



IN THE FAIR WORK COMMISSION

AM2016/31

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

SUBMISSIONS IN REPLY

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Introduction

1. In accordance with the directions issued by Vice President Catanzariti on 21 December 2017, the Health Services Union (**HSU**) makes these submissions opposing variations sought to the *Health Professionals and Support Services Award 2010 (the HPSS Award)*.
2. In addition to our submissions below, the HSU relies on its previous written submissions of 12 February 2018, as well as previous submissions dated 17 March 2017, 22 May 2017 and 12 February 2018, and its oral submissions made on 11 December 2017.

Span of hours

3. A number of parties in these proceedings have made applications for the spans of hours in clause 24 (ED 8.2) to be varied. The HSU oppose these applications. We refer to our submissions of 12 February 2018 in relation to the span of hours provisions in this Award. In addition, we make a number of comments below, particularly in response to the most recent submissions of parties.

Chiropractors Association of Australia proposal

4. In their submissions of 13 February 2018, the Chiropractor Association of Australia (**CAA**) propose two alternative proposals to amend the span of hours clause in the Award.
5. The first proposal, 'Variation 1A', is to insert a new span applying to chiropractic practices, of 7:00am – 8:00pm, Monday to Friday, and 7:00 – 2:00pm Saturday.
6. The second, 'Variation 1B', proposal is to:
 - a. expand the definition of '*private medical, dental and pathology practice*' to include any '*health*' practices, including chiropractic, physiotherapy, and medical imaging practices, as well as other kinds of practices not previously included in this definition, such as '*traditional and complementary medicine*'.¹
 - b. insert a span of hours applying to all of the practices above of 7:30am – 9:00pm Monday to Friday, and 8:00am – 4:30 Saturday.²
 - c. retain the special span of hours, and penalty rates applying to private medical imaging – 7 day practices.³
7. The HSU are opposed to both of the above proposals.

Variation 1B

¹ Chiropractors Association of Australia, Submission in *Four Yearly Review, Health Professional and Support Services Award AM2016/31*, 13 February 2018, Attachment 1, 15 ('*CAA Submissions*').

² *Ibid*, 14.

³ *Ibid*, 14-15.



8. 'Variation 1B' proposes to radically expand the definition of '*medical*' practice to include a vague and expanded concept of '*health*' practices. The proposed span of hours appears to mirror clause 24.2, which is the current span of hours for Private medical, dental and pathology practices.
9. This would mean a much expanded span of hours for many private practices. The CAA has provided no probative evidence or justification for why the definition of '*medical, dental and pathology practice*' should be expanded so greatly, or why such an expansive a span of hours should apply to a very broad collection of practices. The proposal is not necessary or appropriate to achieve the modern awards objective.⁴
10. In our view, it is not logical as to why such a broad collection of private practices should have greater flexibility than hospitals, which operate on a 24/7 basis. Similarly, it is confusing as to why 'seven day' medical imaging practices remain a special case. This would appear to contradict the consideration that modern awards are '*simple, easy to understand, stable and sustainable*'.⁵ The proposal would be a great disincentive for employers to engage in enterprise bargaining,⁶ and would allow employees to work unsociable hours of up to 9:00pm each evening without any penalty.⁷

Variation 1A and comparison to other awards

11. We reiterate our previous submissions, that we are also opposed to the addition of a sixth span of hours in the Award, as proposed in Variation 1A.
12. The CAA contend that it is not confusing or ambiguous for the HPSS Award to provide for multiple spans of hours, and provides examples of awards that '*attempt to meet the needs of its varied subsectors*' in paragraph 4.12 of their submissions.
13. We disagree with the relevance of the examples provided in paragraph 4.12 of the CAA's submissions. None of the clauses referred to by the CAA contain span of hours provisions. We submit that these are not helpful comparisons to the span of hours provisions in the HPSS Award. We provide comments on some of these examples below.
14. A number of the awards referred to by the CAA provide for separate 'sections' or 'parts' which contain a set of multiple provisions relevant to the distinct industries, sectors or professions covered by the award. An example is the *Broadcasting, Recorded Entertainment and Cinemas Award 2010*,⁸ which includes distinct provisions, for industries/ professions such as Radio Broadcasting in Part 7, Journalists in Part 8, and Musicians in Part 11. These parts include multiple provisions relevant to that distinct industry, including ordinary hours of work, overtime, penalty rates, meal breaks, and allowances. Another example is the *Vehicle Manufacturing, Repair, Services and Retail*

⁴ FW Act s 138, s 134(1).

