups that the list is exhaustive, then the effect will be to disenfranchise any employee who is not employed in one of the specifically named health professions in Schedule B. That is it would create an expanding group of employees that are excluded from modern award coverage except under the Miscellaneous Award 2010.
22. The AiG submitted that the decision concerning Dental Hygienists⁸ militates against the argument that the list is indicative. The HSU submits that nothing in the decision lends support to that view. The application was unopposed, and it was made by a body which the then Commission was satisfied represented the views of that profession. For that reason the group was removed from coverage by the award. If the professions in Schedule B are treated as indicative, future employers and professional groups will retain the capacity to persuade the Commission 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. The starting point, however, should be that all professions are covered.
23. To ensure that the position is clear the HSU proposes a variation to the Schedule A and Schedule B;

“A.2 Health Professional employees – definitions

An indicative list of common health professionals which are covered by the definitions is contained in Schedule B – Indicative List of Common Health Professionals.

Schedule B – Indicative List of Common Health Professionals.”

24. A draft determination containing this proposed amendment is provided at Appendix B

Definition of Health Industry

25. The Exposure Draft contains the definition for the term “Health Industry” at clause 3.2 and then again in Schedule I Definitions.
26. The HSU submits, in keeping with the proposal in the Nurses Award, that the definition should be retained in the Coverage clause at 3.2 only.
27. A draft determination containing this proposed amendment is provided at Appendix B

⁸ [\[2009\] AIRCFB 948](#)

Facilitative provisions

28. The ADA has made submissions that clause 6.3(c) Part-time employment should be included in the tables of facilitative provisions.
29. The HSU does not oppose the inclusion of the part-time provisions, however we note that while the provision allowing for variation to a part-time employee's hours is included in all the other Stage 2 health awards (except the Medical Practitioners Award), none of them include the provision in the table of facilitative provisions.
30. If the provision is included in the table at clause 5.2, the HSU submits the third column 'Agreement between an employer and: 'can only read 'An Individual'.

Minimum Engagement

31. Parties were asked to clarify whether the minimum engagements are daily minimums, which can be worked in two or more occasions (i.e. in split shifts) or if these hours must be worked consecutively.
32. The HSU submits that to even imply the minimum engagement could be worked in two or more occasions would result in a significant change to the current HPSS Award provisions.
33. Split or broken shifts do not constitute standard arrangements for work. A requirement to work split or broken shifts gives rise to a range of difficulties, including difficulty in ensuring an appropriate rest period between the conclusion of one shift and the commencement of another. Where they exist there are, or should be stand alone and definitive provisions for working split/ broken shifts, which include at least the number of hours over which the split/broken shifts can be worked (as is the case, for example, in clause 29 of the *Hospitality Industry (General) Award 2010*, clause 24 of the *Fitness Industry Award 2010*, clause 22.8 of the *Aged Care Award 2010* and clause 25.6 of the *Social, Community, Home Care and Disability Services Award 2010*), and the penalties applicable. Such an approach would provide a fair and relevant minimum safety net in respect of the performance of the work.
34. Further the HSU submits that because the HPSS Award does not contain provision for split/broken shifts then all hours must be worked consecutively, not just those hours specified as the minimum period of engagement for casual employees.
35. If the 'minimum period of engagement' was to be interpreted to allow for an employee to work split/broken shifts to reach their minimum hours the HPSS Award would need to include provisions prescribing the conditions under which they may be worked, and possibly attracting additional remuneration, consistent with s.134(1)(da)(ii) and (iv) of the Act.
36. The HSU further notes the opening statement included in the Exposure Draft:

"This exposure draft does not seek to amend any entitlements under the Health Award but has been prepared to address some of the structural issues identified in modern awards."

37. The HSU also notes the ACE submissions⁹ at paragraph [4] proposing a variation to the clauses 6.4(c) and 6.4(d) and the AiG submissions¹⁰ in support. The effect of such a clause is to ensure an employee will be paid for the ‘minimum period of engagement’ regardless of whether they work the full number of hours or not.
38. The current provision provides as follows:
- “6.4 Casual employment*
- ...
- (c) Subject to clause 6.4(d) the minimum period of engagement of a casual employee is three hours.*
- (d) The minimum period of engagement of cleaners employed in private medical practices is two hours.”*
39. The HSU submits the effect of the provision is the same as the effect of the proposed variation. The employee is entitled to payment equivalent to having worked a minimum number of hours. There is nothing that compels the employer to require an employee to work if the employer is unable to provide the minimum period of engagement. The employer is, however, required to pay for those hours.
40. The HSU submits that there is no reason to make the variation to the clause, there is no ambiguity or lack of clarity in the wording of the current clause, and therefore the variation is unnecessary.

