IN THE FAIR WORK COMMISSION

AM2016/31
s 156 - Four yearly review of modern awards
Health Professionals and Support Services Award

SUBMISSIONS

12/02/2018

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Contents

Introduction

1. The Health Services Union (**HSU**) makes these submissions in support of its claim for variations to the *Health Professionals and Support Services Award 2010* (**the HPSS Award**) in the 4-yearly review of modern awards.

2. Those claims relate to:

   a. The span of hours (clause 8.2, Exposure Draft [**ED**]).

   b. The list of common health professionals (Schedule B, ED).

   c. The payment of weekend penalty rates to shift workers (clause 18, ED).

   d. The substitution of public holidays by agreement (clause 23.3, ED).

   e. Overtime rates for casuals (clause 19.2(d) ED).

3. The HSU relies on its previous written submissions dated 17 March 2017 and 22 May 2017.

4. The amendments proposed by the HSU appear in Attachment A hereto. Given the advanced stage of the Exposure Draft, to minimise confusion, the clauses referred to in Attachment A and otherwise in these submissions address the relevant provisions as drafted and numbered in the latest Exposure Draft of the HPSS Award published by the FWC on 10 November 2017.

5. The HSU's position remains that advanced in its previous submissions, and at the hearing before the Full Bench on 11 and 12 December 2017, subject to one change, which has arisen from discussions between the HSU and PHIEA. The HSU has contended for consolidation of all spans of hours into a single span. However, alternatively, it contends that if the FWC is not inclined to establish a single span, it should consider consolidating the spans into one general span to cover most health sector workplaces including hospitals, and a second span to cover private practices of all types. The HSU and PHIEA are in agreement that such a variation would be desirable, subject to their difference of view as to whether the HPSS Award contemplates and allows for the working of "split shifts". The HSU's proposed variation is set out in the draft determination in Attachment A, but it is supportive of any amendment which would reverse the proliferation of spans which has occurred following modernisation, and provide parity of conditions for health professionals and support staff.

6. The HSU contends that the amendments contained in Attachment A are appropriate to ensure that the HPSS Award meets the *modern awards objective*. That objective applies to the exercise by the FWC of its modern award powers, that is, the powers in Part 2-3 of the *Fair Work Act* 2009 (**the FW Act**), including the power to make determinations varying awards in its 4-yearly review conducted pursuant to section 156 of the FW Act.

7. The modern awards objective is defined in s.134 of the FW Act as follows:

   What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
(a) relative living standards and the needs of the low paid; and
(b) the need to encourage collective bargaining; and
(c) the need to promote social inclusion through increased workforce participation; and
(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
(da) the need to provide additional remuneration for:
(i) employees working overtime; or
(ii) employees working unsocial, irregular or unpredictable hours; or
(iii) employees working on weekends or public holidays; or
(iv) employees working shifts; and
(e) the principle of equal remuneration for work of equal or comparable value; and
(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

8. Fairness in the context of s.134 of the FW Act is to be assessed from the perspective of both the employees and employers covered by the award (*4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37]).

9. It is not incumbent upon a party contending for a variation for it to show that there has been a material change in circumstances since the last review of the award (*ibid*, at [42]). Rather, it is the modern awards objective, as defined in s.134 which provides the basis in principle for the exercise of the power in the review process.

10. These submissions also address clause 19.2(d) of the ED. Having reviewed this clause during the course of the recently commenced common matter AM2017/51, the HSU is concerned how the exposure draft has affected the operation of what was previously clause 28 of the award.

Span of hours

11. It is important at the outset of this section to note that the span of hours provisions in the HPSS Award do not operate to either:

    a. limit the hours during which a business covered by the award is open;

    b. limit the hours during which an employee covered by the award may work in a business; or

    c. limits the hours during which the ordinary hours of an employee may be rostered by the employer.

12. This last proposition is apparent from the definition of "shiftworker"; 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. Save that the number of the span clause has

changed, that provision remains the same in the Exposure Draft in Schedule I. The final proposition also makes sense when one considers hospitals, which are governed by the first span. The Commission would appreciate that those employers regularly roster workers for coverage across 24 hours of the day.

