

From: Elizabeth Guarino [<mailto:eguarino@sladen.com.au>]
Sent: Friday, 17 March 2017 4:04 PM
To: Chambers - Catanzariti VP
Cc: Joanna Bandara; Louise Houlihan
Subject: AM2014/204 - Group 2 awards - MA000027 Health Professionals and Support Services Award (Matter 21500160)

Dear Associate,

FWC Matter No: AM2014/204
Group 2 Awards – MA000027 – Health Professionals and Support Services Award 2010

We refer to the above matter and to Vice President Catanzariti's amended Directions in this matter dated 3 March 2017.

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

1. Submissions dated 17 March 2017; and
2. Unsworn Witness Statement of Matthew Fisher (to be sworn in due course) dated 17 March 2017.

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

Kind regards,

Elizabeth Guarino | Lawyer

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

FWC MATTER NO: AM2014/204

SUBMISSIONS DATED 17 MARCH 2017

Date of document: 17 March 2017

Solicitor's code: 13655

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

DX 30970

Prepared by:

Tel: 03 9611 0196

Sladen Legal

Fax: 03 9620 9288

Level 5, 707 Collins Street
MELBOURNE 3008

Ref: 21500160

Attention: Joanna Bandara
Email: jbandara@sladen.com.au

1. INTRODUCTION

The Chiropractors' Association of Australia (National) Limited (**CAA**) makes these submissions pursuant to Directions made by the Fair Work Commission (**Commission**) dated 27 November 2016 (and amended on 2 March 2017) relating to the *Health Professionals and Support Services Award 2010 (HPSS Award)*. The facts on which the CAA relies are predominantly set out in:

- (a) the witness statement of Matthew William Fisher dated 17 March 2017;
- (b) a survey of CAA members entitled, "Fair Work Survey 2017", conducted in February 2017 (**Survey of Members 2017**);
- (c) a review of a random selection of the websites of 200 CAA members detailing opening hours conducted in February 2017 (**Review of Practice Opening Hours**),

filed in these proceedings.

2. BACKGROUND: CHIROPRACTIC & THE CAA

- 2.1 Chiropractic is an essential element of healthcare and chiropractors are a fundamental part of the treatment of many health conditions.
- 2.2 Chiropractors are highly trained. To become a registered chiropractor in Australia, you must have studied an accredited 5-year chiropractic program conducted at a University within Australia, or have completed an accredited program overseas that satisfies the requirements set by the Chiropractic Board of Australia (**Board**) (the relevant chiropractic regulating authority). Once registered, chiropractors are required to adhere to strict and extensive educational requirements and standards.
- 2.3 Chiropractors are subject to the Health Practitioner Regulation National Laws (variously enacted in each state and territory). Other professions that are subject to the national laws include dental, medical, medical radiation practice, occupational therapy, physiotherapy, osteopathy, Chinese medicine, podiatry, nursing and midwifery, pharmacy and psychology.
- 2.4 Registrant data compiled by the Board shows that the chiropractic industry is a growing profession.¹ As at 31 December 2016, there were approximately 5,277 registered chiropractors in Australia.²
- 2.5 Many people utilise chiropractic services. Although, since such services are not routinely funded through Medicare, administrative data regarding the use of such services is difficult to obtain. In 2016, private insurers paid for almost 9.5 million chiropractic services.³ The next closest allied health service was physiotherapy which accounted for around 11.3 million services.⁴

¹ For example, Chiropractic Board of Australia, Registrant Data for December 2012, 2013, 2014 and 2015 show the number of registered chiropractors being 4,610, 4,686, 4,977, and 5,148 respectively (source: <http://www.chiropracticboard.gov.au/About-the-Board/Statistics.aspx>).

² Chiropractic Board of Australia, Registrant Data: 1 October 2016 – 31 December 2016.

³ Australian Prudential Regulation Authority, Statistics: *Private Health Insurance Quarterly Statistics* for March, June, September and December 2016 (<http://www.apra.gov.au/PHI/Publications/Pages/Quarterly-Statistics.aspx>).

⁴ Ibid.

- 2.6** Most chiropractic practices will also engage chiropractic assistants, who are responsible for all clerical and support tasks in relation to patients and the practice (including appointments, general patient welfare, report typing, billing and specialised practice functions).
- 2.7** The CAA is the peak body representing chiropractors. The CAA was formed in 1990, following the amalgamation of the Australian Chiropractors' Association (founded in 1938) and the United Chiropractors' Association of Australasia Ltd (founded in 1961).⁵
- 2.8** The CAA represents over 2,700 members and is the largest chiropractic health body in Australia. It has members in all states and territories within Australia.⁶
- 2.9** The CAA is unusually positioned in that it represents both employers and employees. The CAA's membership consists of chiropractors, student members, business owners (including standalone practices, small and large private practice groups and multidisciplinary practices).⁷ However, it should be noted that chiropractic practices are predominantly small businesses and frequently do not employ dedicated human resources professionals.⁸
- 2.10** The CAA takes a leading role in advocating the views of Australian chiropractors to public policy decision-makers. It works with its members to understand their needs across various elements of their practices, which includes the industrial needs of its members and (where relevant) their employees. The CAA's objective is to ensure that the voice of Australian chiropractors are heard.
- 2.11** The CAA's goals for participating in this review are to ensure that the HPSS Award reflects the interests of both its employer and employee members by making sure the award is unambiguous and caters to the way the industry operates.
- 2.12** In correspondence from the Fair Work Ombudsman (**FWO**)⁹ to the Commission regarding its research on base rates of pay, overtime and penalties for the modern award review, the FWO identified that the HPSS Award:
- 2.12.1 does not clearly identify when overtime applies;
 - 2.12.2 does not state whether or not overtime calculations are on a daily or weekly basis;
 - 2.12.3 does not clearly state whether casual employees are entitled to overtime;
 - 2.12.4 does not clearly state the interaction between the casual loading and overtime;
 - 2.12.5 does not clearly state when penalties apply; and
 - 2.12.6 includes references to penalties in clauses which do not prescribe any penalty rates.

⁵ Witness Statement of Matthew William Fisher dated 17 March 2017, [6].

⁶ Ibid [7].

⁷ Ibid [8]-[9].

⁸ See for example, Survey of Members 2017.

⁹ Letter from Fair Work Ombudsman to Fair Work Commission dated 11 April 2014 regarding "FWO Research for Modern Award Review on base rates of pay, overtime and penalties", Appendix F, p 47.

2.13 The CAA shares this view and wishes to emphasise the importance of ensuring that the HPSS Award makes it clear when overtime or other penalty rates are payable.

3. AWARD COVERAGE HISTORY

3.1 Chiropractors

Prior to the modern award, chiropractors have historically been essentially award free. The incidence of award-coverage for Chiropractors is set out in Table 1 of Schedule 2.

3.2 Chiropractic Assistants

Chiropractic assistants have traditionally (though not always) been covered by the relevant state clerical and administrative employee awards. The incidence of award-coverage for Chiropractic Assistants is also set out in Table 1 of Schedule 2.

4. AWARD MODERNISATION

4.1 Formulation of the HPSS Award

4.1.1 Regrettably, chiropractors were not involved in the formulation of the HPSS Award. The CAA made a late submission in June 2009 seeking removal of chiropractors from coverage of the HPSS Award.

4.1.2 The submission was purely about chiropractors not being covered by the HPSS Award, and not to do with the matters raised in this submission.

4.1.3 A Full Bench of the Australian Industrial Relations Commission (**AIRC**) determined that such a submission was better progressed by way of an application to vary.¹⁰

4.1.4 An application to vary was made and ultimately rejected.¹¹ The Full Bench determined that although chiropractors had traditionally been award-free, the occupation of chiropractor could be regarded as similar in character to those occupations, such as physiotherapists and occupational therapists, which had historically been covered by award regulation, and therefore chiropractors ought to have the same safety net as other health professionals.¹² The appropriateness of the span of hours and other specific provisions of the HPSS Award to chiropractic practices was not considered or addressed in any way.

4.2 2012 Review of Modern Awards

4.2.1 The CAA was one of a number of parties that sought to vary the HPSS Award as part of the 2012 review into all modern awards.

4.2.2 Relevantly, a joint position was advanced by Dr Patrick Sim (on behalf of the CAA), the Australian Medical Association (**AMA**), Australian Business Industrial (**ABI**), Australian Federation of Employers and Industries (**AFEI**), the Australian Dental Association (**ADA**) and Business SA (**Employers**) seeking changes to clause 24 (span of hours), clause 29 (shift

¹⁰ *Request from Minister for Employment and Workplace Relations – 28 March 2008 (Award Modernisation)* [2009] AIRCFB 800 (2 September 2009), [147].

¹¹ *Health and Professionals and Support Services Award 2010* [2010] FWAFB 324, [6].

¹² *Ibid* [5].

work), clause 31.1(b) (quantum of leave for a shiftworker), clause 3.1 (definitions of a shiftworker) and award flexibility.