Overtime

41. The parties were asked to clarify whether casuals are entitled to overtime.
42. The current clause makes it clear that the entitlement applies to ‘an employee’ working hours outside their ordinary hours on any day, and states: [emphasis added]

“19.1 Overtime rates

- (a) **An employee** who works outside their ordinary hours on any day will be paid at the rate of:*
- (i) 150% of the minimum hourly rate for the first two hours; and*
- (ii) 200% of the minimum hourly rate thereafter.*
- (b) All overtime worked on a Sunday will be paid at the rate of 200% of the minimum hourly rate.*

⁹ [ACE Submissions 28 Jan 2015](#)

¹⁰ [AiG Submissions 4 Mar 2015](#)

(c) *These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 18.4.*

(d) *Part-time employees*

Where agreement has been reached in accordance with clauses 6.3(b) or (c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause."

43. The clause does not differentiate between categories or types of employee. The opening words of the clause refer simply to 'an employee'. The plain reading of the words is simple, straightforward and clear and applies to any employee. No category of employee is excluded from the entitlement.

44. The HSU submits that the clause clearly has application to casual employees. However if this matter is pursued further and submissions between the parties are greatly at odds, the HSU contends the matter should be referred to the Casual and Part-time Full Bench.

Weekend penalties

45. The current HPSS Award provides for weekend penalties as follows.

"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.

(b) A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate for all time worked, but will not be paid the casual loading of 25%."

46. The HSU submits there was an error in the original drafting of the HPSS Award in 2010 that was not recognised at the time. That error was to draft a clause which appears to provide that weekend penalties are only payable to day workers and casual employees.

47. Day workers are employed to work within the span of hours as detailed in clause 8.2:

"(a) 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."

48. And in accordance with the definitions in Schedule I - Definitions a shiftworker is defined as

"shiftworker is 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."

49. On a plain reading of the words at clause 18.1, weekend penalty rates appear to apply only to day workers and not to shift workers who are excluded by the definition of a shiftworker as an employee regularly rostered to work 'outside the hours of a day worker'

50. While some day workers can work ordinary hours on weekends at clauses 8.2(b), 8.2(c), 8.2(d) and 8.2(e), the ordinary hours they may work on a weekend and be paid weekend rates in accordance to clause 18.1 are limited by the span of hours (underlined below):

“(b) Private medical, dental and pathology practices

The ordinary hours of work for a day worker in private medical, dental and pathology practices are worked between:

(i) 7.30 am and 9.00 pm, Monday to Friday; and

(ii) 8.00 am and 4.30 pm on Saturday.

(c) Private medical imaging practices—five and a half day practices

Where a practice services patients on a five and a half day a week basis, the ordinary hours of work for an employee are worked between:

• 7.00 am and 9.00 pm, Monday to Friday; and

• 8.00 am and 1.00 pm on Saturday.

(d) Private medical imaging practices—seven day practices

(i) Where a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location are worked between 7.00 am and 9.00 pm, Monday to Sunday.

(ii) Payment for weekend work under clause 8.2(d)(i) is paid in accordance with clause 18.2.

(e) Physiotherapy practices

In physiotherapy practices, the ordinary hours of work for a day worker will be worked between:

(i) 6.00 am and 6.00 pm, Monday to Friday; and

(ii) 6.00 am to 12.00 noon on Saturday.”

51. Weekend penalties only apply to ordinary hours worked by a day worker between midnight Friday and midnight Sunday.

52. A shiftworker, whose rostered hours are outside the span of hours of a day worker, does not, according to the plain meaning of the words at clause 18.1, receive weekend penalty rates.

53. Not only is this inconsistent with the predecessor awards, it is logically inconsistent. The wording which appeared to be in general use in many predecessor awards are versions of ‘... ordinary duty [hours] performed between...’ leaving out any reference to a class of worker [see for example: clause 32 of the *Health and Allied Services - Private Sector - Victoria Consolidated*

*Award 1998*¹¹, clause 32 of the *Health Services Union of Australia (Health Professional Services - Private Sector Victoria) Award 2004*¹², clause 7.3 of the *Health Services Union of Australia (NSW/ACT Private Medical Imaging) Award 2004*¹³, or clause 28.1.5 of the *Health Services Union of Australia (Victoria - Private Sector – Medical Scientists, Psychologists and Pharmacists) Award 2004*¹⁴.] While all the examples are federal awards, the language is not inconsistent with many state based health awards.

