

From: Jac Trengove [<mailto:jtregove@sladen.com.au>] **On Behalf Of** Louise Houlihan
Sent: Monday, 22 May 2017 4:06 PM
To: AMOD
Subject: AM2014/204 - Group 2 awards - MA000027 Health Professionals and Support Services Award (Matter 21500160)

Dear Sir / Madam,

We refer to the above matter and to the extension granted on 8 May 2017 by Vice President Catanzariti.

Attached for filing on behalf of the Chiropractors' Association of Australia (National) Limited are the following documents:

1. Reply Submissions dated 22 May 2017; and
2. Unsworn Second Witness Statement of Mathew Fisher (to be sworn in due course) dated 22 May 2017.

Please do not hesitate to contact us should you require any further information.

Yours faithfully,
SLADEN LEGAL

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**AWARD STAGE, GROUP 2 MODERN AWARDS
MA000027 – HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010**

FWC MATTER NO: AM2014/204

REPLY SUBMISSIONS DATED 22 MAY 2017

Date of document: 22 May 2017

Solicitor's code: 13655

Filed on behalf of: The Chiropractors' Association
of Australia (National) Limited

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Attention: Joanna Bandara

Email: jbandara@sladen.com.au

1. INTRODUCTION

- 1.1 The Chiropractors' Association of Australia (National) Limited (**CAA**) is the peak body representing the chiropractic industry.
- 1.2 The CAA makes these reply submissions pursuant to Directions made by the Fair Work Commission (**Commission**) dated 27 November 2016 (and amended on 24 March 2017) relating to the *Health Professionals and Support Services Award 2010 (HPSS Award)*.
- 1.3 This submission opposes the claim by the Health Services Union (**HSU**) to vary clause 8.1 of the HPSS Award by:
 - 1.3.1 including a single span of hours for all day workers of 6.00am to 6.00pm, Monday to Friday; and
 - 1.3.2 importing a new requirement for hours of work to be "continuous".
- 1.4 The facts on which the CAA relies are predominantly set out in the witness statement of Matthew William Fisher dated 22 May 2017, filed in these proceedings.

2. SINGLE SPAN OF HOURS

- 2.1 To be clear, the CAA does not oppose the rationalisation of the span of hours. However, the CAA submits that the current span of hours in the HPSS Award and those now pressed by the HSU are inappropriate because it disregards the traditional operating hours of most health employers covered by the HPSS Award, who perform work outside of traditional business hours (i.e. on weeknights and on weekends).
- 2.2 We refer to our submissions dated 17 March 2017 and particularly paragraph 6.3. The CAA submits that most modern awards reflect the trading hours of the relevant industry. The usual trading hours for the chiropractic industry are between 7am to 8pm, Monday to Friday and 7am to 2pm, Saturday. In other words, the variation pursued by the HSU fails to meet the needs of the chiropractic industry.
- 2.3 The HSU has based its proposed clause on the *Nurses Award 2010*.¹ The HSU also submits that the span of hours clause in the HPSS Award "should not diverge so greatly from the other health awards in the modern award system." However, this is an oranges and apples comparison. While nurses and chiropractors are clearly both health professions, the type of work they perform and their work environments are distinct. For example, chiropractors rarely work in hospital environments but are predominantly employed in private practices which operate within the trading hours identified above. Nurses, on the other hand, often work in a hospital environment on a 24/7 basis. The CAA submits that it is these contextual considerations that mandate a different span of hours for the chiropractic industry.
- 2.4 The Full Bench has specifically acknowledged that the characteristics of the employees and employers covered by modern awards varies between modern awards and that "to some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations."² It

¹ Submissions made by the Health Services Union dated 17 March 2017, [42].

² *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [33] and [60].

further said that the application of the modern awards objective could result in different outcomes between different modern awards.

2.5 It is not, in our view, appropriate to simply apply that which works for nurses to allied health professionals. The CAA submits that if a rationalised span of hours was to be considered, it ought to include a span of hours that reflects industry practices.

3. “CONTINUOUS” HOURS OF WORK

3.1 Prior to the modern award, chiropractors were essentially award free. Split shifts were (and are) common in the chiropractic industry.

3.2 Many chiropractic practices operate a morning and an afternoon shift. We refer to the Review of Practice Opening Hours (attached to the witness statement of Matthew William Fisher dated 17 March 2017, filed in these proceedings) and note that on average there are 57 practices per day (Monday to Friday) who utilise a split shift (i.e. an average of around 31%).

3.3 It is the CAA's submission that the HPSS Award enables this to occur. There is no requirement in the HPSS Award that hours must be worked continuously. If split shifts were prohibited, the HPSS Award could have clearly contained words to that effect.