13. The spans established in the award serve only to define the period during which ordinary hours may be worked without attracting any shift penalty. That is because:

    a. The obligation to pay shift penalties under clause 29 (ED 18.4) is only applicable in respect of a *shiftworker* as defined;

    b. The term *shiftworker* is defined in clause 3 (ED, Sch I) by reference to regularity of rostering outside the spans of hours provided for in the award.

14. The expansion of a span of hours, therefore, gives an employer the capacity to roster employees to work at earlier, or later hours, without the employee being entitled to any compensation in respect of the unsociability or disutility in respect of the working at those hours. A business or social imperative to work extended hours does not logically bear on the need for an extended span.

15. The HPSS award (as amended by the Exposure Draft) currently provides 5 different spans of hours which apply to:

    a. Workplaces not specifically mentioned elsewhere in the clause, and which are likely to be private hospitals (cl 8.2(a) (**the default span**);

    b. Private medical, dental and pathology practices (cl 8.2(b));

    c. Five and a half day private medical imaging practices (cl 8.2(c));

    d. Seven day private medical imaging practices (cl 8.2(d));

    e. Physiotherapy practices (cl 8.2(e)).

16. The latter four spans are referred to hereafter as the "private practice spans".

17. It is immediately apparent that the workplaces most likely to be working on a continuous basis (those referred to in cl 8.2(a)) have the most limited span. Conversely, the types of practices likely to be operating during more limited hours have greater spans.

18. The current disparate spans emerged in part in the award modernisation process. In the *Award Modernisation Decision* [2009] AIRFCB 345, the Full Bench published an award which contained four spans; those referred to at (a) to (d) above.

19. By a later decision, *Re Health Professionals and Support Services Award* [2010] FWAFB 2356, the Full Bench added a fifth span applicable to physiotherapy practices.

20. The HSU contends that there is no reasoning in the above decisions in support of any proposition that employees of the same profession or classification working at the same time of day should have different entitlements to shift penalties on the basis that they work within different professional streams of the same industry (or indeed, are employed in the same professional stream, but work in a practice which opens on 7 days rather than 6). It is unjust and anomalous and therefore inconsistent with the modern awards

objective. Indeed, in his decision concerning spans in *Re Australian Medical Association and others* [2013] FWC 2182, VP Watson acknowledged the anomaly in that respect at [34], when he said: *"The issue of rationalising the different penalties involves a larger comparative exercise which is best addressed in the subsequent review of the Award."*

21. In addition to the arguments set out in the HSU's written submissions, the following matters are relevant to the Full Bench's consideration of this issue.

s 134(1)(b) the need to encourage collective bargaining

22. The current spans of hours for certain workplaces under the HPSS award are so wide, that they create little, if any, incentive for these employers to engage in collective bargaining. That effect is compounded by the fact that no other provision in the award creates any such incentive.

23. This point becomes clear when one considers the evidence of Emma Jane McKenny, Executive Manager of People and Culture for Pacific Smiles Group, who was called by the ADA. Ms McKenny confirmed that Pacific Smiles, which operates 74 centres with a total of 902 employees, has never attempted to engage in enterprise bargaining with its workforce.[1] The only enterprise agreement it is covered by is one inherited through a business acquisition.[2] The logical conclusion from that evidence is that rather than the award operating to provide minimum terms and conditions which underpin enterprise bargaining, the award provides that employer with terms and conditions which suit perfectly its preferred mode of operation, and which create no incentive for the employer to have to engage the workforce with a view to collective bargaining.

24. There is no basis for thinking either that collective bargaining is inappropriate for the industry sectors in question. The ADA called evidence that dental practices are generally quite profitable businesses, which benefit from a significant amount of government funding, particularly from recent government subsidy schemes.