54. The HSU submits this can only have been an unintentional oversight at the time of drafting. The HSU submits the clause should read:

18.1 Weekend penalties

- (a) *For all ordinary hours worked between midnight Friday and midnight Sunday, an employee will be paid 150% of the minimum hourly rate.*
- (b) *A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate for all time worked, but will not be paid the casual loading of 25%.*

55. If required by the Commission, the HSU will provide evidence of industry practice, further submissions on pre-existing and ongoing award entitlements, and supporting witness evidence.
56. The HSU submits that whilst this is not a technical and drafting matter relating to the Exposure Draft, it is nonetheless a technical and drafting error that should be dealt with by the Full Bench during the brief hearings on technical and drafting matters. The HSU believes that this is an anomaly and as such need not be referred to a separately constituted Full Bench. The correction which is proposed is consistent with the modern awards objective at s.134(1)(g) of the Act, in that it renders the provision simple and easy to understand, whilst providing an entitlement to a fair and relevant minimum safety net.
57. Should the parties be significantly at odds with each other and there be a view supported the Commission that the matter requires an more extended hearing, the HSU submits that the matters should be dealt with as a substantive matter.
58. A draft determination containing the amendment has been provided at Appendix B

Outline of submissions in relation to HSU substantive claims

59. The HSU provides an outline of submissions in relation to its substantive claims in three parts:
- a) Firstly an outline of the matters which have been agreed by the parties;

¹¹ [Health and Allied Services - Private Sector - Victoria Consolidated Award 1998](#)

¹² [Health Services Union of Australia \(Health Professional Services - Private Sector Victoria\) Award 2004](#)

¹³ [Health Services Union of Australia \(NSW/ACT Private Medical Imaging\) Award 2004](#)

¹⁴ [Health Services Union of Australia \(Victoria - Private Sector – Medical Scientists, Psychologists and Pharmacists\) Award 2004](#)

- b) Secondly an outline of the matters now withdrawn; and
- c) Finally submissions in relation to issues on which the parties have not reached agreement and which the HSU intend to pursue

Agreed Matters

Ceremonial leave

- 60. The HSU has proposed a variation to the current Ceremonial leave clause to include reference to Torres Strait Islander tradition.
- 61. During the consultation processes the HSU provided the following proposed wording to other parties and the variation was agreed. Variations are marked up.

19 Ceremonial Leave

An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for Aboriginal ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.

- 62. The HSU submits the agreed variation meets the modern award objectives, and particularly the objective at s.134(1)(c) of the Act of promoting social inclusion through increased workforce participation. Recognition of ceremonial obligations, and an entitlement to leave in that event, will assist to facilitate and promote the participation of Aboriginal and Torres Strait Islander peoples in the workforce, and the application should be granted by the Commission.
- 63. Clauses in the same or very similar words are a common feature of modern awards. The HSU believes failure to include reference to Torres Strait Islander custom at the time of making the HPSS Award was an oversight and as such is an anomaly. The HSU does not intend to lead further evidence in respect of this claim unless requested by the Commission.
- 64. A draft determination, reflecting the agreed proposal has been provided at Appendix C.

Withdrawn Matters

- 65. The HSU foreshadowed the following variations in submissions filed on 25 November 2014¹⁵:
 - a) Replacement of the term 'day worker' – paragraph 14;
 - b) Variations to the classifications definitions for support services employees – paragraph 16; and
 - c) Inclusion of new provisions for training plans – paragraph 19.

¹⁵ [HSU Submissions Nov 2014](#)

66. The HSU does not intend to pursue these variations at this time. Without any admission as to the merits of those variations and without prejudice to its capacity to re-agitate those claims at an appropriate point in the future, it withdraws those claims.

Outline submissions in support of substantive claims

Definition of shiftworker and day worker

67. The HSU submits that the current HPSS Award definitions of “shiftworker” and “day worker” lack clarity for the purposes of interpretation of the award entitlements for employees. For clarity the HSU is not concerned in this part of its submission with the definition of shiftworker for the purposes of clause 20 Annual leave, as we acknowledge this definition stands alone.

68. For general purposes of the HPSS Award there is a definition of the term shiftworker contained in Schedule I:

“shiftworker is 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.”

69. The only definition for day worker is effectively by default in the span of hours clause at clause 8.2:

“(a) 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.”

70. The HSU proposes a definition for day worker and an updated definition for shift worker to be included in Schedule I Definitions:

***Day worker** means an employee who is engaged as such and whose ordinary hours are worked between the span of hours as defined in clause 8.1.*

***Shiftworker** means 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.*

71. The HSU believes that this is a technical and drafting issue that could be dealt with by either the Full Bench hearing on technical and drafting issues or as a substantive claim. The HSU does not intend in the first instance to lead any significant evidence beyond detailed submissions in relation to this claim nor does it have a preference as to how this should be heard and will be guided by views of the other parties involved and the Commission.

72. A draft determination, reflecting that proposed change has been provided at Appendix C.

Ordinary hours and rostering provisions

73. The HSU submits that the rostering provisions should reference both the span of hours and ordinary hours of work provisions because these provisions provide restrictions on the rosters that could be developed or posted by an employer.
74. The current rostering provisions at clause 8.3 provide only for the posting of rosters, notification of changes and notice periods. The clause essentially sits in isolation and without reference to criteria such as shift length, maximum hours, span of hours or ordinary hours, and gives rise to questions about rostering split or broken shifts.
75. The HSU submits that the Commission should amend the provision in the Exposure Draft to ensure rostered hours are consistent with the span of hours and ordinary hours of work provisions in clauses 8.1 and 8.2.