4.2.3 Although Vice President Watson varied the HPSS Award in some minor respects, his Honour declined to make a number of the requested changes on the basis that they were substantive and better suited to the four-yearly review.¹³

4.3 The situation today

In these circumstances, the chiropractic industry has been operating under the HPSS Award since 2010 without having had any proper input into key terms of the Award, such as the span of hours. Prior to the introduction of the HPSS Award the industry had previously operated in a very different and much more flexible manner. All attempts by the CAA to address the inappropriateness of the application of certain terms of the HPSS Award to the industry have been put off pending this 4-yearly review of modern awards. This review is the first real opportunity for the chiropractic industry to have substantive input into appropriate award terms for the industry.

5. LEGAL FRAMEWORK

5.1 The Commission is required to conduct a 4-yearly review of modern awards in accordance with s.156 of the *Fair Work Act 2009* (Cth) (**Act**). This provision requires the Commission to review all modern awards and provides it with a power to make, amongst other things, one or more determinations varying modern awards.

5.2 Section 134(2) of the Act provides that the modern awards objective applies to the performance or exercise of the Commission's modern award powers, which relevantly include its function or power to conduct the 4-yearly review and in making any determination to vary modern awards.

5.3 It has been accepted that the modern awards objective is to "ensure that modern awards, together with the National Employment Standards (**NES**) provide a *fair* and *relevant* minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h)" of the Act.¹⁴

5.4 Relevantly, section 134(1) provides:

"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*

¹³ *Australian Medical Association and others* [2013] FWC 2182, [34]

¹⁴ [2017] FWCFB 10001, [37]

- (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.”*

5.5 The Full Bench has determined that “no particular primacy is attached to any of the s.134 considerations”.¹⁵ Rather, it is the Commission’s task to “balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net.”¹⁶ However, the Full Bench has also accepted that not all the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.¹⁷

5.6 The Full Bench has further held that “fairness” in this context is “to be assessed from the perspective of the employees and employers covered by the modern award in question” and that the term “relevant” is “intended to convey that a modern award should be suited to contemporary circumstances.”¹⁸

5.7 However, the Commission must (in determining whether or not to vary a modern award) also have regard to s.138 of the Act. This section relevantly provides that a modern award must include terms that it is required to include “only to the extent necessary to achieve the modern awards objective”. Thus, s.138 was recognised by the Full Bench as imposing a significant hurdle when it adopted Justice Tracey’s decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* that:

*...a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable.*¹⁹

5.8 In its recent decision on penalty rates, the Full Bench agreed with the observation that reasonable minds may differ as to whether an award term or proposed variation was necessary as opposed to merely

¹⁵ *4-yearly review of modern awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [32].

¹⁶ *Ibid* [33].

¹⁷ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [115].

¹⁸ *Ibid* [37].

¹⁹ (2012) 205 FCR 227, [46].

desirable.²⁰ It held that what is “necessary” to achieve the modern awards objectives in a particular case is a “value judgement, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.”²¹

- 5.9** 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.²² Notwithstanding that variations to modern awards must be justified on their merits, the Full Bench has accepted that the extent of the merit argument required will depend on the circumstances.²³ Notably, it has held that “significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative and, where feasible, probative evidence.”²⁴ 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.²⁵
- 5.10** The Commission has also indicated 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.”²⁶
- 5.11** The CAA submits that the changes addressed in these submissions are necessary to achieve the modern award objectives. The change of most significance that it is seeking is a variation to the span of hours contained in clause 24 of the HPSS Award. Other changes that it seeks are, in its submission, not significant changes but variations to the HPSS Award to ensure its clarity. In other words, they are changes which are, in the CAA’s view, obvious as a matter of industrial merit.

6. SUBMISSION TO VARY THE HPSS AWARD – SPAN OF HOURS

6.1 Clause 24 – Span of Hours²⁷

- 6.1.1 The span of hours in clause 24 varies depending on the type of health practice involved.
- 6.1.2 Clause 24.1 (which applies to chiropractic practices) provides that:

“Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.”²⁸

- 6.1.3 The span of hours for chiropractic practices in the current HPSS Award is significantly more limited than that currently applying in other arguably equivalent allied health professions, notably private medical, dental and pathology practices where under clause 24.2 of the HPSS Award, ordinary hours can currently be worked between 7:30am and 9pm Monday to Friday

²⁰ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [136].

²¹ *Ibid.*

²² *Ibid* [52].

²³ *Ibid.*

²⁴ *Ibid.*

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

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

²⁷ Note this is clause 8 in the Revised Exposure Draft.

²⁸ Note this is clause 8 in the Revised Exposure Draft.

and between 8am and 4:30pm on Saturday. In addition, in physiotherapy practices, under clause 24.4 of the HPSS Award, ordinary hours can also currently be worked on Saturdays.

- 6.1.4 As noted previously, chiropractors had no representation during the formation of the HPSS Award. It is the CAA's submission that, at the time of making the award, a span of hours was adopted from various industrial instruments (many of which were specific to hospital work) without examining the features and characteristics of the chiropractic industry.
- 6.1.5 We set out those features and characteristics in more detail throughout these submissions. However, in summary they include that:
- 6.1.5.1. prior to the modern award chiropractors were effectively award free and chiropractor employees were not entitled to evening or weekend penalties;
 - 6.1.5.2. prior to the modern award chiropractic assistants were largely covered by general clerical awards;
 - 6.1.5.3. the industry is dominated by private clinic small business employers;
 - 6.1.5.4. most of these businesses operate outside of traditional business hours to accommodate working patients, including on evenings and Saturdays; and
 - 6.1.5.5. shift work as it is traditionally understood (i.e. where shifts are continuously rostered 24 hours a day for 7 days a week) is not a feature of the industry.
- 6.1.6 Whilst it is acknowledged 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,²⁹ the fact that the appropriate span of hours for chiropractic practices was not substantively or specifically considered during the award modernisation process should not be overlooked.
- 6.1.7 Furthermore, the adoption of the current span of hours has been problematic for the chiropractic industry in several significant ways, including that it has led to increased employment costs, imposed greater regulatory burdens on business and created confusion with respect to rates of pay.

6.2 Summary of Submissions

- 6.2.1 It is the CAA's submission that the span of hours in the HPSS Award applicable to those in the chiropractic industry does not provide a fair and relevant minimum safety net of terms and conditions for those in the chiropractic industry because:

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

- 6.2.1.1. the span of hours in clause 24.1 is not appropriate to the chiropractic industry practice hours, which are largely driven by patient demand;
- 6.2.1.2. that there is an inherent unfairness in the different span of hours in the HPSS Award for similar industries such as physiotherapy;
- 6.2.1.3. chiropractic employees are being inappropriately captured by the shiftworker provisions of the HPSS Award, when they are clearly not working “shifts” which has led to uncertainty, increased employment costs, greater regulatory burden and is unfair because it overcompensates such employees; and
- 6.2.1.4. there is confusion as to what is the appropriate rate of pay for employees who work outside of the current span provided for in clause 24.1 which is inconsistent with the need to provide a simple and easy to understand modern award system.

6.3 Industry practice

- 6.3.1 It is axiomatically the case that most modern awards reflect the trading hours of the relevant industry³⁰ and in fact the HPSS Award also does this (to an extent) by the various spans contained in clause 24.
- 6.3.2 However, it is the CAA’s submission that clause 24.1 does not reflect the standard operating hours for the chiropractic industry.
- 6.3.3 Relevantly, the Commission is required to consider whether the award being reviewed provides a “relevant” minimum safety net of terms and conditions. As noted earlier, the Full Bench has held that the term “relevant” is “intended to convey that a modern award should be suited to contemporary circumstances.”³¹
- 6.3.4 The hours of operation for chiropractic practices are largely similar across the industry with most hours set to accommodate working patients. A survey conducted by the CAA of its members identified that 83% of the respondents operated outside the span of hours contained in the HPSS Award.³² The survey further asked the respondents to select the main factors that determined their opening hours (with respondents being able to select more than one option). The respondents were provided with 6 options – the answer choices and response rates are set out in Table 2 of Schedule 2. Of the 686 total respondents to the survey, 568 respondents answered this question (118 respondents skipped the question). The answer choice with the highest response rate (about 84% of responses) was “patient demand for the after hours appointments (e.g. after 6pm)”.

³⁰ See for example, clause 22.2 of the *Animal Care and Veterinary Services Award 2010*; clause 25.1 of the *Clerks – Private Sector Award 2010*; clause 28.2 of the *Hair and Beauty Industry Award 2010*; clause 24.1 of the *Fitness Industry Award 2010*; clause 27.2 of the *General Retail Industry Award 2010*; clause 26.2 of the *Live Performance Award 2010*; clause 25.2 of the *Pharmacy Industry Award 2010*.

³¹ *4 yearly review of modern awards – Penalty Rates [2017]* FWCFB 1001, [37].