25. Eithne Irving, who was called by the ADA, gave evidence based on a survey from 2013, that the average gross income of a dental practice is about $1.1 million.[3] During cross-examination, Ms Irving confirmed that, based on the results of this survey, this would amount to a profit of approximately $350,000 per year, after expenses, for the average owner of a dental practice.[4] She later said the average profit margin for a dental practice is 20-25%.[5]

26. Ms Irving also confirmed that a child dental benefits scheme made available more than $4 billion in government money to the dental sector over a space of six years.[6] Two other schemes – the CLACP and DVA schemes – also provided further funding to the dental sector.[7]

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[1] Transcript of Proceedings, *AM2016/31* (12 December 2017), PN1855-7.
[2] Ibid PN1825.
[3] Ibid PN1686.
[4] Ibid PN1693.
[5] Ibid PN1757.
[6] Ibid PN1738-1740.
[7] Ibid PN1744-1756.

27. Ms McKenny gave evidence that Pacific Smiles is in a state of continual expansion.[8]

28. It is not clear why employers in dental practices, which, as discussed above, are strikingly profitable businesses, should have the benefit of a more generous span, and lower burden in shift penalties than employers in hospitals or physiotherapy practices. In circumstances where the preferred operating hours of the employer are entirely accommodated by the award, it is difficult to see how the terms of the award could function to encourage collective bargaining, or, how it might be said that objective had informed the current terms of the award. Whatever was the case at the time of award modernisation, on the evidence before the Commission, the award does not, at least in respect of the dental sector, operate to create any incentive to bargain.

29. There is no justification for the multiple and inconsistent carve outs in the span of hours clause for a handful of industries. Their inclusion means that the award does not operate to provide a fair safety net, and they work to provide a disincentive to enterprise bargaining.

S 134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

30. The current award allows for separate spans of hours for a handful of certain health and medical practice types. It is not clear why the workplaces with extended spans of hours warrant special treatment. It is unclear why private practices that generally operate during the day (even if extended) have greater flexibility than hospitals that operate on a 24 hour a day, 7 day a week basis. It is far from *simple and easy to understand* why the award contains such inconsistent provision.

31. Further applications from employer parties in these proceedings seek to provide for further separate iterations of these spans of hours.[9] Those applications demonstrate how the tail has come to wag the dog. The employers seek award conditions to reflect their preferred position (a position the FW Act envisages should ordinarily be achieved by way of collective bargaining), as opposed to conditions which provide a fair minimum standard having regard to <u>both</u> employers and employees. The maintenance of a limited number of disparate spans inevitably invites applications for further specialist spans and the further devolution of the existing clause, with further unjust and anomalous consequences.

S 134(1)(da) the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; weekends or public holidays; and shifts

32. S 134(1)(da) requires the FWC to take into consideration the needs to provide additional remuneration for employees working unsocial hours and shifts.

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[8] Ibid PN1826.

[9] See, eg, submissions from Kids Matters OT Pty Ltd; Medical Imaging Employment Relations Group; Private Hospital Industry Employers Association; Chiropractors' Association of Australia (National) Limited; Australian Industry Group.

33. An employee working until 9.00 p.m. on a weekday (as is contemplated in the spans for private medical, dental and pathology practices and medical imaging practices) is working unsocial hours. The unsociability of such hours is recognised in clause 29 (ED 18.4), which provides for the payment of a shift allowance for work finishing after 6.00 p.m. (Significantly, such payments only apply to *shiftworkers* as defined. Where ordinary hours are regularly rostered within the span in such period, no shift allowance is payable).

34. The interference likely to be caused to family life by the rostering at such hours is immediately apparent. A worker rostered to work during such hours would be disadvantaged in obtaining child-care during such hours. They would almost certainly not be in a position to share an evening meal with their partner and/or children. They would almost certainly have no capacity to be involved in bathing, talking about the day or helping younger children with schoolwork before they went to bed. Participation in after work social activities and/or sport would also be circumscribed.