76. The current rostering provisions provide:

"8.3 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 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."*

77. The HSU proposes the addition of a sub-clause (d):

- (d) Rosters will be developed in accordance with the provisions in clause 6 Types of employment, clause 8.1 Ordinary hours of work and clause 8.2 Span of hours.*

78. The HSU does not believe this is a significant matter and does not at this stage intend to lead substantial amounts of evidence beyond detailed submissions. A draft determination, reflecting the proposed change has been provided at Appendix C.

Span of hours and related matters

79. The HSU seeks to vary clause 8 Span of Hours to provide for a single simple span of hours in the HPSS Award.
80. Part of the purpose of the development of Modern Awards was to rationalise the number of industrial instruments. An outcome of the process was standardisation of terms and conditions,

meaning parties were required to accept some alteration to past conditions in the name of greater uniformity and simplicity within an industry.

81. The HPSS Award currently provides for 5 different spans. In the HSU's submission, that is four spans too many for a modern award.
82. There are several applications for additional variations to the span of hours clause already formally foreshadowed in November 2014, and at least two others mooted during consultations around the HPSS Award. The number of current spans, and the further applications tends to suggest that there has been a departure from the modern awards objective of providing a "*fair and relevant minimum safety net*" and a tendency to seek, in an award context, outcomes that should be the subject of bargaining. The inclusion of extended and specialised spans is, in the HSU's submission, contrary to the modern award objective at s.134(1)(b) of the Act – the need to encourage collective bargaining.
83. A fair minimum standard would provide that an employee who is employed as a day worker is entitled to overtime if they are rostered to work, or work outside the span of hours. An employee who is employed as a shift worker should be entitled to shift, weekend or public holiday rates unless they are working excess hours.
84. The HSU submits 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. Hours that fall outside these hours would constitute ordinary hours of work for a shift worker, and attract penalties or loadings depending on the time and/or day. Each penalty or loading would be determined by where the hours worked fall within the day or week, regardless of which employer for whom an employee works.
85. The HSU therefore seeks a single span of hours applicable to all day workers covered by the HPSS Award and inclusion in the award of clear entitlements relating to shift, weekend and public holiday loadings for shiftworkers:

8.1 Span of hours—day worker

- (a) Ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday.*

86. If the span of hours clause is varied to provide for a single span, then provisions differentiating between various practices would no longer be required and the following definition in Schedule I should be deleted:

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

87. The HSU also seeks to further vary clause 18. Clause 18.2 provides for lower weekend penalties to apply to private medical imaging seven day practices.
88. The HSU submits the differentiation between the rates payable for working a weekend shift based on the number of days a practice operates is illogical. The entitlement appears to be an artefact of a single Enterprise Award, the *Health Services Union of Australia (NSW/ACT Private Medical Imaging) Award 2004*¹⁶.
89. Clause 7.4 of the award reads:
- “7.4 Where a work location of a practice services patients on a seven day a week basis the ordinary hours of full-time and part-time employees at that work location will be between 7 a.m. and 9 p.m. on such days; where such work is undertaken on a Saturday it will be paid at the rate of time and a quarter; on Sunday it will be paid at the rate of time and a half. Hours worked by full-time and part-time employees at such locations before 7 a.m. or after 9 p.m. on any day will attract overtime rates in accordance with clause 8 - Overtime.”*
90. There is, in the HSU’s submission, no justification for including such a distinction in the context of modern award. The differentiation is inconsistent with the modern awards objectives, in particular the principle of equal remuneration for work of equal or comparable value which appears at s.134(1)(e) of the Act, and contrary to the modern award objective at s.134(1)(b) of the Act – the need to encourage collective bargaining.
91. The HSU also seeks to vary the engagement provisions at clause 6.1(b) to include a requirement for the employer to advise an employee at the time of appointment whether they are employed as a day worker or shiftworker.
- 6.1 Employment Categories*
- (a) ...*
- (b) At the time of engagement an employer will inform each employee whether they are employed on a full-time, part-time or casual basis, and whether they are employed as a day worker or shiftworker.*
92. The HSU submits an additional requirement to advise an employee of their employment status as a day worker or shiftworker will have not detrimental impact on employers and will have the advantage of making clear from the outset the entitlements that apply to the employee under the award.