³² CAA, Survey of Members 2017

6.3.5 The Review of Practice Opening Hours conducted by the CAA (set out in Tables 3 and 4 of Schedule 2 of these submissions) demonstrates that most chiropractic practices are open Monday to Friday largely between the hours of 7.00am and 8.00pm and Saturday between the hours of 7.00am and 2.00pm.

6.3.6 The CAA's analysis of the data from this review also revealed that:

6.3.6.1. a clear majority of the practices surveyed were open on Saturday, in fact, 142 of the 200 practices surveyed (i.e. 71%) were open;

6.3.6.2. on any day, there was no more than 3 of the 200 practices surveyed (i.e. 1.5%) that were open prior to 7am;

6.3.6.3. on any day, there was no more than 2 of the 200 practices surveyed (i.e. 1%) that were open later than 8pm;

6.3.6.4. 197 of the practices surveyed (i.e. 98.5%) were closed on Sunday; and

6.3.6.5. the closing times for practices on Saturdays varied, however, the overwhelming majority (i.e. 77%) closed between noon and 2pm.

6.3.7 Accordingly, it can be said that most chiropractic practices open Monday to Friday largely between the hours of 7.00am and 8.00pm and Saturday between the hours of 7.00am and 2.00pm (and are not operating only within the limited span currently contained in the HPSS Award). In other words, these are the contemporary circumstances that prevail in the chiropractic industry.

6.3.8 Therefore, it is the CAA's submission that the current span is not suited to the contemporary circumstances prevailing in the chiropractic industry and as such is not "relevant" and this weighs in favour of the Commission granting the variation set out in the draft determination contained in Schedule 1 (and summarised below for ease).

6.3.9 Proposed variation

The CAA seeks the insertion of a new clause 24.5 which provides for a span of hours relevant to chiropractic practices as follows:³³

Day	Span of hours
Monday to Friday	7:00am to 8:00pm
Saturday	7:00am to 2:00pm

6.3.9.1. In short, the proposed variation is intended to:

³³ A draft determination is contained in Schedule 1.

- (a) provide for ordinary hours of work on a Saturday (which will be compensated in accordance with clause 26.1 of the HPSS Award); and
- (b) shift the commencement and finishing time for ordinary hours during the week to 7.00am to 8.00pm. This will have the effect of slightly expanding the number of ordinary hours contained in the span of hours on Monday to Friday (by one additional hour).

6.3.10 The CAA submits that as a result of this variation the HPSS Award will meet the modern award objective of making the span of hours “relevant” to the contemporary circumstances prevailing in the chiropractic industry, which weighs in favour of the Commission granting the variation sought.

6.3.11 Furthermore, as noted, these hours are largely dictated by the needs of patients to access care outside of their own usual working hours. It is the CAA's submission that within this context it is necessary and appropriate that chiropractic practices should be enabled to provide these services at times that are convenient to the community.

6.4 “Unfairness”

6.4.1 Relevantly, the Commission is required by s.134(1) of the Act to consider whether the award provides a “fair” safety net of terms and conditions. The Full Bench has held that “fairness” in this context is “to be assessed from the perspective of the employees and employers covered by the modern award in question”.³⁴

6.4.2 Notably, prior to the introduction of the modern award, the CAA sought to remove the occupation of chiropractor from the coverage of the HPSS Award. As noted in paragraph 4.1.4 of our submissions, the Full Bench rejected this application. Critically, the Full Bench determined that although chiropractors had traditionally been award-free, the occupation of chiropractor could be regarded as similar in character to those occupations, such as physiotherapists and occupational therapists, which had historically been covered by award regulation, and therefore chiropractors ought to have the same safety net as other health professionals.³⁵

6.4.3 However, chiropractors do not have the same safety net as other health professionals, such as physiotherapists. For example, there does not appear to be additional compensation for (or there is significant confusion regarding the compensation for employees) working Saturdays and this also runs contrary to the modern award objective in s.134(1)(da) (this is addressed further in our submissions at paragraph 6.5.2).

6.4.4 Similarly, chiropractic employers are having to administer and pay shift work loadings in circumstances where other allied health employers are not, and where such entitlements never previously existed and are arguably unwarranted.

³⁴ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [37].

³⁵ *Health and Professionals and Support Services Award 2010* [2010] FWAFB 324, [5]

6.4.5 It is the CAA's submission that the HPSS Award operates unfairly on both chiropractic employers and employees compared to other employers and employees also covered by the HPSS Award.

6.4.6 Unfairness: Chiropractic Employers

6.4.6.1. As, prior to the modern award, chiropractors were effectively award-free, there was no span of hours that applied prior to the introduction of the HPSS Award. As such, chiropractors could be required to work ordinary hours outside of traditional business hours, such as on evenings and weekends, without any penalties.

6.4.6.2. Similarly, the ordinary hours of work for chiropractic assistants formerly included Saturdays in most jurisdictions. For completeness, we have included the span of hours prescribed by the various clerical pre-modern awards in Table 5 of Schedule 2. It is immediately apparent that clause 24.1 of the HPSS Award has a much different and often smaller span of hours than was provided for in most of the applicable pre-modern awards with respect to clerical workers in the chiropractic industry.

6.4.6.3. Relevantly, the Full Bench has acknowledged that the spread of ordinary hours and the payments applying varied considerably before the HPSS Award was made.³⁶ In granting a separate span of hours for physiotherapy practices (which included Saturday), the Full Bench stated that it was satisfied that many of the pre-reform instruments that applied to clerical and other employees provided for ordinary hours to be worked on a Saturday.³⁷ Accordingly, it determined that a case had been made out for some change and agreed to include the hours which commonly applied to support staff in physiotherapy practices (since the position relative to physiotherapists themselves was unclear). It also held that clause 26 (which provides a Saturday penalty rate) would apply.³⁸

6.4.6.4. As noted above, ordinary hours on a Saturday was also a common feature for support staff within the chiropractic industry. However, unlike the situation for physiotherapists under pre-modern awards, there were no restrictions on working ordinary hours on weekends or evenings for chiropractors.

6.4.6.5. Despite this (and presumably because the issue of the operating hours for chiropractic practices was not specifically considered in the award modernisation process) chiropractic practices were included in the general span of hours contained in the HPSS Award.

³⁶ *Health Professionals and Support Services Award 2010* [2010] FWA FB 2356, [10].

³⁷ *Ibid* [13].

³⁸ *Ibid* [13]-[15].

- 6.4.6.6. This had the consequence of converting a day worker (in the chiropractic industry) who is regularly rostered to work past 6.00pm and/or on a Saturday into a “shiftworker” (we refer to our submissions at paragraph 6.5).³⁹
- 6.4.6.7. The application of the shift work penalties in the HPSS Award has the likely unintended and arguably unfair consequence of converting a day worker who is regularly rostered to work until even as early as 6.15pm into a shiftworker and entitling that worker to a shift penalty (presumably for that entire shift). In other words, it does not provide a “fair and relevant minimum safety net” because, in our submission, it overcompensates such employees (which makes it unfair on employers).
- 6.4.6.8. Furthermore, many other employers covered by the HPSS Award are not required to pay shift loadings to employees who work beyond 6.00pm because their span of hours is tailored to their industry and therefore covers evening work.⁴⁰
- 6.4.6.9. It seems illogical and unfair that chiropractic employers are having to pay shift loadings to employees who work in what would be considered normal trading hours for the chiropractic profession (in circumstances where other health practices covered by the HPSS Award do not). In this regard, chiropractic employers are at a distinct disadvantage as compared to health practices, like private medical, dental and pathology practices, whose ordinary hours include hours beyond 6.00pm during the week.
- 6.4.6.10. Although the unfair cost consequences associated with the current span is obviously an issue, there is also the additional regulatory burden associated with calculating specific payments owed to an employee for working shift work. Notably, this is also relevant to the Commission’s consideration of whether the HPSS Award meets the objective in s. 134(1)(f) and is addressed further in paragraph 6.5 of our submissions.
- 6.4.6.11. Prior to the introduction of the HPSS Award, shift work was not a feature of the chiropractic industry and employers were not, generally speaking, required to administer shift work loadings. In other words, there is a greater regulatory burden imposed on employers because of the current limited span of hours contained in clause 24.1. This is unfair because many other employers are not required to pay and therefore administer shift work loadings despite that their operating hours are effectively the same (or very similar) to those of chiropractic employers.
- 6.4.6.12. In short, the HPSS Award does not meet the modern award objective to provide a “fair” minimum safety net because it operates unfairly on chiropractic employers compared to other employers covered by the award, both in terms of its cost

³⁹ “Shiftworker” is defined in clause 3.1 of the HPSS Award 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.”

⁴⁰ See for example, clauses 24.2 and 24.3 of the HPSS Award.

consequences and the additional regulatory burden associated with calculating shift work loadings.

6.4.7 Unfairness: Chiropractic Employees

6.4.7.1. The CAA submits that the HPSS Award may also operate unfairly on permanent employees who commonly work on a Saturday in the chiropractic industry.