⁵ FW Act s 134(1)(g).

⁶ FW Act s 134(1)(b).

⁷ FW Act s 134(1)(da).

⁸ CAA Submissions, 13 February 2018, [4.12.1].



Award,⁹ which also is divided into ‘sections’. These awards provide for comprehensive sets of conditions for various, distinct industries or sub-sectors, rather than simply variations to the span of hours.

15. It is unclear what the utility is of some examples provided by CAA. For example, the *Clerks – Private Sector Award*¹⁰ does not provide for multiple spans of hours in clause 25.1. CAA may be referring to clause 25.1(b) which simply provides that ‘*where an employee works in association with other classes of employees who work ordinary hours outside the spread prescribed by this clause, the hours during which ordinary hours may be worked are as prescribed by the modern award applying to the majority of the employees in the workplace.*’ CAA also refer to clause 30 in the *Victorian State Government Agencies Award*, which provides a number of provisions for employees working at government-run events such as Moomba.¹¹ Clause 28 of the *Wine Industry Award*¹² contains a number of provisions for vineyard workers during the ‘*period of vintage*’. We submit these clauses offer no useful comparison to the span of hours provisions in the HPSS Award.
16. Many of the examples provided by CAA provide for different ordinary hours of work for different and distinct sub-sectors, which is different to spans of hours. These include the *Dry Cleaning and Laundry Industry Award*,¹³ the *Meat Industry Award*,¹⁴ and the *Graphic Arts, Printing and Publishing Award* (‘*Graphic Arts Award*’).¹⁵ These awards contain detailed ordinary hour provisions for each sub-sector, and further protections or payments for employees working unsocial hours. For example, the *Graphic Arts Award* provides for limitations on shiftwork¹⁶, limitations on double shifts,¹⁷ and payment for night work provisions for work performed between 5:00pm and 8:00am.¹⁸ We submit that comparisons between these clauses and the span of hours clause in the HPSS Award are of limited use.
17. We also refer to our comments on the *General Retail Award*, in paragraphs [42] – [45] of our submissions of 12 February 2018.

Medical Imaging Employment Relations Groups proposal

18. In its submissions of 12 February 2018, the Medical Imaging Employment Relations Group (MIERG) propose varying the award so that the span of hours for *all* employees

⁹ Ibid [4.12.9].

¹⁰ Ibid [4.12.2].

¹¹ Ibid [4.12.10].

¹² Ibid [4.12.11].

¹³ Ibid [4.12.3].

¹⁴ Ibid [4.12.8].

¹⁵ Ibid [4.12.5].

¹⁶ *Graphic Arts Award*, clauses 30.3(a), 30.5(a)

¹⁷ *Graphic Arts Award*, clauses 30.4(e), 30.6(e)

¹⁸ *Graphic Arts Award*, clause 30.6(d)-(f)



will be between 7:00am – 9:00pm Monday – Friday, and reducing Saturday penalty rates for all employees covered by the award.¹⁹

19. We submit that this proposal to radically extend the span of hours for all employees covered by the award is not in accordance with the modern award objective. The proposed draft determination drastically reduces the requirement for employers to pay shift-loading and penalty rates for work performed during unsocial hours. It would greatly weaken the safety net for employees covered by the award, and would therefore fail to provide a fair and relevant minimum safety net for employees in accordance with s 134(1). In particular, it fails to provide for adequate remuneration for employees working unsocial hours,²⁰ provides a disincentive for collective bargaining,²¹ and would be likely to have a detrimental impact on low-paid employees covered by this award.²²
20. MIERG's submissions offer little to no coherent reasoning for why such a drastic variation affecting all employees covered by the award is necessary to meet the modern awards objective, nor have they provided probative evidence in this regard.

