



Australian Federation of  
Employers & Industries

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Submission in Reply to the Health Services Union:

Matter No.: AM2016/21 Health Professionals and  
Support Services Award 2010

(19 March 2018)

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## Introduction

1. The Australian Federation of Employers and Industries (**AFEI**) makes the following submissions concerning proposals in the four yearly review of modern awards for substantive changes to the *Health Professionals and Support Services Award 2010* (AM2016/31) (**Award**).
2. These submissions are made in accordance with the Directions issued by the Fair Work Commission (**FWC**) on 21 December 2017 and the extension approved on 09 March 2018.
3. These submissions are concerned with proposals by the Health Services Union (**HSU**) in its submissions dated 12 February 2018 that would result in substantive changes to the Award, as follows:
  - a. varying the span of hours under the Award for a single span of hours for a day worker; and
  - b. varying the classifications in the Award to provide an 'indicative' list of classifications.
4. AFEI opposes the HSU's proposal and submits that the HSU has not made out a case for these substantive changes to the Award.

## Legislative framework

5. Under subsection 156(1) of the *Fair Work Act 2009* (**the Act**) the FWC must conduct a four yearly review of existing modern awards.
6. Subsection 156(2) specifies what must be done, and sets out the discretionary powers of the FWC during the review process. The FWC may take into consideration the historical context of each award, as well as its current context and operation.<sup>1</sup>
7. The FWC in exercising these powers under subsection 156(2) must consider the modern awards objective in section 134 of the Act.<sup>2</sup>
8. In deciding whether to exercise their powers under section 156(2) of the Act, the FWC must also take into account the broader objects of the Act.<sup>3</sup>

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<sup>1</sup> *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001, [60].

<sup>2</sup> *4 Yearly Review of Modern Awards – Education Group* [2018] FWCFB 1087, [11].

<sup>3</sup> *Fair Work Act 2009* (Cth), 578.

## The relevant evidentiary burden and onus of proof

9. In the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision<sup>4</sup> the FWC confirmed there is a presumption that modern awards are operating effectively.
10. Therefore, the onus of proof is on the party seeking the FWC to make a variation to a modern award under subsection 156(2)(b)(ii). A party bearing the onus of proof must also satisfy the evidentiary burden.
11. In *4 Yearly Review of Modern Awards – Education group*<sup>5</sup> the FWC referred to the following statement from the earlier *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision<sup>6</sup>:

*“Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”*<sup>7</sup>
12. Furthermore, a party seeking a variation to an award, must demonstrate the variations are necessary to meet the modern awards objective.<sup>8</sup>
13. AFEI submits that the HSU has failed to discharge the onus of proof and evidentiary burden.

## Span of hours claim

14. The HSU’s claim to ‘consolidate’ the spans of hours in the Award would result in a very substantial reduction in the span of hours for some subsectors of the Award, most notably private medical, dental and pathology practices and private medical imaging.
15. However, the HSU has not advanced any evidence in support of its claim.
16. The five separate spans of hours in the Award were intended largely to reflect the arrangements that existed in relevant premodern award provisions.
17. In 2010 a separate span of hours was introduced, by way of a decision of Fair Work Australia for physiotherapy practices on the basis of working hours most commonly applying to staff in physiotherapy practices in relevant premodern awards<sup>9</sup>.

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<sup>4</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

<sup>5</sup> *4 Yearly Review of Modern Awards – Education Group* [2018] FWCFB 1087.

<sup>6</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [60].

<sup>7</sup> *4 Yearly Review of Modern Awards – Education* [2018] FWCFB 1087, [14] – [16].

<sup>8</sup> *Fair Work Act 2009* (Cth), 138.

<sup>9</sup> *Re Health Professionals and Support Services Award* [2010] FWAFB 2356.

18. As detailed above, the legislative framework requires the HSU to discharge a significant evidentiary burden to demonstrate that their proposed change is necessary to meet the modern awards objective. Yet the HSU has failed to produce any evidence which would be required to support such proposals. In the place of probative evidence, the HSU appears to rely on several submissions, which are discussed further below.
19. The HSU claims it is 'unjust and anomalous' for employees of the same profession or classification working at the same time of day to have different entitlements on the basis of the professional stream in which they work.
20. Far from being anomalous, we note that many modern awards provide conditions that differ depending on the industry, environment or professional stream in which the work is performed. A number of these awards are listed in the submission of the Chiropractors' Association of Australia dated 13 February 2018 at paragraph 4.12.