¹⁶ [Health Services Union of Australia \(NSW/ACT Private Medical Imaging\) Award 2004](#)

Shift work

93. The HSU seeks to vary clause 18.4 Shift work penalties to ensure that shift allowances are payable to employees when they work an afternoon or night shift. The provision of such additional remuneration is consistent with s134(a)(da)(iv) of the Act.
94. The HSU believes that medical evidence, both international and Australian, incontrovertibly shows that working shiftwork has a detrimental health impact on employees. That detriment or disadvantage is suffered regardless of the day the shifts are worked; that is, the detriment is not suffered only on weekdays.
95. Weekend and public holiday rates of pay are intended to compensate an employee for the loss of social and family time. Shift work allowances are intended to provide some compensation to an employee for working hours late in the evening or overnight. In the HSU's submission these are not interchangeable. Both should be paid where both detriments and disadvantages are suffered.
96. The payment of shift allowances in addition to weekend and/or public holiday rates was a feature of many awards prior to the award modernisation process. The practice continues in some modern awards, (see for example Clause 20.6 of the *Ambulance and Patient Transport Award 2010*, Clause 25.2 of the *Medical Practitioners Award 2010*, clause 26 of the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015*, clause 23 of the *Nurses (ANMF – Victorian Local Government) Award 2015*, clause 20.5 & 20.6 of the *Mining Industry Award 2010*) and in many agreements. Nothing in the modern awards objective requires that only one form of penalty or loading may accrue in respect of the same shift. Section 134(1)(da) of the Act recognises that additional remuneration is required for both working on weekends and working shifts. Nothing in that section warrants the view that an employee might only be entitled to one form of penalty of loading in respect of a particular shift.
97. The HSU intends to provide research evidence, current and pre-existing award material and submissions in support of the claim. At this stage it does not intend to lead witness evidence, other than the possible exception of an expert in support of the research.
98. The HSU proposes the following variations:

18.xx Shiftwork

- (a) *Where the ordinary rostered hours of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am on any day of the week, the employee will be paid an additional 15% of their minimum hourly rate for each hour worked.*
- (b) *The shiftwork rate is payable in addition to any penalty, allowance, overtime, weekend or casual rates of pay.*

99. The HSU recognise that the claims around span of hours and shiftwork entitlements amount to a substantive matter and will be subject to separate specific directions.

Annual leave

100. The HSU seeks to vary clause 20.2 Additional leave for certain shiftworkers and specifically the definition of shiftworker for the purposes of the additional annual leave.
101. The HSU seeks to provide an additional week of leave to shiftworkers who work 4 or more ordinary hours on 10 or more weekends and/or public holidays.
102. The FB decision¹⁷ of 2012 substantially varied the entitlements of employees covered by the HPSS Award.
103. The initial 2010 Award provided [emphasis added]

31.1 Quantum of leave

(a) In addition to the entitlements in the NES, a shiftworker or an employee who works for more than four ordinary hours on 10 or more weekends is entitled to an additional week's annual leave on the same terms and conditions.

(b) For the purpose of the NES a shiftworker is defined as 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—Span of hours.

104. That is the entitlement was an additional week's leave provided to an employee
- a) Where the employee was 'a shiftworker' as defined, or
 - b) Where the employee worked 'for more than four ordinary hours on 10 or more weekends'
105. The HSU contends the changes
- a) Reduced the entitlement to shiftworkers,
 - b) Removed an entitlement for employees who were not shiftworkers but who worked 'ordinary hours' on weekends, and
 - c) Reduced the certainty of the entitlement by changing the reference from 'more than four ordinary hours on 10 or more weekends' to 'regularly rostered'.
106. The HSU has made other claims that are intended to ensure that an employee who was not a shiftworker would not be working ordinary hours on weekends or public holidays.
107. In addition the HSU seeks to clarify the position in relation to employees engaged for part of the year as a shiftworker.

¹⁷ annual leave decision

20.2 Additional leave for shiftworkers

- (a) The NES provides that an employee who is defined as a shiftworker under this clause is entitled to an additional weeks' annual leave on the same terms and conditions.*
- (b) For the purposes of the NES a shiftworker is an employee who works for more than four ordinary hours on 10 or more weekends and/or public holidays.*
- (c) An employee who is engaged for part of the yearly period as a shiftworker, is entitled to have the period of four weeks' annual leave increased by half a day for each month the employee is engaged on shiftwork, up to a maximum of 5 days additional leave.*

108. The HSU intends to provide research evidence, current and pre-existing award material and submissions in support of the claim. At this stage we do not intend to lead witness evidence, other than the possible exception of an expert in support of the research.

109. The HSU recognise that this will be a substantive matter and will be subject to separate specific directions.

Overtime

110. The HSU seeks to vary clause 19.1 Overtime rates to ensure that there is no ambiguity as to the payment of overtime for all employees, including casual employees, performing work outside or in excess of the times, rosters and patterns considered 'ordinary' under the HPSS Award.

111. In addition the HSU seeks to clarify that each period of overtime stands alone in its own right, whether that employee works beyond the hours for that single day or shift, their hours of engagement or the normal hours for a full-time employee in a week.

112. The current clause reads:

"19.1 Overtime rates

- (a) An employee who works outside their ordinary hours on any day will be paid at the rate of:
 - (i) 150% of the minimum hourly rate for the first two hours; and*
 - (ii) 200% of the minimum hourly rate thereafter.**
- (b) All overtime worked on a Sunday will be paid at the rate of 200% of the minimum hourly rate.*
- (c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 18.4.*
- (d) Part-time employees*

Where agreement has been reached in accordance with clauses 6.3(b) or (c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause."