3.4 The HSU seeks to vary the HPSS Award to include a new requirement that hours of work be “continuous”.³ However, the HSU has not:

3.4.1 made specific submissions directed at the need for this variation to the HPSS Award; or

3.4.2 filed any evidence to support the variation.

Moreover, the HSU has not properly identified the consequence for working a split shift.

3.5 We refer to our submissions dated 17 March 2017 and particularly paragraph 5.

3.6 The Full Bench has held that the 4-yearly review is to proceed on the basis that “prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”⁴

3.7 Furthermore, it held that a party seeking a variation to a modern award must generally speaking mount a merit-based case in support of its claim which is accompanied by probative evidence.⁵ Notably, the Full Bench said that “significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative and, where feasible, probative evidence.”⁶ However, those changes which are obvious as a matter of industrial merit will not require the party to advance probative evidence in support of the proposed variation.⁷

³ Submissions made by the Health Services Union dated 17 March 2017, [47].

⁴ *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [24] and [60].

⁵ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [52].

⁶ *Ibid.*

⁷ *4 yearly review of modern awards – Award Flexibility* [2016] FWCFB 6178, [60]–[61].

- 3.8** The CAA submits that the change proposed by the HSU qualifies as a “significant change”. Thus, it is incumbent on the HSU to justify the proposed change with a merit-based argument supported by probative evidence. The HSU also has the burden of satisfying the Commission that the modern awards objective is no longer being met.
- 3.9** By failing to submit any arguments or provide any evidence of the need for this variation, the HSU has not met these burdens and the Commission should not be satisfied that the change is necessary to achieve the modern award objectives.

4. Conclusion

The CAA submits that the proposed variations are not necessary to ensure that the HPSS Award, together with the NES, provide a “fair and relevant” minimum safety net for the chiropractic industry. As such, the CAA submits that the variations sought by the HSU outlined in these reply submissions should not be made to the HPSS Award.

SECOND WITNESS STATEMENT OF MATTHEW WILLIAM FISHER

I, MATTHEW WILLIAM FISHER of [REDACTED], New South Wales, say as follows:

- 1 I make this statement from my own knowledge and experience except where otherwise stated. Where I refer to information that has been provided to me by others, I identify the source of that information and believe that information to be correct.
- 2 As to my background and the role of the Chiropractors' Association of Australia (**CAA**), I refer to my witness statement dated 17 March 2017.
- 3 I am aware that the Health Services' Union (**HSU**) has filed submissions which, amongst other things, seek to vary the *Health Professionals and Support Services Award 2010* (**HPSS Award**) to introduce a requirement for an employee's ordinary hours of work to be continuous and to include a single span of hours for all health professionals and support services staff that is the same as the *Nurses Award 2010* and the general span of hours in the HPSS Award (which applies to chiropractors at this time). The CAA oppose these variations.

Split Shifts

- 4 It is common in the chiropractic industry for chiropractic practices to close during the day for a period. In my experience, the extent of the closure varies, but it is usually over an extended lunch break of around 2 hours.
- 5 I refer to my witness statement dated 17 March 2017. The CAA conducted a review of members' websites to ascertain the published opening hours of practices in the industry (**Review**). Tables setting out the outcome of the Review were annexed to that witness statement as Annexure 2.
- 6 Annexure 2 shows that, on average, about one third of practices surveyed operate two shifts per day. In other words, there is the possibility of those employed in these practices to be required to work a split shift.
- 7 I am also aware that prior to the introduction of the modern award, this practice was also common and the HPSS Award also effectively enables this to occur.
- 8 I understand that the main reason for such closures is that it is not a peak time for patients to access services in these practices.
- 9 The variation sought by the HSU would be a dramatic change for the chiropractic industry and could have a number of negative consequences. For example, if an employee's ordinary hours of work had to be continuous, this could result in employers having to pay employees despite there being little or no work to do. Alternatively, it could mean that some employees receive less work because an employer may only roster them for one shift rather than the two shifts available that day.

- 10 The variation would also likely make rostering more difficult and less flexible for employers and employees alike.

Span of hours

- 11 I refer to my witness statement dated 17 March 2017. One of the primary issues being agitated by the CAA is to do with the current span of hours being inappropriate for the way that chiropractic practices operate.
- 12 Overwhelmingly, chiropractic practices operate outside of traditional business hours (i.e. on evenings and Saturdays). The general span of hours contained in the HPSS Award (which is the span of hours being sought by the HSU) does not reflect the trading hours of chiropractic businesses. While the CAA does not oppose the notion of a single span of hours, it certainly opposes a span which does not consider industry practices.

Dated: 22 May 2017



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Matthew William Fisher