6.4.7.2. These employees are (per the terms of the HPSS Award) shiftworkers. However, shiftworkers are not entitled to the payments prescribed by clause 26.1 (Saturday and Sunday work). This is because clause 26.1 only refers to day workers. There is no other clause that provides a weekend penalty for “shiftworkers”.

6.4.7.3. Consequently, a chiropractic employee could theoretically receive less pay than another employee covered by the HPSS Award whilst performing similar work (e.g. support services) and during the same hours (e.g. 8am to 12pm on a Saturday). In fact, with the increasing emergence of multi-disciplinary practices, this disparity could even exist amongst employees within the same business.

6.4.7.4. This is plainly unfair to chiropractic employees.

6.4.8 The CAA submits that the variation proposed will meet the modern award objective of making the HPSS Award “fair” for employers and employees alike. It will achieve this by:

6.4.8.1. effectively rectifying the issue of the shift work loading being inappropriately paid to chiropractic employees (so that only chiropractic employees that work beyond 8pm would be entitled to the loading), which would in turn largely obviate the requirement to administer such loadings; and

6.4.8.2. ensuring chiropractic employees are appropriately remunerated for working in the evening or on a Saturday (at a rate that is consistent with that received by many other employees covered by the HPSS Award).

6.4.9 This weighs in favour of the Commission granting the variation set out in the draft determination contained in Schedule 1.

6.5 “Shiftworkers” in the Chiropractic Industry

6.5.1 Overcompensation of shift work employees in the Chiropractic Industry

6.5.1.1. Historically, a shiftworker has been someone employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week and who works those shifts. This position is reflected in s. 87 of the Act which provides a definition of “shiftworker” for the purposes of determining if an award/agreement-free employee qualifies for the shiftworker additional annual leave entitlement.

- 6.5.1.2. As previously noted, the current definition of a shiftworker contained in clause 3.1 of the HPSS Award deems an employee in the chiropractic industry who is regularly rostered to work past 6.00pm on Monday to Friday and/or on a Saturday as a “shiftworker”. It should be noted that on Monday to Friday, most chiropractic practices only operate until between 6.00pm and 8.00pm (we refer to our submissions at paragraphs 6.3.4-6.3.6).⁴¹ That is, chiropractic employees will work the majority of their hours during the general span of ordinary hours for day workers.
- 6.5.1.3. This is unlike the situation for employers in 24/7 operations where employees on shift work are frequently required to work a majority (or all) of their hours outside the general span of hours in clause 24.1.
- 6.5.1.4. The CAA believes this leads to an anomaly (which overcompensates employees in the chiropractic industry). By way of an example, an employee in a hospital who commences at midnight and works until 6am would currently receive the same rate of pay as an employee in a chiropractic practice who commences at 1.30pm and works until 6.30pm (assuming they share the same classification and pay point).
- 6.5.1.5. The CAA does not believe that this was intended and submits that it is unfair to employees who work the majority (or all) of their hours outside of the span of hours for a day worker because they are compensated in exactly the same way as an employee who works the majority of their hours within the span of hours for a day worker (we refer to our submissions at paragraph 6.4.7). In other words, the HPSS Award does not meet the modern award objective to provide a “fair” minimum safety net because it treats all “shift work” in the same way despite that there must be a much greater disutility experienced by an employee who works most or all their hours outside of the general span of hours provided in clause 24.1.
- 6.5.1.6. Furthermore, even though an employee will most likely always work a majority of their hours within the span of hours contained in clause 24.1 and that shift would not constitute “shift work” as it is traditionally understood, chiropractic employers are having to pay shift loadings (presumably on the entire shift).
- 6.5.1.7. As these loadings were not typically payable prior to the introduction of the HPSS Award, this has led to increased employment costs, which in our submission, is contrary to the objective in s.134(1)(f) of the Act.
- 6.5.1.8. Relevantly, s.134(1)(f) of the Act is expressed in very broad terms and requires the Commission to “take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters

⁴¹ Chiropractors’ Association of Australia (National) Ltd, Review of Practice Opening Hours, March 2017.

mentioned”.⁴² Those matters include employment costs and the regulatory burden on business.

6.5.1.9. The objective of the modern award was not intended to increase costs for employers but the inclusion of chiropractic practices under the general span of hours and the consequential application of the shift work provisions has had this effect. Furthermore, as the chiropractic industry is dominated by small business, the viability of practices is sensitive. It can be difficult for practices to absorb additional wages and compliance costs. Chiropractors operate on a fee-for-service basis. Increased costs have either to be passed onto patients (which may inflate the cost of healthcare and affect healthcare affordability) or absorbed in the margins (which for small businesses may not always be possible).

6.5.1.10. The CAA submits that the variation sought would have the effect of rectifying the issue of the shift work loading being inappropriately paid to chiropractic employees (so that only chiropractic employees that work beyond 8.00pm would be entitled to the shift work loading). This would have a beneficial impact on the employment costs of business and this therefore weighs in favour of granting the variation.

6.5.1.11. Notably, however, this variation also necessarily has the effect of reducing the earnings of employees who regularly work beyond 6.00pm, Monday to Friday as these employees will no longer be deemed “shiftworkers” and therefore will not be entitled to a shiftwork loading (in this instance for shifts finishing between 6.00pm and 8.00pm). While the CAA acknowledges that the Commission is required to consider, amongst other things, the need for additional remuneration for employees working shift work (pursuant to s. 134(1)(da)) the CAA submits that this factor should not weigh against the proposed variation because the shiftwork loading is arguably unwarranted in these circumstances. That is, this loading is being incurred despite that an employee will almost always work a majority of their hours within the span of hours contained in clause 24.1 and not whilst working “shift work” as that is traditionally understood. In other words, we say that this loading actually overcompensates employees for the level of disutility experienced.

6.5.2 Weekend penalties for shiftworkers

6.5.2.1. As briefly outlined in paragraphs 6.4.7.1-6.4.7.4 of our submissions, the CAA is aware of another anomaly in the shiftworker provisions, namely that the HPSS Award, in its current drafting, does not appear to provide any penalties for shiftworkers who work on the weekend. Please note that this is further considered at paragraph 7.3 of our submissions.

⁴² 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001, [218].

6.5.2.2. The CAA's proposed variation puts to rest potential issues surrounding employees within the chiropractic industry being paid no additional remuneration for working on a Saturday. This is because, like the application made by the Australian Physiotherapy Association,⁴³ the CAA does not seek to vary the entitlement provided by clause 26.1 (Saturday and Sunday work) but simply wants the option of working ordinary hours on a Saturday.

6.5.2.3. In this regard, the CAA acknowledges that s. 134(1)(da) of the Act also requires the Commission to consider 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;...*”

6.5.2.4. The Full Bench has made clear that in assessing “the need to provide additional remuneration” to employees working in the circumstances identified in ss.134(1)(da)(i) to (iv), the Commission must have regard to a range of matters, including:

(a) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);

(b) the terms of the relevant modern award, in particular, whether it already compensates employees for working at such times or on such days; and

(c) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.⁴⁴

6.5.2.5. The Full Bench further rejected the notion that section 134(1)(da) *required* that additional remuneration be paid for working in the circumstances prescribed.⁴⁵

6.5.2.6. Extent of the disutility

(a) The Full Bench acknowledged that assessing the extent of the disutility of working at such times or on such days includes an assessment of the impact of such work on employee health and worklife balance, taking into account the preferences of the employees for working at those times.⁴⁶

(b) The CAA accepts that there is a disutility associated with working on a Saturday and in the evening. However, it is our submission that the extent of the disutility

⁴³ *Health Professionals and Support Services Award 2010* [2010] FWAFB 2356.

⁴⁴ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [45], [190].

⁴⁵ *Ibid* [194].

⁴⁶ *Penalty Rates Decision* [191].

for those in the chiropractic industry is unlikely to be any greater than experienced by employees in the private medical, dental and pathology industries and the private medical imaging industry (and insofar as the variation relates to Saturdays, the physiotherapy industry).

- (c) In addition we note that in the experience of CAA members, it is not uncommon for employees in the chiropractic industry to prefer evening/Saturday work (for example, as a parent wanting to work flexibly at night/Saturdays to enable his/her partner to care for the child or to enable school drop-offs).⁴⁷

6.5.2.7. Compensation already provided

- (a) The minimum wage rates in the HPSS Award do not already compensate employees for working on weekends or evenings.
- (b) However, if the variation is granted, employees would be entitled to receive “additional remuneration” in the form of a Saturday loading (being 150% of the relevant minimum hourly rate). That is, insofar as the Commission is required to consider the need to provide additional remuneration to those employees working on a Saturday, this factor will be met if the draft determination is made.
- (c) We refer to and repeat our submissions at paragraphs 6.4 and 6.5. The CAA accepts that this variation has the effect of possibly reducing the earnings of employees who regularly work beyond 6.00pm, Monday to Friday as these employees will no longer be deemed “shiftworkers” and therefore will not be entitled to a shiftwork loading (for shifts finishing between 6.00pm and 8.00am). However, it is our submission that chiropractic employees have been inappropriately captured by the shiftworker provisions and this has operated unfairly on employers.
- (d) In any event, if the Commission wishes to attach some weight to this factor, the CAA notes that this issue is not determinative and it does not prohibit the Commission from making the change sought, particularly given that fair compensation for the disutility associated with working on Saturdays will be made.