113. The HSU submits that an employee who works in excess of their rostered times, again whether this occurs because the employee starts early or finishes late, should be entitled to payment at overtime rates. Any definition of overtime provided in the HPSS Award should define when overtime is paid for both ongoing **and** casual employees as overtime provisions apply to all employees.

114. The HSU proposes to expand the clause to:

19.1 Overtime penalty rates

(a) *Hours worked in excess of the ordinary hours or average weekly hours on any day or shift prescribed in accordance with clause 8 will be paid at the rate of:*

(i) *150% of the minimum hourly rate for the first two hours; and*

(ii) *and double time thereafter*

(b) *All overtime worked on a Saturday or Sunday will be paid at the rate of 200% of the minimum hourly rate.*

(c) *Overtime rates under this clause will be in substitution for and not cumulative upon the weekend premiums prescribed in clause 18.1 Weekend penalties.*

(d) *For the purposes of overtime each shift, day, week or averaged roster period stands alone. All work beyond these hours will be overtime and paid as prescribed in clause 19.1(a) or (b).*

(e) *Part-time employees*

Where agreement has been reached in accordance with clauses 6.3(b) or (c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause.

(f) *Casual employees*

A casual employee, who works beyond their rostered or agreed hours, the maximum daily hours or a 38-hour week, must be paid overtime in accordance with this clause.

(g) *Day workers*

Day workers will be paid overtime for all hours worked outside the Span of Hours in clause 8.2.

115. The HSU contends that some of this claim relates only to clarification of the current entitlement. However the HSU understands that the claim for double time on Saturdays will be regarded as a substantive matter and as such the claim is likely to be subject to separate specific directions.

Classification matters

116. The HSU seeks to vary Schedule A.2 Health Professional employees – definitions to provide for a classification for Health Professional employed as interns by inserting a new subclause:

A.2.1(c) This level is the level for employees who are undertaking an internship.

117. The HSU does not believe this claim is contentious. The variation does not seek to change the current entitlement, but clarify that interns are a specific type of new graduate and as such would commence at level 1, the entry level for health professionals for the period of their internship.

118. The current wording of the award is

“A.2.1 Health Professional—level 1

(a) Positions at level 1 are regarded as entry-level health professionals and for initial years of experience.

(b) This level is the entry level for new graduates who meet the requirement to practise as a health professional (where appropriate in accordance with their professional association’s rules and be eligible for membership of their professional association) or such qualification as deemed acceptable by the employer. It is also the level for the early stages of the career of a health professional.”

119. The addition of a sub-clause A.2.1(c) will therefore only clarify the existing position of interns under the HPSS Award.

120. The HSU also seeks to vary Schedule B to add some additional Health Professional titles that are now in common usage.

121. The second part of this claim is in addition to the proposed variation designed to deal with the question raised by the Commission about whether the List is indicative or exhaustive.

122. Again the HSU submits the proposed variation does not change the current HPSS Award, but seeks to make the schedule easier to read by listing the titles in alphabetical order and add some titles not currently included but which are currently commonly used.

Schedule B — Indicative List of Common Health Professionals

Acupuncturist	Aromatherapist	Audiologist
Administrator	Art Therapist	Biomedical Engineer

Biomedical Technologist	Health Information Manager	Musculoskeletal Therapist
Building Engineer	Health Promotion Officer	Music Therapist
Cardiac Technologist	Homeopathist	Myotherapist
Cardiac Technologist	Hospital Engineer	Naturopath
Child Life Therapists	Human Resource Professional	Nuclear Medicine Technologist
Child Psychotherapist	Information Manager	Nutritionists
Chiropractor	Magnetic Resonance Imaging Technologist	Occupational Therapist
Client Advisor	Manager	Optician
Clinical Coders	Massage therapist	Optometrist
Clinical Perfusionist	Masseur (Remedial)	Orthoptist
Community Development Worker	Medical Engineer	Orthotist
Counsellor	Medical Illustrator	Osteopath
Dental Prosthetist	Medical Imaging Technologist	Pastoral Carer
Dental Technician	Medical Laboratory Technician	Pharmacist
Dental Therapist	Medical Librarian	Physiotherapist
Dentist	Medical Photographer	Plant Engineer
Denturist	Medical Physicist	Play Therapist
Dietician	Medical Radiographer	Podiatrist
Director of Allied Health	Medical Record Administrator	Prosthetist
Dispenser	Medical Scientist	Psychologist
Diversional Therapist	Medical Technician	Radiation Engineer
Environmental Engineer	Microbiologist	Radiation Therapist
Exercise Physiologist		Radiation Therapy Technologist
Genetics Counsellor		Radiographer
		Recreation Therapist

Reflexologist	Renal Dialysis Technician	Speech Pathologist
Rehabilitation Consultant	Research Technologist	Technical Officer
Rehabilitation Counsellor	Social Worker	Ultrasonographer
	Sonographer	Welfare Worker
		Youth Worker

123. The HSU believes that this is an anomaly and as such we do not intend at this stage to lead any substantial evidence beyond detailed submissions in relation to this claim.
124. A draft determination, reflecting the proposed change has been provided at Appendix C.