35. None of that unsociability has been recognised in the framing of the current spans. That situation should not be compounded by the making of further spans, and the existing spans

Pre reform awards

36. During the HSU's opening, the Bench raised the issue of the spans of hours in the pre-modern awards.[10] The HSU does not accept the proposition that the spans of hours in the award reflected the preponderance of arrangements under the pre-reform awards. Provisions for spans of hours varied greatly between pre-reform state and federal awards. Further, the effect of the spans was contingent upon the other provisions in the award concerning shift arrangements, rostering and the payment of shift penalties and allowances.

37. Private medical imaging practices may be taken as an example, as these practices currently have the broadest span of hours under the HPSS Award. The span is listed as 7:00am – 9:00pm Monday to Sunday for seven day practices.[11] This span of hours is by no means found across the board in the pre-reform awards.

38. As mentioned in our previous submission of 17 March 2017, in relation to weekend penalty rates, this span appears to be an artefact of a single Enterprise Award, the *Health Services Union of Australia (NSW/ACT Private Medical Imaging) Award 2004*[12]. Clause 7.4 of that award reads:

> *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*

[10] Transcript of Proceedings, *AM2016/31*, (11 December 2017) PN785.
[11] *HPSS Award,* clause 8.2(d)
[12] *Health Services Union of Australia (NSW/ACT Private Medical Imaging) Award 2004.*

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.

39. That span was by no means common to other pre-modern awards covering private medical imaging practices. For example, the *Health Services Union of Australia (Private Pathology – Victoria) Award 2003*, contained no set span of hours, but provided that employees were entitled to shift allowances where rostered hours of ordinary duty finished between 6pm – 8am, or commenced between 6pm and 6:30am[13], a provision which is similar to the current clause 29 (ED 18.4). Such allowance was calculated by reference to the weekly rate of pay. As a federal common rule award, this award had widespread coverage in the pre-modern award system, and would have covered many more employees than the NSW/ACT Enterprise Award from where this provision has apparently originated.

40. Under the Queensland *Medical Imaging and Radiation Therapy Employees (Private Sector) Award - State 2002*, the span of ordinary hours for a day worker was 7:00am – 8:00pm.[14] However, an afternoon shift was defined as one finishing after 6.30 p.m. (cl 1.5.3), a shift loading was payable in respect of hours worked after 8.00 p.m (cl 6.4.1). and specific provision was made in respect of the payment of meal allowances and crib break after more than one hour's overtime (cl 5.48(a)).

41. The *Medical Diagnostic Services (Private Sector) Award* in Tasmania provided for a span between 8.00 a.m. and 8.00 p.m Monday to Friday (cl 18(a)), but also provided that an '*employee, who has ordinary hours of work on any day concluding after 7.00pm, shall be paid a loading of 15 per cent on the hourly rate for all hours worked on that day*' (cl 18(c)).

Other modern awards

42. During the Hearing on 11 December 2017, reference was made to the *General Retail Industry Award*, as an example of a modern award providing for multiple spans of hours for different subsectors. Whilst that award contains multiple spans, it also contains other provisions which are beneficial to employees, and which counteract the otherwise wide spans of hours.

43. For example, clause 28.10 in that award provides that

Ordinary hours will be worked on not more than five days in each week, provided that if ordinary hours are worked on six days in one week, ordinary hours in the following week will be worked on no more than four days.

44. Clause 28.11(a) requires the employer to provide employees with at least two consecutive days off each week or three consecutive days off in a two week period. Clause 28.13 provides that employees regularly working Sundays '*will be rostered so*

[13] *Health Services Union of Australia (Private Radiology - Victoria) Award 2003*, clause 22.2.
[14] *Medical Imaging and Radiation Therapy Employees (Private Sector) Award - State 2002,* clause 6.1

as to have three consecutive days off each four weeks and the consecutive days off will include Saturday and Sunday.'

45. As the discussion above demonstrates, an examination of the provisions concerning span of hours alone provides an analysis with limited utility.