6.5.2.8. Feature of the Industry

- (a) We refer to and repeat our submissions at paragraph 6.3 which clearly demonstrate that work after 6.00pm on Monday to Friday and on Saturdays is a common feature of the chiropractic industry.

⁴⁷ See further, Table 2 of Schedule 2, which indicates that employees’/practitioners’ need for flexible evening/weekend shifts was the third most important factor in determining opening hours.

(b) Furthermore, as has been previously noted, these hours are dictated by the needs of patients to access care outside of their own usual working hours. It is the CAA's submission that within this context it is necessary and appropriate that chiropractic practices should be enabled to provide these services at times that are convenient to the community.

6.5.2.9. Critically in our submission, the CAA seeks only that which is readily offered to other health businesses, namely the opportunity to work ordinary hours during what would be considered typical operating hours – and with the same cost consequences. While it is acknowledged that additional compensation was not previously paid to chiropractors prior to the introduction of the HPSS Award, such compensation was common in the clerical pre-modern awards, which is also set out in Table 2 of Schedule 2. In other words, unlike the shift work loading, the CAA accepts that it is appropriate for a Saturday penalty to apply.

6.5.2.10. The CAA submits that on balance the variation supports the need to provide additional remuneration, or insofar as it does not support the need to provide additional remuneration, it is appropriate to make the variation sought given the need for patients to access health services and that evening work is a common feature of the industry.

6.5.3 Administering the shift work provisions

6.5.3.1. Moreover, the CAA submits for many businesses there has been a consequential regulatory burden of calculating specific payments owed to an employee for working shift work (which can be particularly burdensome where the employee works a mixture of day work and shift work). This burden is also arguably greater for such industries like the chiropractic industry because it is dominated by small business who usually do not employ dedicated human resource professionals.⁴⁸ This additional regulatory burden is also in our submission contrary to s. 134(1)(f).

6.5.3.2. The variation would effectively resolve the issue of a day worker being inappropriately captured by the shiftworker provisions (which necessitates the administration of the shift work loading). Accordingly, it would reduce the regulatory burden on business and accordingly this factor also weighs in favour of granting the variation.

⁴⁸ See for example, Survey of Members 2017, question 6 – 95.55% of respondents indicated they did not employ a dedicated human resources manager in their clinic.

6.6 Confusion as to rates of pay

- 6.6.1 Relevantly, s.134(1)(g) of the Act requires the Commission to consider the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.
- 6.6.2 The CAA submits that its inclusion under the general span of hours contained in clause 24.1 of the HPSS Award has caused confusion as to the appropriate rate of pay for chiropractic employees that work on weekends and evenings.
- 6.6.3 It is the CAA's submission that this confusion arises because the CAA's members have difficulty properly characterising work after 6pm Monday to Friday and on Saturdays as either overtime or as triggering a shift work loading.⁴⁹
- 6.6.4 These difficulties are in the CAA's submission justified. Clause 24 of the HPSS Award cannot be read in isolation. This clause has a bearing on several other provisions within the award. As we have previously discussed, clause 24 determines who is a shiftworker for the purposes of the HPSS Award. However, clause 24 also interacts with other provisions, such that it may be a trigger for overtime (although the position in relation to this is unclear).
- 6.6.5 We refer to paragraph 2.12 of our submissions and note that the FWO similarly recognises that the HPSS Award does not, amongst other things, clearly identify when overtime applies and does not clearly state when penalties apply.
- 6.6.6 For completeness, we note that these ambiguities are the subject of our submissions at paragraph 7, along with our proposals to resolve them.
- 6.6.7 Any uncertainties that exist in the various penalty rates provisions (or those they interact with) presents a potential compliance issue for chiropractic employers and there is, in our view, a real risk of employees being either underpaid or overpaid these entitlements.
- 6.6.8 The CAA submits that if the proposal to vary the span of hours is granted, it will largely (but not completely) resolve the issues of uncertainty surrounding shiftwork entitlements in the chiropractic industry. This is because most (but not all) chiropractic employees will no longer be captured by these provisions. Accordingly, the variation sought would assist in making the HPSS Award simpler and easier to understand for many employers and this factor weighs in favour of granting our proposal, however, it is the CAA's submission that the Commission should grant both this and our proposal contained in paragraph 7.3 of these submissions, below.
- 6.6.9 Furthermore, clause 28 of the HPSS Award (which provides for overtime) does not appear to provide overtime rates for employees that regularly work on a Saturday and/or beyond 6.00pm

⁴⁹ See for example, CAA, Survey of Members 2017, question [insert].

on Monday to Friday (although the case is not as certain for employees that work on an ad hoc basis during these times).

- 6.6.10 It is our submission that this is likely to have been intended, otherwise, clause 28 would arguably be inconsistent with the definition of a shiftworker contained in clause 3.1.
- 6.6.11 In other words, this work does not attract overtime because it is considered pursuant to the terms of the HPSS Award to be “shiftwork”. However, the CAA is aware that overtime rates are being paid in many instances for work performed on Saturdays. Employees in receipt of overtime rates of pay for working on a Saturday have undoubtedly, in our view, been overpaid since the introduction of the HPSS Award.
- 6.6.12 It is certainly understandable, given the anomalies already set out in these submissions (see paragraphs 6.4.7.2-6.4.7.3 and 6.5.2, which deals with weekend penalties for shiftworkers), why employers are paying overtime to employees and not simply relying on a strict interpretation of the award which results in shiftworkers not receiving weekend penalties.
- 6.6.13 Whilst this is an anomaly the CAA doubts was intended, the CAA’s proposal puts to rest any possible issues surrounding employees within the chiropractic industry being paid no additional remuneration for working on a Saturday or being incorrectly remunerated for work on a Saturday by the payment of overtime. The variation would, in this regard, assist in making the HPSS Award simpler and easier to understand by making it clearer what employees in the chiropractic industry are entitled to be paid, and this factor weighs in favour of the Commission granting the proposed variation.
- 6.6.14 In addition to making the award clearer, this proposal may also decrease employment costs (e.g. by correcting overtime payments) which as outlined in paragraphs 6.5.1.7 to 6.5.1.9 of our submissions is a relevant consideration in exercising the Commission’s power to vary the award, and which provides further support in favour of the Commission granting the proposed variation.
- 6.6.15 It is the CAA’s submission that it is important that the HPSS Award is drafted in simple and easy to understand ways that make it clear what the appropriate rates of pay are. The CAA submits that the proposed variation will go some way in addressing the confusion that exists in relation to pay rates and the need to ensure modern awards are simple and easy to understand, which weighs in favour of granting the proposal.
- 6.6.16 However, the CAA also submits that it is not possible that a variation to only the span of hours within the award could resolve all the ambiguities associated with pay rates in the award and the Commission should grant both the variation in the draft determination and our proposals contained in paragraph 7 of these submissions.

6.7 Consideration of Other Modern Award Objectives

6.7.1 In our view, the submissions in paragraphs 6.1-6.6 address the need for the proposed variation and the manner in which that variation will ensure that the HPSS Award achieves the modern award objectives. However, we acknowledge that it is the Commission's task is to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net."⁵⁰ Accordingly and for completeness, we have addressed the remaining s.134(1) considerations below.

6.7.2 Section 134(1)(a) - Relative living standards and the needs of the low paid

6.7.2.1. The Commission, when dealing with the issue of the needs of the "low paid", has concluded that a threshold of two-thirds of median full-time wages provides a "suitable and operational benchmark for identifying who is low paid."⁵¹

6.7.2.2. Relevantly, almost all health professionals covered by the HPSS Award (with the exception of Level 1/Pay Point 3 (and below) employees) are entitled to a minimum wage greater than the "low paid" threshold. Although almost all the support services classifications (excluding senior support staff) are entitled to a minimum wage equal to or lower than the "low paid" threshold.

6.7.2.3. In the CAA's submission, it is probable that the effect of this variation will be to reduce the incidence of shift work penalties within the chiropractic industry and that this may impact on the "low paid". However, it is also probable that this may result in a greater demand for labour in the evenings, and that this may somewhat ameliorate any reduction in income for "low-paid" employees (by having more hours available).

6.7.2.4. Notwithstanding that there may be an impact on the "low-paid" and that the Commission may wish to attach some weight to this factor, it is the CAA's submission that this factor alone is not determinative and does not preclude the Commission from making the variation sought. The CAA further submits that it ought to be relevant that no evening/shift work penalties apply to private medical, dental and pathology practices and private medical imaging practices, where the span of hours is even later than the span being sought by the CAA. That is, the impact on the "low paid" can theoretically be no greater than that which is experienced by support staff in these other professions.