Examples of this include:

- a. the *General Retail Award 2010*, which contains 4 separate spans of hours;
  - b. the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*, which contains 7 streams, across which there is significant variation not just in relation to ordinary hours of work, but also in relation to rostering, meal breaks, allowances, overtime and other penalties; and
  - c. the *Clerks – Private Sector Award 2010*, which contains a single span of hours, but provides that clerical employees may instead be covered by the span of an award which covers another class of employees with which the clerical employees are working in association.
21. The current spans of hours in the Award are not necessarily out-of-place given the diverse nature of the Award's coverage, which ranges from private medical services largely requiring day work over 6 or 7 days of the week to private hospitals who provide services 24 hours a day 7 days a week.
  22. The HSU claims that a consolidated span of hours would provide an incentive to collective bargaining. However, the proposed change would result in terms and conditions being measured against an inappropriate base, which is likely to increase the cost that must be burdened by an employer following bargaining. The HSU has indicated that bargaining is not extensive in some subsectors of the industry, but provided no evidence that would demonstrate that it proposed changes would encourage employers to more likely to commence bargaining.
  23. While the HSU claims that the proposed span of hours would not operate to limit the hours during which a business covered by the Award can operate, an inappropriate span of hours has consequences for a business in the form of shift penalties and overtime penalties. The payment of new or additional penalty rates is likely to be a factor in limiting the operating hours of a business.

24. The HSU asserts *“it is far from simple and easy to understand”* why the Award contains multiple spans of hours. The HSU had provided no evidence in support of this claim, and, if it had, this submission would not support the proposed change in light of the above.

### Alternative proposals

25. AFEI is not opposed to variations to the span of hours that would more appropriately reflect the operating circumstances of particular industry subsectors. We note in this regard the proposal of the Chiropractors Association of Australia to ‘rationalise’ the span of hours. We do not oppose the extension of private medical, etc. practice span of hours to Chiropractors.

## **List of Common Health Professionals**

26. AFEI opposes the HSU claims in relation to the list of common health professionals.
27. The HSU submits that the list of common health professionals at Schedule B of the latest Exposure Draft<sup>10</sup> is historically and currently an indicative list and not an exhaustive list, and proposes a draft variation to Schedule A of the Exposure Draft.
28. As submitted by the HSU, an indicative list of common health professionals in Schedule B would qualify the classification definitions within Schedule A and provide a list common practice area and titles. Employers and employees would refer to both schedules for the purposes of classification under the Award.
29. AFEI submits that the list of common health professionals in the Award is an exhaustive list and should remain so.
30. During the award modernisation process, dentists and dental hygienists were removed from the list of common health professionals. If the list were intended to be indicative, the exclusion of these professionals would arguably have been of no effect.
31. An exhaustive list provides employers and employees under the Award with clarity, certainty and achieves the modern award objectives by ensuring the modern awards system remains simple, easy to understand and stable. An indicative list would create greater uncertainty regarding award coverage and require employers to seek industrial advice for the coverage of positions not included in the list.

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<sup>10</sup> Published 10 November 2017.

32. The evidence led by the HSU (Alex Leszczynski) does not support their submissions that the proposal would lead to better outcomes in collective bargaining, and does not support their submission that the current award classifications have led to employers creating position descriptions to avoid award coverage.
33. If the FWC decides to make a variation to the list of common health professionals, we submit the Award should only be varied in the following manner.
34. Schedule B of Exposure Draft could be varied so that it remains an exhaustive list, but is expressed to cover specific professional as well as professionals that are logically and substantially employed in the same or similar profession to the principal category. An example from Schedule B of the current Exposure Draft is provided below.
  - Medical Imaging Technologist (MIT) (including: Medical Radiographer; Ultrasonographer; Magnetic Resonance Imaging Technologist; Nuclear Medicine Technologist; and Radiation Therapist).<sup>11</sup>
35. AFEI submits the Massage Therapist professional in Schedule B of the Exposure Draft could be amended to provide the following, which could fit within the current exhaustive list of occupations.
  - Masseur, Remedial (including: Massage Therapist).
36. If the FWC does make this variation to the Exposure Draft, it would be incumbent on parties seeking to vary the Award to submit probative evidence supporting the inclusion of new professions within the sub group.

## **Overtime for casuals**

37. We reserve our position in relation to the HSU's submission on overtime for casuals, given this is likely to be dealt with by the newly created common matter.

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<sup>11</sup> Exposure Draft, page 44.