Referral

125. The HSU has indicated that the following matters are substantive claims and therefore likely to be subject to separate directions:
- Span of hours and related matters
 - Shift work
 - Annual leave
 - Overtime
126. The HSU is also conscious that there have been several matters foreshadowed by other parties, both formally in previous submissions and informally during consultation processes, that are substantive claims and which include matters that overlap with the claims made by the HSU.
127. The HSU considers that these matters are interrelated and as such submits that if matters are to be referred to a separately constituted Full Bench such a bench would be an 'Award Review Bench' constituted to hear all outstanding matters on the Health Professional and Support Services Award.
128. Where the HSU indicates that in its opinion the matter is substantive and likely to be subject to separate directions it is an indication that the HSU believes the matter should probably be referred to a separately constituted Full Bench.

A handwritten signature in black ink, appearing to read 'Leigh Svendsen'.

Leigh Svendsen
Senior National Industrial Officer

Appendix A

Exposure Draft - Agreed Matters

Item No	Exposure Draft	Agreed Wording																																	
9	<p>3.1 This industry and occupational award covers:</p> <p>(a) employers throughout Australia in the health industry and their employees in the classifications listed in Schedule A—Classification Definitions to the exclusion of any other modern award; and</p> <p>(b) employers engaging a health professional employee in the classifications listed in clause 11.</p>	<p>3.1 This industry and occupational award covers:</p> <p>(a) employers throughout Australia in the health industry and their employees in the classifications listed in Schedule A—Classification Definitions to the exclusion of any other modern award; and</p> <p>(b) employers engaging a health professional employee in the classifications listed in Schedule A clause 11.**</p>																																	
10	Inclusion of the definition of Health Industry in clause 3.2 and Schedule I Definitions	That it should be included in 3.2 Coverage and not repeated in the Schedule I																																	
11	<p>5.2 Facilitative provisions in this award are contained in the following clauses:</p> <table border="1" data-bbox="197 970 1021 1283"> <thead> <tr> <th>Clause</th> <th>Provision</th> <th>Agreement between an employer and:</th> </tr> </thead> <tbody> <tr> <td>9.1(b)</td> <td>Unpaid meal breaks</td> <td>An individual</td> </tr> <tr> <td>9.2(b)</td> <td>Paid tea breaks</td> <td>An individual</td> </tr> <tr> <td>12.1</td> <td>Payment of wages</td> <td>The majority of employees</td> </tr> <tr> <td>23.4(a)</td> <td>Substitution of public holidays by agreement</td> <td>The majority of employees</td> </tr> </tbody> </table>	Clause	Provision	Agreement between an employer and:	9.1(b)	Unpaid meal breaks	An individual	9.2(b)	Paid tea breaks	An individual	12.1	Payment of wages	The majority of employees	23.4(a)	Substitution of public holidays by agreement	The majority of employees	<p>5.2 Facilitative provisions in this award are contained in the following clauses:</p> <table border="1" data-bbox="1133 970 1984 1331"> <thead> <tr> <th>Clause</th> <th>Provision</th> <th>Agreement between an employer and:</th> </tr> </thead> <tbody> <tr> <td>6.3(c)</td> <td>Part-time employment</td> <td>An individual</td> </tr> <tr> <td>9.1(b)</td> <td>Unpaid meal breaks</td> <td>An individual</td> </tr> <tr> <td>9.2(b)</td> <td>Paid tea breaks</td> <td>An individual</td> </tr> <tr> <td>12.1</td> <td>Payment of wages</td> <td>The majority of employees</td> </tr> <tr> <td>23.4(a)</td> <td>Substitution of public holidays by agreement</td> <td>The majority of employees</td> </tr> </tbody> </table>	Clause	Provision	Agreement between an employer and:	6.3(c)	Part-time employment	An individual	9.1(b)	Unpaid meal breaks	An individual	9.2(b)	Paid tea breaks	An individual	12.1	Payment of wages	The majority of employees	23.4(a)	Substitution of public holidays by agreement	The majority of employees
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23.4(a)	Substitution of public holidays by agreement	The majority of employees																																	
21	Heat Allowance:	Retain Heat Allowance clause 15.2(a)(iii)																																	

	Parties are asked to comment on whether the provisions in clause 15.2(a)(iii) are obsolete.	
36	<p>25 Ceremonial leave</p> <p>An employee who is legitimately required by Aboriginal tradition to be absent from work for Aboriginal ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.</p>	<p>25 Ceremonial leave</p> <p>An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for Aboriginal traditional ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.</p>

Appendix B

Draft Determinations - Exposure Draft Matters

SCHEDULE X

<<FileNo>> <<PrintNo>>

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Health Professionals and Support Services Award 2010

(ODN AM2014/204) MA000027

Health and Welfare

<<FWC MEMBER>>

<<PLACE, MONTH, YEAR>>

Review of modern awards to be conducted.