CAA submission on technical variations

21. The HSU are opposed to the changes proposed by the CAA in their 'Variation 2' Draft Determination, on page 16 of their submissions.
22. In relation to clause 18.1, we reiterate our submission that there is no reason why employees private medical seven-day imaging practices should not receive the same penalty rates as other employees covered by the award.
23. In relation to clause 8.1, we are of the view that the current provision is sufficiently clear.
24. In relation to clause 19.1, we firstly submit that as ordinary hours are already defined in clause 8.1 (ED), this definition does not need to be repeated in the CAA's proposed variation in relation to full-time employees in clause 19.1(a)(i), or in relation to part-time employees in clause 19.1(a)(iii).
25. Secondly, we are opposed to deletion of the phrase '*their ordinary hours*' in clause 19.1(a)(i) (ED). In our submission, the word '*their*' has work to do, as it ensures that full-time employees, like part-time employees, should be entitled to overtime where they work in excess of their ordinary hours, that is, the number of hours fixed for their shift or roster. For example, a full-time employee who is rostered for six hours on a given day, but works an additional hour, should be paid one hour of overtime. The employee should not have to work in excess of a ten hour shift before being entitled to an overtime payment where they work in excess of their rostered hours.

¹⁹ Medical Imaging Employment Relations Group, Submission in *Four Yearly Review, Health Professional and Support Services Award AM2016/31*, 21 February 2018, 7-9 ('MIERG Submissions').

²⁰ *FW Act* s 134(1)(da).

²¹ *FW Act* s 134(1)(b).

²² *FW Act* s 134(1)(a).



Rostering

Aged Care Employers

26. The HSU submits the variation to clause 8.3(b) (ED) is not required to meet the modern awards objective, as per s 134 of the *Fair Work Act*, which requires that the award provide ‘a fair and relevant minimum safety net of terms and conditions’.

27. It is our view that the current rostering provisions in the HPSS Award provides for an appropriate safety net, as it already enables an employer to provide less than seven days’ notice of a change of roster in circumstances of illness or emergency. Clause 8.3(b) provides that:

The employer may alter a roster at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work due to illness or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee’s day off, an alternative day off will be taken at an agreed time.

28. In its submissions of 15 July 2015, ACE state that this provision, which allows for an employer to unilaterally change an employee’s roster in cases of illness or emergency is too narrow, stating that:

Clearly, there are many other matters beyond just illness or emergency that an employer might require a roster to be altered. For example, an employee’s car may have broken down, an employee may have abandoned duty, and an employee may have taken leave at short notice for a family matter.²³

29. It is our view that this construction of clause 8.2(f) is misconceived. The examples provided of an employee’s car breaking down, or an employee abandoning duty, or taking leave at short notice because of a family matter, all meet the definition of ‘emergency’.

30. This is in accordance with the definition of ‘emergency’ in the Macquarie Dictionary, which defines emergency as ‘an unforeseen occurrence; a sudden and urgent occasion for action’.²⁴ The examples provided by ACE and their witnesses fit this definition.

31. Moreover, we submit that the evidence provided by ACE, in the form of witness statements by Mr John Favalaro, Karen Foster, Kalena Jefferson and Mark Douglas, are of little or no relevance to the ACE submissions. As the witnesses acknowledge in their statements,²⁵ all of the witness evidence are from employers covered by enterprise

²³ Aged Care Employers, Submission in *Four Yearly Review, Health Professional and Support Services Award AM2016/31*, 15 July 2015, [3].

²⁴ *Macquarie Dictionary Online*, (definition of ‘emergency’), March 2018, <<https://www-macquariedictionary-com-au>>

²⁵ Exhibit AC1, Statement of John Favalaro, [3], [6]; Exhibit AC2, Statement of Karen Foster, [3],[6]; Exhibit AC3, Statement of Kalena Jefferson [3],[6]; Exhibit AC4, Statement of Mark Douglas, [3],[6].



agreements, to whom the rostering clause does not apply. Their evidence of why the clause is needed is therefore purely speculative, and should be given little weight.

32. We are concerned that including this amendment may lead to situations where employees do not want a last minute roster change, but feel pressured to 'agree'. As pointed out by the ANMF in their submissions of 22 May 2017 in relation to the Nurses Award, a 2009 AIRC Full Bench decision, discussing the making of the HPSS Award, Nurses Award and a number of other health awards, discussed such a consideration in relation to the pressure that part-time employees may experience when requested by a supervisor to change their roster. The seven member AIRC Full Bench stated:

*We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.*²⁶

²⁶ *Re Award Modernisation* (2009) 181 IR 19, [148].