6.7.3 Section 134(1)(b) - The need to encourage collective bargaining

6.7.3.1. Many employers within the chiropractic industry are small or micro businesses. As a matter of logic, collective bargaining is unusual in the context of such businesses.

⁵⁰ *4-yearly review of modern awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, [33].

⁵¹ *Annual Wage Review 2015-16* [2016] FWCFB 3500, [449]. See also, *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001, [166].

6.7.3.2. In any event, the CAA does not consider that the inclusion of the variation itself nor its application would act as a disincentive to employers or employees in collective bargaining. There remains scope for parties to negotiate a different span of hours appropriate to the individual enterprise if needs be. Accordingly, it is our submission that this a neutral consideration in this matter.

6.7.4 **Section 134(1)(c) - The need to promote social inclusion through increased workforce participation**

6.7.4.1. It has been accepted by the Full Bench that social inclusion is “a concept to be promoted exclusively ‘through increased workforce participation’, that is obtaining employment is the focus of s. 134(1)(c).”⁵²

6.7.4.2. The current span of hours may be having an impact on workforce participation. However, the CAA’s evidence is anecdotal in nature only. A number of comments made by the CAA’s members in response to a question regarding extending opening hours included such things as:

- (a) the practice utilised family members as support staff at the weekend;
- (b) work outside the span is done by the principal/operator;
- (c) reduced opening hours as a result of the introduction of the award.

6.7.4.3. In fact, when asked what were the main factors that determined a practice’s opening hours, 15.85% of respondents noted the requirement to adhere to the HPSS Award’s span of hours (see Table 2 of Schedule 2). In other words, the introduction of the HPSS Award may now actually be influencing the operating hours for chiropractic practices.

6.7.4.4. In our view, it is logical to conclude that if the span of hours for chiropractic practices was altered to better reflect the usual opening hours for chiropractic practices, existing staff (particularly support staff) that may otherwise be rostered to finish work at 6.00pm (to avoid work outside of the ordinary hours) may have their shifts extended until the closing time of the particular practice (for example, up to an additional one or two hours in the evening) and/or would be rostered to work on Saturdays.

6.7.4.5. That is, the objective behind s.134(1)(c) may be met by the variation sought, however, it is the CAA’s submission that the variation proposed would at the very least not run contrary to the need to promote social inclusion through increased workforce participation.

⁵² 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001,[179], [828].

6.7.5 Section 134(1)(d) - The need to promote flexible modern work practices and the efficient and productive performance of work

Except to the extent that the variation proposed potentially encourages chiropractic employers to engage employees to perform work in the evenings/Saturdays (which may be preferred by those, for example, with carer or parental responsibilities), the variation proposed does not promote flexible modern work practices and the efficient and productive performance of work. The CAA submits that this factor is a neutral consideration in this matter.

6.7.6 Section 134(1)(e) - The principle of equal remuneration for work of equal or comparable value

6.7.6.1. The expression “equal remuneration for work of equal or comparable value” is defined in section 302(2) of the Act to mean “equal remuneration for men and women workers for work of equal or comparable value”. The Full Bench has held that the appropriate construction of s. 134(1)(e) is to read the words of the definition into the substantive provision.⁵³ That is, the Commission must take into account the principle of “equal remuneration for men and women workers for work of equal or comparable value”.⁵⁴

6.7.6.2. Any increases or reductions in the remuneration of employees in the chiropractic industry as a result of the variation to the span of hours would apply equally to men and women workers. As such, s.134(1)(e) is a neutral consideration in this matter.

6.7.7 Section 134(1)(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

In considering the likely impact of any exercise of modern award powers on the sustainability, performance and competitiveness of the national economy, the Commission must focus on the aggregate and not the sectorial impact of an exercise of modern award powers.⁵⁵ It is the CAA’s submission that the variation sought is unlikely to have economy-wide impacts and this is a neutral consideration in this matter.

6.8 Conclusion

It is our submission that the proposed variation is necessary to ensure that the HPSS Award, together with the NES, provides a “fair and relevant” minimum safety net for the chiropractic industry. In short, if the variation is granted, the HPSS Award will achieve the modern award objectives because:

⁵³ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001, [207].

⁵⁴ Ibid.

⁵⁵ Ibid [229].

- 6.8.1 it will reflect standard chiropractic operating hours and so is a more “relevant” minimum safety net of terms and conditions;
- 6.8.2 it will make the award “fair” for employers and employees by:
 - 6.8.2.1. ensuring chiropractic employees are remunerated for working in the evening or on a Saturday at rates that are consistent with other employees covered by the HPSS Award;
 - 6.8.2.2. ensuring chiropractic employees are entitled to an appropriate penalty for working on a Saturday (which is also relevant in assessing whether the award meets the need to provide additional remuneration to employees working on weekends);
 - 6.8.2.3. removing the disadvantage suffered by chiropractic employers in having to administer and pay shift loadings to employees who work in what would be considered normal trading hours for the chiropractic profession (in circumstances where other health practices covered by the HPSS Award do not).
- 6.8.3 it will likely reduce the employment costs of business by:
 - 6.8.3.1. only providing a shiftwork loading for chiropractic employees that work beyond 8.00pm (rather than 6.00pm) which is less common within the industry;
 - 6.8.3.2. removing the confusion associated with the appropriate rates of pay for work on a Saturday and reducing the costs of (incorrectly) applying overtime rates;
- 6.8.4 it will likely reduce the (unfair) regulatory burden suffered by chiropractic employers in having to administer and calculate shift work loadings;
- 6.8.5 it will make the award simpler and easier to understand by removing the confusion associated with pay rates for working evenings, weekends and overtime.

7. SUBMISSION TO VARY THE FURTHER REVISED EXPOSURE DRAFT OF THE HPSS AWARD – TECHNICAL ASPECTS

7.1 Background

- 7.1.1 As previously noted at paragraph 2.12 of these submissions, the FWO has identified that the HPSS Award, amongst other things, does not clearly identify when overtime or other penalties apply. The CAA shares this view and submits that it is important that the HPSS Award clearly states when overtime or other penalties are applicable.

7.1.2 We refer to our submissions at paragraph 5.9-5.11. Notably, the Full Bench has determined that 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.⁵⁶

7.1.3 The CAA submits that the proposals outlined below are such changes that are obvious as a matter of industrial merit. Furthermore, it should be noted that these proposals are intended to clarify rather than change the existing entitlement.

7.2 Issues associated with the term “ordinary hours”

7.2.1 Unfortunately, the term “ordinary hours” is used interchangeably throughout the HPSS Award to refer to an employee’s rostered hours, the span of hours used to define a day worker and the ordinary hours which must be worked for an employee to be entitled to penalties, loadings and overtime, which the CAA submits has resulted in confusion.

7.2.2 Furthermore, the CAA submits that the Further Revised Exposure Draft of the HPSS Award (as at 31 October 2016) (**Exposure Draft**) does not resolve the confusion.

7.2.3 As noted earlier, in order to vary the terms of the HPSS Award, the Commission must be satisfied that the award, together with the NES provides a “fair and relevant” minimum safety net of terms and conditions, taking into account the various considerations in s. 134(1)(a) to (h) of the Act.

7.2.4 Relevantly, s.134(1)(g) of the Act requires the Commission to consider the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. The Commission is also required, pursuant to s. 134(1)(f) of the Act, to consider the likely impact of any exercise of modern award powers on business, including amongst other things, the regulatory burden.

7.2.5 The CAA submits that the HPSS Award does not achieve a “fair and relevant” minimum safety net of terms and conditions because the penalty rates provisions (or those they interact with) are ambiguous. These uncertainties not only present a potential compliance issue for chiropractic employers but, in our submission, create a real risk of employees being either underpaid or overpaid these entitlements.