A. The above award is varied

[1] Delete A.2 Health Professional employees – definitions

A list of common health professionals which are covered by the definitions is contained in **Schedule B - List of Common Health Professionals**.

And insert:

A.2 Health Professional employees – definitions

An indicative list of common health professionals which are covered by the definitions is contained in Schedule B – Indicative List of Common Health Professionals.

[2] Insert in the title **Schedule B – List of Common Health Professionals** before the word List, the word Indicative to read:

Schedule B – Indicative List of Common Health Professionals

[3] Delete the following from Schedule I - Definitions:

health industry means employers whose business and/or activity is in the delivery of health care, medical services and dental services

[4] Delete clauses 18.1 and replace it with the following:

18.1 Weekend penalties

- (a) For all ordinary hours worked between midnight Friday and midnight Sunday, an employee will be paid 150% of the minimum hourly rate.
- (b) A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate for all time worked, but will not be paid the casual loading of 25%.

B. The determination shall operate on and from <<date>>

Appendix C

Draft Determinations - Substantive Matters

SCHEDULE X

<<FileNo>> <<PrintNo>>

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

Health Professionals and Support Services Award 2010

(ODN AM2014/204) MA000027

Health and Welfare

<<FWC MEMBER>>

<<PLACE, MONTH, YEAR>>

Review of modern awards to be conducted.

C. The above award is varied

[5] Delete clause 25 Ceremonial leave and replace with the following:

25 Ceremonial leave

An employee who is legitimately required by Aboriginal or Torres Strait Islander tradition to be absent from work for traditional ceremonial purposes will be entitled to up to 10 working days unpaid leave in any one year, with the approval of the employer.

[6] Insert in alphabetical order the following definition into Schedule I – Definitions:

Day worker means an employee who is engaged as such and whose ordinary hours are worked between the span of hours as defined in clause 8.1.

[7] Delete the definition for shiftworker from Schedule I – Definitions and replace it with the following:

Shiftworker means 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.

[8] At Clause 8.3 Rostering add an additional sub-clause 8.3(d) as follows:

(d) Rosters will be developed in accordance with the provisions in clause 6 Types of employment, clause 8.1 Ordinary hours of work and clause 8.2 Span of hours.

[9] At A.2.1 insert a new A.2.1 (c)

(c) This level is the entry level for employees who are undertaking an internship.

[10] Delete **Schedule B – List of Common Health Professionals** and replace it with the following:

Schedule B — Indicative List of Common Health Professionals

Acupuncturist	Clinical Perfusionist	Health Information Manager
Administrator	Community Development Worker	Health Promotion Officer
Aromatherapist	Counsellor	Homeopathist
Art Therapist	Dental Prosthetist	Hospital Engineer
Audiologist	Dental Technician	Human Resource Professional
Biomedical Engineer	Dental Therapist	Information Manager
Biomedical Technologist	Dentist	Magnetic Resonance Imaging Technologist
Building Engineer	Denturist	Manager
Cardiac Technologist	Dietician	Massage therapist
Cardiac Technologist	Director of Allied Health	Masseur (Remedial)
Child Life Therapists	Dispenser	Medical Engineer
Child Psychotherapist	Diversional Therapist	Medical Illustrator
Chiropractor	Environmental Engineer	
Client Advisor	Exercise Physiologist	
Clinical Coders	Genetics Counsellor	

Medical Imaging Technologist	Nutritionists	Radiographer
Medical Laboratory Technician	Occupational Therapist	Recreation Therapist
Medical Librarian	Optician	Reflexologist
Medical Photographer	Optometrist	Rehabilitation Consultant
Medical Physicist	Orthoptist	Rehabilitation Counsellor
Medical Radiographer	Orthotist	Renal Dialysis Technician
Medical Record Administrator	Osteopath	Research Technologist
Medical Scientist	Pastoral Carer	Social Worker
Medical Technician	Pharmacist	Sonographer
Microbiologist	Physiotherapist	Speech Pathologist
Musculoskeletal Therapist	Plant Engineer	Technical Officer
Music Therapist	Play Therapist	Ultrasonographer
Myotherapist	Podiatrist	Welfare Worker
Naturopath	Prosthetist	Youth Worker
Nuclear Medicine Technologist	Psychologist	
	Radiation Engineer	
	Radiation Therapist	
	Radiation Therapy Technologist	

D. The determination shall operate on and from <<date>>