Split shifts

46. During the course of these proceedings, it became clear that there is some disagreement between parties as to whether split shifts are allowable under the HPSS Award. It is the HSU's view that split shifts are not allowable under the Award. Other modern awards contain clear provisions regarding the circumstances in which split shifts can apply. The HPSS Award has no provisions for split shifts, except that the word 'continuous' is absent from the span of hours clause. We submit that employers who wish to utilise split shifts may do so through enterprise bargaining.

47. Our proposed variation seeks to make clear that employers cannot roster employees on split shifts by providing that the hours of work are 'continuous'.

Details of variation

48. Following discussions with the PHIEA, the HSU proposes an amendment to the span of hours for day workers clause in 8.1 and 8.2(a) as follows:

Delete clause 8.1 and 8.2(a) and replace as follows:

8. Ordinary hours of work and rostering

8.1 Ordinary Hours

(a) The ordinary hour of work for a full-time employee will be:

(i) 38 hours per week; or

(ii) 76 per fortnight; or

(iii) 152 hours over 28 days

(b) The shift length of ordinary hours of work per day will be a maximum of 10 hours exclusive of meal breaks.

*(c) The hours of work will be continuous, except for meal breaks. Except for the regular changeover of shifts, an employee will not be required to work more than one shift in each 24 hours.**

*(*Note: Clause 8.1 (c) is opposed by the PHIEA)*

49. The following amendments to clauses 18.1 and 18.4 are agreed between the HSU and PHIEA, although we note that PHIEA makes no comment regarding our proposed deletion of clause 18.2 – Weekend work in private medical imaging seven day practice:

Delete Clause 18.1, 18.2 and 18.4 and replace as follows:

18. Penalty Rates and Shiftwork

18.1 Weekend penalties

(a) For all ordinary hours worked between midnight Friday and midnight Sunday, a full time or part time employee will be paid 150% of the minimum hourly rate applicable to their classification and pay point.

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

18.2 Shift work penalties

(a) For the purposes of this clause:

(i) Afternoon shift means any shift commencing on or after 12:00 noon and finishing after 6:00 pm on the same day; and

(ii) Night Shift means any shift commencing on or after 6:00 pm and finishing before 7:30 am on the following day.

(b) Shift penalties

(i) Where a full time or part time employee works a rostered afternoon shift between Monday and Friday, the employee will be paid 112.5% of their minimum hourly rate.

(ii) Where a full time or part time employee works a rostered night shift between Monday and Friday the employee will be paid 115% of their minimum hourly rate.

(iii) A casual employee who works a rostered afternoon shift between Monday and Friday will be paid 137.5% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(iv) A casual employee who works a rostered night shift between Monday and Friday will be paid 140% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(v) The provisions of this clause do not apply where any employee commences their ordinary hours of work after 12:00 noon and completes those hours at or before 6:00 pm on that day.

(iv) The shift penalties prescribed in this clause will not apply to shift work performed by any employee on Saturday, Sunday or public holidays were the extra payment prescribed by clause 18.1 Weekend Penalties work and clause 23 Public holidays applies.

50. While agreement was not able to be reached with other employer parties, the HSU submit that the following span of hours clause could be included for private practices:

Delete Clause 8.2(b)-(e) and replace as follows:

8.2 Span of hours – private practice

(a) In addition to the above, the ordinary hours of work for a worker in private practice are between:

(i) 7:00am – 7:00pm, Monday to Friday

(ii) 7:00am – 12:00pm, Saturday

List of Common Health Professionals

51. In accordance with its previous submissions and the evidence and submissions presented at Hearing, the HSU contends that the list of common health professionals contained in Schedule B of the Award be amended to make it explicit that the list is indicative, rather than exhaustive.

52. The reason for seeking such an amendment is to ensure that the list is not used as a basis for an employer to resist award coverage for a “health professional”.

53. The HPSS award is an industry and occupational award (ED 3.1). Subject to exemptions elsewhere in clause 3, the award is expressed to cover both employers in

the “health industry” and their employees in the classifications in Schedule A, and employers engaging a “health professional employee” in the classifications in Schedule A. Health professionals employed outside the “health industry” are intended to be covered by the award.