7.2.6 The relevant terms of the current HPSS Award and the Exposure Draft are set out below:

Current HPSS Award	Further Revised Exposure Draft of HPSS Award
Clause 23 Ordinary hours of work 23.1 The ordinary hours of work for a full-time employee will be an average of	Clause 8.1 Ordinary hours (a) The ordinary hours of work for a full-time employee are an average of 38

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

Current HPSS Award	Further Revised Exposure Draft of HPSS Award
<p>38 hours per week in a fortnight or four week period.</p> <p>23.2 Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.”</p>	<p>hours per week in a fortnight or four week period.</p> <p>(b) Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.</p>
<p>Clause 24 Span of hours</p> <p>24.1 Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday...</p> <p>24.3...</p> <p>(b) Seven day practice</p> <p>Where the work location of a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location will be between 7.00 am and 9.00 pm Monday to Sunday. Work performed on a Saturday will be paid at the rate of time and a quarter of the employee’s ordinary rate of pay instead of the loading prescribed in clause 26—Saturday and Sunday work. Work performed on a Sunday will be paid at the rate of time and a half of the employee’s ordinary rate of pay instead of the loading prescribed in clause 26...</p> <p>Nb Similar language is used to describe the various spans contained in within this clause (except clause 24.3 which uses the term “employee” rather than “day worker”).</p>	<p>Clause 8.2 Span of hours – day workers</p> <p>(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...</p> <p>(d) Private medical imaging practices – seven day practices</p> <p>(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.</p> <p>(ii) Payment for weekend work under clause 8.2(d)(i) is paid in accordance with clause 18.2....</p>

Current HPSS Award	Further Revised Exposure Draft of HPSS Award
<p>Clause 26 Saturday and Sunday work</p> <p>26.1 For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid their ordinary hourly rate and an additional 50% loading.</p> <p>26.2...</p>	<p>Clause 18 Penalty rates and shift work</p> <p>Clause 18.1 Weekend penalties – day worker</p> <p>(a) For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid 150% of the minimum hourly rate applicable to their classification and pay point.</p> <p>(b)...</p> <p>18.2 Weekend work in private medical imaging seven day practice</p> <p>(a) Work performed on a Saturday in accordance with clause 8.2(d)(i) will be paid at the rate of 125% of the minimum hourly rate applicable to their classification and pay point instead of the loading prescribed in clause 18.1.</p> <p>(b) Work performed on a Sunday in accordance with clause 8.2(d)(i) will be paid at the rate of 150% of the minimum hourly rate applicable to their classification and pay point instead of the loading prescribed in clause 18.1.</p>
<p>Clause 28.1</p> <p>(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:</p> <p>(i) time and a half for the first two hours; and</p> <p>(ii) double time thereafter.</p>	<p>Clause 19.1</p> <p>Overtime is paid in the following circumstances:</p> <p>(a) Where a full time employee:</p> <p>(i) works in excess of their ordinary hours;</p> <p>(ii) works in excess of 10 hours per shift;</p>

Current HPSS Award	Further Revised Exposure Draft of HPSS Award
<p>(b) All overtime worked on a Sunday will be paid at the rate of double time.</p> <p>(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29-Shiftwork.</p> <p>(d) Part-time employees</p> <p>Where agreement has been reached in accordance with clauses 10.3(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.</p>	<p>(b) Where a part time employee:</p> <p>(i) works in excess of their ordinary hours, except where agreement has been reached in accordance with clauses 6.3(c); and/or</p> <p>(ii) works in excess of 10 hours per shift; and/or</p> <p>(iii) works in excess of an average of 38 hours per week in a fortnight or four week period...</p>

7.2.7 Impact of “ordinary hours” definition on weekend penalties (clause 18.1)

- 7.2.7.1. Clause 18.1 of the Exposure Draft remains problematic in that it provides a penalty rate that is applied to all “ordinary hours” worked by a “day worker” on the weekend.
- 7.2.7.2. However, it is unclear whether this clause is referring to the ordinary hours specified in clause 8.1 or clause 8.2 of the Exposure Draft, both of which purport to define an employee’s “ordinary hours”.
- 7.2.7.3. It is the CAA’s submission that clause 18.1 was intended to refer to the “ordinary hours” contained in clause 8.2 (span of hours) and provide an appropriate weekend penalty for those industries that are (by virtue of this clause) able to work “ordinary hours” on Saturdays and/or Sundays. However, there is only one instance in clause 8.2 where ordinary hours are specified to include Sundays (in clause 8.2(d)) and this clause explicitly refers to clause 18.2, which provides for a penalty in substitution for the weekend penalties prescribed by clause 18.1. In other words, there seemingly cannot be “ordinary hours” for “day workers” on a Sunday, which makes clause 18.1 (insofar as it relates to Sunday penalty rates) redundant and confusing.
- 7.2.7.4. The CAA also submits that because clause 8.1 also defines “ordinary hours” it is possible for an employer to (erroneously) link clauses 8.1 and 18.1 – in other words, so long as the relevant employee is working within the ordinary hours prescribed by clause 8.1 (i.e. no greater than 10 ordinary hours per day or an average of 38 hours per week/fortnight/four-week period) an employer could pay them pursuant to the

rates set out in clause 18.1 for work on a Saturday or Sunday, which the CAA submits was unlikely to have been intended.

7.2.7.5. It is the CAA's submission that this issue could easily be resolved, for example, by adopting the language in clause 18.2 (which provides the weekend penalties for private medical imaging seven-day practices).

7.2.7.6. The CAA submits that clause 18.1 should be replaced as follows:

"18.1 Weekend penalties – day worker

Except in the case of private medical seven-day imaging practices, work performed by a day worker on a Saturday or Sunday in accordance with clause 8.2 will be paid at the rate of 150% of the minimum hourly rate applicable to their classification and pay point."

7.2.7.7. The CAA submits that the proposal is necessary to ensure that the HPSS Award achieves the modern award objectives as it will:

(a) make it clear how and to who the penalty is applied, which will have the effect of making the HPSS Award simpler and easier to understand for employers;

(b) reduce the regulatory burden employers would otherwise face in navigating and interpreting these provisions,

and these factors weigh in favour of granting the proposal outlined above.

7.2.8 Impact of "ordinary hours" definition on overtime (clause 19)

7.2.8.1. Clause 19 of the Exposure Draft also remains problematic in that it (like clause 28 of the HPSS Award) provides that an employee who works outside *their* ordinary hours will be entitled to overtime (at clause 19.1(a)(i)). However, given the number of uses for ordinary hours throughout the Exposure Draft it is not clear which "ordinary hours" is the trigger for overtime.

7.2.8.2. Presumably this clause is referring to the relevant employee's ordinary hours in clause 8.1 (ordinary hours) because otherwise, in the CAA's submission, such a clause would be inconsistent with the definition of a shiftworker contained in Schedule I of the Exposure Draft. However, this is not clear and the CAA submits that this clause is open to interpretation. That is, it may be interpreted to mean that overtime is not payable unless the employee:

(a) works outside of their ordinary hours prescribed by clause 8.1; or

(b) works outside of their ordinary hours prescribed by clause 8.2; or

(c) works outside of their rostered hours, even if the hours worked fall outside of the ordinary hours set out in clause 8.

7.2.8.3. Furthermore, as previously noted at paragraph 6.6.11 of our submissions, the CAA is aware that overtime rates are frequently being paid to employees who regularly work on Saturdays (where in fact, such an employee is considered a “shiftworker” pursuant to the terms of the HPSS Award and so is not seemingly entitled to any additional remuneration for working on a Saturday, see also our submissions at paragraphs 6.4.7.2-6.4.7.3 and 6.5.2). In other words, the confusion is not simply academic but concrete.

7.2.8.4. In the CAA’s submission, it is also unclear what (if anything) should be paid to employees who work outside of the relevant span of hours on an ad hoc basis (that is, those employees could not be properly categorised as “shiftworkers”). As it stands, there does not appear to be a provision entitling such employees to overtime (but it may be that clause 19 was intended to cover this situation). It is simply unclear.

7.2.8.5. The CAA submits that the following amendments to clauses 8.1 and 19.1 of the Exposure Draft to address the ambiguities identified above (blue text has been used to highlight insertions):

“Clause 8.1 Ordinary hours

(a) *The ordinary hours of work for a full-time employee are an average of 38 hours per week, 76 hours in a fortnight, or 152 hours in a four-week period...”*

“Clause 19.1 Overtime is paid in the following circumstances:

(a) *Where a full time employee:*

(i) *works in excess of ~~their ordinary hours~~ 38 ordinary hours per week, 76 ordinary hours per fortnight or 152 ordinary hours per four-week period;*

(ii) *works in excess of 10 ordinary hours per shift; or*

(iii) *other than a shiftworker, works outside the relevant span of hours set out in clause 8.2; or*

(b) *Where a part time employee:*

(i) *works in excess of their ordinary hours, except where agreement has been reached in accordance with clauses 6.3(c); and/or*

(ii) *works in excess of 10 ordinary hours per shift; and/or*

(iii) *works in excess of an average of 38 ordinary hours per week, or 76 ordinary hours in a fortnight or 152 ordinary hours in a four-week period;*

(iv) *other than a shiftworker, works outside the relevant span of hours set out in clause 8.2; or ...”*

7.2.8.6. As previously noted, it is not the CAA’s intention to vary the current entitlement to overtime but to make it clear when overtime rates apply. The CAA submits that this proposal resolves the uncertainty associated with the application of the overtime rates.

7.2.8.7. We refer to and repeat our submission at paragraph 7.2.7.7.

7.2.9 Conclusion

7.2.9.1. The CAA submits that the proposals outlined in paragraphs 7.2.7.6 and 7.2.8.5 (above) do not vary (as applicable) the entitlement to weekend penalties or overtime, but instead clearly identify the triggers for these entitlements.