54. Schedule A contains the classifications in the Award. The second part contains the “Health Professional Employee” classifications. The term “Health Professional”, which appears at each level of the classifications is not defined in the Dictionary and does not appear elsewhere.

55. In Schedule A, "Health professional employees - definitions", there's a preamble which says: "A list of common health professionals which are covered by the definitions is contained in Schedule C, list of common health professionals."

56. The use of the term “common” in respect of the list, signifies that it is not an exhaustive list. Those roles may be contrasted with health professional roles which are relatively scarce, or have only recently been developed. Award coverage is not limited by reference to the list, it is defined by reference to the classifications schedule. Although the HSU contends the award was always intended to be so read, this should be made clear in order to prevent any further doubt or confusion. This is consistent with the need for modern awards to be easy to understand, per s 134(1)(g).

57. The question as to whether the schedule is ‘indicative’ or ‘exhaustive’ was originally posed by the Fair Work Ombudsman (FWO), which included this question in its correspondence of 24 November 2014, amongst a list of queries commonly raised with the FWO.

58. Mr Alex Leszczynski, Senior Industrial Officer with the HSU, gave evidence that the question of whether the Schedule is indicative or exhaustive has given rise to confusion during enterprise bargaining, when there is a need to determine whether or not certain professionals such as clinical coders or massage therapists – currently not listed in the Schedule – are covered by the Award for the purposes of applying the BOOT.[15] As Mr Leszczynski opines, it would be anomalous for an employee in a Massage Therapist role to fall outside award coverage when a Masseur, Remedial, falls within its scope[16].

59. Evidence provided at hearing from the parties provided no logical reason why the Schedule should be treated as an exhaustive list of health professionals.

60. To treat the list as exhaustive has the highly undesirable outcome that award coverage is determined at the discretion of an employer with a creative approach to job description. That approach is inconsistent with the modern awards objective.

Details of variation

61. The HSU proposes that the HPSS Award be amended as follows:

[6] ***Delete A.2 Health Professional employees – definitions***
A list of common health professionals which are covered by the definitions is

[15] PN1330-1335
[16] Leszczynski [15].

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 Practice Areas and Titles.

Weekend penalties

62. As addressed in our previous submissions of 17 March 2017, the HSU also seeks to vary clause 18 of the HPSS Award Exposure Draft. In summary, the HSU's proposal seeks to:

    a. Amend clause 18.1 to clarify that shift workers also receive penalty rates for weekend work, not only 'day workers'.

    b. Remove clause 18.2 which provides a lesser entitlement to weekend penalties for employees in private medical imaging seven day practices.

    c. Amend clause 18.4 – Shiftwork penalties, to include an afternoon shift penalty rate of 12.5%, in line with the Nurses Award, and renumber as 18.3.

    d. Renumber clause 18.3 – Public Holidays, as 18.2

63. The limitation of the penalty in clause 18.1 of the ED to day workers is anomalous, unfair and contrary to the modern awards objective. It is not consistent with any established industrial principle that someone who is ordinarily rostered at unsocial times outside the span of hours should be paid less for the further inconvenience of being required to work on a Saturday or Sunday, than someone who is ordinarily rostered within the span.

64. The HSU's proposal also includes the elimination of the inconsistency in weekend penalties in the area of medical imaging. Health professionals or support services employees in the health industry should be treated as suffering the same disability or inconvenience as a consequence of working on weekends.

Details of variations

65. The HSU's proposed variation appears below, and in the draft determination at **Attachment A**. The HSU's proposal is to delete the current clauses 18.1, 18.2 and insert a weekend penalty clause at 18.1 as follows:

    18.1 Weekend penalties

    (a) For all ordinary hours worked between midnight Friday and midnight Sunday, a full time or part time employee will be paid 150% of the minimum hourly rate applicable to their classification and pay point.
    (b) A casual employee who works on a Saturday or Sunday will be paid 175% of the minimum hourly rate applicable to their classification and

pay point for all time worked, but will not be paid the casual loading of 25%.

18.2 Public holidays

Payment for public holidays is in accordance with clause 23.1.

18.3 Shift work

(a) For the purposes of this clause:

(i) Afternoon shift means any shift commencing not earlier than 12.00 noon and finishing after 6.00 pm on the same day; and

(ii) Night shift means any shift commencing on or after 6.00 pm and finishing before 7.30 am on the following day.

(b) Shift penalties

(i) Where an employee works a rostered afternoon shift between "Monday and Friday, the employee will be paid a loading of 12.5% of their minimum hourly rate.

(ii) Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a loading of 15% of their minimum hourly rate.

(iii) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

(iv) The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holidays where the extra payment prescribed by clause xx – Saturday and Sunday work and clause yy – Public holidays applies.

Public Holidays

66. As addressed in our previous submissions of 17 March 2017, the HSU submits that clause 23.3(b) – Substitution of public holidays by agreement, should be varied, as in its current form it is not consistent with section 114 of the *Fair Work Act* 2009, and in accordance with s.56 of that Act, should have no effect.

67. Clause 23.3(a) enables employers and employers to agree an alternative day to substitute for a public holiday.

68. Clause 23.3(b) provides:

"Where there is no agreement, the employer may substitute another day but not so as to give the employee less time off work than the employee would have had if the employee had received the public holiday".

69. The capacity to compel an employee to work the public holiday in substitution for a day not of the employee's choice undermines the entitlement of an employee in s.114 of the FW Act to:

    a. Be absent from work on a public holiday (s.114(1)); and

    b. Refuse a request from an employer to work on a public holiday if such request is not reasonable, or the refusal is reasonable (s.114(3).

70. The positing of alternative bases to refuse to work suggests that a refusal may be reasonable notwithstanding that the request was also a reasonable one. It also invites particular consideration of the employee's reasons for refusing to work.

71. It may not be assumed that where the employer unilaterally determined a substitute day, that it would not be reasonable for an employee to refuse to work on a public holiday. One can readily imagine a situation where the critical factor inclining a worker to work on a public holiday would be the prospect of an alternative day off on a day convenient to the employee. To leave the employer with the capacity to compel an employee to work in those circumstances would abridge the rights in s.114 of the FW Act.

72. The removal of clause 23.3(b) goes not further than is required to bring the award into conformity with the NES. The employer may still rely on their right to request, and the employee's obligation not to unreasonably refuse, as set out in s.114 of the FW Act.

Details of variations

73. We provide our proposed clause below, and in our draft determination at **Attachment A**. The HSU's proposal is to delete the current clause 23.3(b).

Overtime for casuals – clause 19.2(d)

74. In the course of reviewing the HPSS Award for the purpose of the newly created common matter AM2017/51, the HSU has identified that clause 19.2(d) in the Exposure Draft provides that overtime is paid in substitution for casual loading, as well as penalty rates and shiftwork. This is a departure from the current clause 26.2 in the HPSS Award which provides for casual loading to be paid in addition to the loading for weekend work, and clause 28.1(c), which only provides that overtime rates substitute for shift penalties, not casual loading. The HSU has not agreed to any such amendment, and opposes the adoption of the clause 19.2(d) as it appears in the Exposure Draft.

75. Casual loading is payable as well as overtime rates in the HPSS Award. As we submitted in the AM2017/51 proceedings, this is consistent with the *Award Modernisation decision* in [2009] AIRCFB 345, as well as the *Penalty Rates Case*.

76. In the decision of the Full Bench in the *Casual Employment Case* [2017] FWCFB 3541, the Full Bench recognized the following principles:

    a. Casual employees who work in excess of ordinary hours in a single day, or over 38 hours per week in a particular week or on average over the course of a roster cycle, are subject to the same disabilities as full time employees – that is, fatigue

and a general restriction of opportunities to engage in family, social, community and other activities; and

b. The standard casual loading of 25% in modern awards does not include any element of compensation for the disabilities associated with working overtime.

77. It was clear when the health related awards were created the Fair Work Commission intended casuals to be paid overtime and casual loading. The Full Bench in *Award Modernisation decision* [2009] AIRCFB 345 found, in regard to the Aged Care Award, Nurses Award, HPSS Award and Medical Practitioners Award:

> *Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.*[17]

78. This is also consistent with the comments of the Full Bench in the Penalty Rates Decision [2017] FWCFB 1001.[18] In that case, the Full Bench indicated support for the 'default approach' suggested by the Productivity Commission, whereby the '*rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non casual employees*'.[19]

79. The HSU therefore submits that the words '*and the casual loading in clause 6.4(e)*' be deleted from clause 19.2(d) of the Exposure Draft. There is no basis in the decisions, the previous iterations of the award, or in industrial principle to carry out such an amendment.

[17] 2009 AIRCFB 345, [150]
[18] *Four yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 ('*Penalty Rates Decision*')
[19] *[2017] FWCFB 1001 ('Penalty Rates Decision'), [335] – [337]*

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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 AM2014/190) MA000027

Health and Welfare

VICE PRESIDENT HATCHER <<PLACE, MONTH, YEAR>>

Review of modern awards to be conducted.

A. The above award is varied

[1] Delete clause 8.1 and 8.2(a) and replace as follows:

8. Ordinary hours of work and rostering

8.1 Ordinary Hours

(a) The ordinary hour of work for a full-time employee will be:

(i) 38 hours per week; or

(ii) 76 per fortnight; or

(iii) 152 hours over 28 days

(b) The shift length of ordinary hours of work per day will be a maximum of 10 hours exclusive of meal breaks.

(c) The hours of work will be continuous, except for meal breaks. Except for the regular changeover of shifts, an employee will not be required to work more than one shift in each 24 hours.

[The variation below is relevant only to the alternative submission regarding span of hours in paragraph 5 above]

[2] Delete Clause 8.2(b)-(e) and replace as follows:

8.2 Span of hours – private practice

(a) In addition to the above, the ordinary hours of work for a worker in private practice are between:

(i) 7:00am – 7:00pm, Monday to Friday

(ii) 7:00am – 12:00pm, Saturday

[3] Delete Clauses 18.1, 18.2 and 18.4 and replace as follows:

18. Penalty Rates and Shiftwork

18.1 Weekend penalties

(a) For all ordinary hours worked between midnight Friday and midnight Sunday, a full time or part time employee will be paid 150% of the minimum hourly rate applicable to their classification and pay point.

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

18.2 Shift work penalties

(a) For the purposes of this clause:

(i) Afternoon shift means any shift commencing on or after 12:00 noon and finishing after 6:00 pm on the same day; and

(ii) Night Shift means any shift commencing on or after 6:00 pm and finishing before 7:30 am on the following day.

(b) Shift penalties

(i) Where a full time or part time employee works a rostered afternoon shift between Monday and Friday, the employee will be paid 112.5% of their minimum hourly rate.

(ii) Where a full time or part time employee works a rostered night shift between Monday and Friday the employee will be paid 115% of their minimum hourly rate.

(iii) A casual employee who works a rostered afternoon shift between Monday and Friday will be paid 137.5% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(iv) A casual employee who works a rostered night shift between Monday and Friday will be paid 140% of the minimum hourly rate applicable to their classification and paypoint but will not be paid the casual loading of 25%

(v) The provisions of this clause do not apply where any employee commences their ordinary hours of work after 12:00 noon and completes those hours at or before 6:00 pm on that day.

(iv) The shift penalties prescribed in this clause will not apply to shift work performed by any employee on Saturday, Sunday or public holidays were the extra payment prescribed by clause 18.1 Weekend Penalties work and clause 23 Public holidays applies.

[4] Delete the following words in sub-clause 19.2(d): '*and the casual loading in clause 6.4(e)'*.

[5] Delete sub-clause 23.3(b).

[6] 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 Practice Areas and Titles.

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