7.2.9.2. The CAA submits that these proposals are necessary to ensure that the HPSS Award, together with the NES, provide a fair and relevant minimum safety net of terms and conditions. In this regard, we note that if the variation is granted, the HPSS Award will:

(a) clearly identify the triggers for weekend penalties and overtime, which will have the effect of making the HPSS Award simpler and easier to understand for employers; and

(b) reduce the regulatory burden employers would otherwise face in navigating and interpreting these provisions,

and these factors weigh in favour of granting the proposal outlined above.

7.3 Issues associated with “shiftwork”

7.3.1 The CAA submits that it is not clear whether the shiftwork loading provided in clause 18.4 of the Exposure Draft is to be applied on a shift by shift basis, or whether it is applicable to all hours worked by the shiftworker.

7.3.2 Relevantly, clause 18.4 of the Exposure Draft provides:

“Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid 115% of their minimum hourly rate of pay applicable to their classification and paypoint.”

7.3.3 Clause 29 of the HPSS Award is drafted in similar terms.

- 7.3.4 The FWO has previously provided advice that an employee is only entitled to be paid a shift work loading for shifts that finish between 6:00pm and 8:00am,⁵⁷ however it is the CAA's submission that clause 18.4 is open to either interpretation, which creates uncertainty.
- 7.3.5 The FWO has also received enquiries as to whether the additional 15% loading is paid only for the hours which fall between 6:00pm and 8:00am or if the loading is paid for the entire shift.⁵⁸
- 7.3.6 These issues are particularly problematic for chiropractic employers, for whom the concept of "shift work" is an entirely unfamiliar one (we refer to our submissions at paragraph 6.5). Furthermore, given the usual size of chiropractic businesses, very few employ dedicated human resource managers. It is therefore important that employers are able to clearly and easily understand employee entitlements and it is the CAA's submission that the shift work penalty entitlement ought to be clarified.
- 7.3.7 The CAA submits that the better view is that the requirement to pay a shiftwork loading is attached to the shift worked and not the shiftworker (that is, a shiftworker could work a mixture of day work and shift work and only the shift work attracts the loading set out in clause 18.4). This submission is consistent with the view expressed by the FWO (noted above).
- 7.3.8 Furthermore, the CAA submits that the shiftwork loading was arguably not intended to operate like an evening penalty (so that it would only apply to the hours worked which fall between 6.00pm and 8.00am) because if that were the case it would have been more explicit. That is, the loading is to be paid for the entire shift.
- 7.3.9 The CAA submits that these ambiguities could be resolved by inserting the words "for the entire shift" at the end of clause 18.4 as follows:
- "18.4. Shiftwork penalties*
- Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid 115% of their minimum hourly rate of pay applicable to their classification and pay point [for the entire shift.](#)"*
- 7.3.10 It is the CAA's submission that the proposed amendment will assist the Commission in fulfilling the "need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia..."⁵⁹ by making the HPSS Award less ambiguous.
- 7.3.11 In addition to the ambiguities outlined above, the CAA also submits that it is not clear what (if anything) shiftworkers are entitled to be paid if required to work on Saturday or Sunday. We

⁵⁷ See attached Fair Work Ombudsman Opinion dated 1 June 2012.

⁵⁸ Letter from Fair Work Ombudsman to the Commission dated 24 November 2014 regarding "Award Stage, Group 2 Modern Awards", Table of Provisions, Issue 12.

⁵⁹ FW Act, s. 134(1)(g).

refer to our submissions at paragraphs 6.4.7.2, 6.5.2 and 6.6.12. This is because clause 18.1 of the Exposure Draft, which is relevantly titled “Weekend penalties – **day workers**” (our emphasis) provides that:

*“(a) For all ordinary hours worked between midnight Friday and midnight Sunday, a **day worker** will be paid 150% of the minimum hourly rate applicable to their classification and pay point.” (our emphasis added).*

- 7.3.12 In other words, while it is relatively clear that clause 18.1 has no application to shiftworkers, there is no other clause which provides weekend penalties to shiftworkers, although clause 20.3 of the Exposure Draft (which details the annual leave loading entitlements for shiftworkers) specifically contemplates that shiftworkers receive weekend penalties.
- 7.3.13 In accordance with clause 18.4, shiftworkers are strictly speaking only entitled to a shift loading on the weekend if their shift starts between 6.00pm and 6.00am or finishes between 6.00pm and 8.00am.
- 7.3.14 In other words, a shiftworker could theoretically receive less pay than other workers for work they perform on a weekend, which seems unusual.
- 7.3.15 The CAA submits that this ambiguity ought to be clarified by making it clear whether shiftworkers receive weekend penalties or not. It is the CAA’s submission that the use of the term “day worker” in the clause is a mistake and that shiftworkers are entitled to weekend penalties. However, the CAA also notes that should the Commission agree with that position, the CAA submits that the HPSS Award should also make clear that weekend penalties apply in substitution for the shift work or other penalties.
- 7.3.16 The CAA suggests that this ambiguity could be resolved in two ways. If shiftworkers are entitled to weekend penalties, then the CAA submits that the term “day worker” in clause 26 should be replaced with “employee”. Alternatively, if shiftworkers are deemed not to be entitled to weekend penalties, then clause 31.2 (annual leave loading) ought to be redrafted accordingly.
- 7.3.17 It is the CAA’s submission that the proposed amendment will assist the Commission in fulfilling the “need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia...”⁶⁰ by making the HPSS Award less ambiguous.

8. CONCLUSION

For the reasons outlined in this submission, the CAA’s proposals to vary clause 24.1 (span of hours) of the HPSS Award, and clauses 8.1 (ordinary hours), 18.1 (weekend penalties for day workers), 18.4 (shiftworker penalties) and 19.1 (overtime) should be accepted and the variations made.

⁶⁰ FW Act, s. 134(1)(g).

SCHEDULE 1 – DRAFT DETERMINATION

PRXXXX

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—*Health Professionals and Support Services Award 2010*

(AM2014/204)

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010

[MA000027]

Health Professionals and Support Services

[MEMBERS]

[LOCATION, DATE]

4 yearly review of modern awards.

A. Further to the Full Bench decision issued by the Fair Work Commission on [date], the above award is varied as follows:

1. By adding new clause 24.5:

24.5 Chiropractic practices

In chiropractic practices, the ordinary hours of work for a day worker may be worked within the following span of hours:

Day	Span of hours
Monday to Friday	7:00am to 8:00pm
Saturday	7:00am to 2:00pm

SCHEDULE 2 – TABLES

Table 1: Historical Award-Coverage for Chiropractors and Chiropractic Assistants

State/Territory	Chiropractors	Chiropractic Assistants
Queensland	Award free	Clerical Employees Award - State 2002
New South Wales	Award free	Clerical and Administrative Employees (State) Award
Australian Capital Territory	Award free	Clerks (A.C.T.) Award 1998
Victoria	Health and Community Services Industry Sector - 1997	Health and Allied Services - Private Sector - Victoria Consolidated Award 1998
Tasmania	Award free	Clerical and Administrative Employees (Private Sector) Award
South Australia	Award free	Clerks' (South Australia) Award
Northern Territory	Award free	Clerical and Administrative Employees (Northern Territory) Award 2000
Western Australia	Award free	Award free

Table 2: Responses to Question 13 of CAA's Survey of Members 2017 ("What are the main factors that determine your opening hours? You can pick more than one option below).

Answer Choice	No. of Responses	Percentage
Patient demand for the after hours appointments (e.g. after 6pm)	477	83.98%
Patient demand for appointment times on weekends	319	56.16%
We are a multi-disciplinary practice with other health professionals that work evenings and/or weekends	119	20.95%
Employees'/practitioners' needs for flexible evening/weekend shifts	164	28.87%
It is easier to employ staff to work after business hours	11	1.94%
To adhere to Award's Span of Hours (6am - 6pm, Mon-Fri)	90	15.85%

Table 3: Analysis of Review of Practice Opening Hours – Of the Practices Opened, the number that opened 7am or later

Day	Practices Open (No. out of 200)	Opening time – 7am or later (No.)	Opening time – 7am or later (%)
Monday	193	191	98.96%
Tuesday	184	183	99.46%
Wednesday	174	172	98.85%
Thursday	191	189	98.95%
Friday	182	178	97.80%
Saturday	142	140	98.59%

Table 4: Analysis of Review of Practice Opening Hours – Of the Practices Opened, the number that closed from 6pm to 8pm (inclusive)

Day	Practices Open (No. out of 200)	Closing time – 6pm to 8pm (No.)	Closing time – 6pm to 8pm (%)
Monday	193	176	91.19%
Tuesday	184	160	86.96%
Wednesday	174	146	83.91%
Thursday	191	173	90.58%
Friday	182	109	59.89%

Table 5: Span of Hours and Saturday Rates for Support Staff in Pre-Modern Awards

Pre-modern Award	Span of Hours		Saturday Rate
Clerical Employees Award - State 2002 (Qld)	Monday to Friday Saturday	6.30am to 6.30pm 6.30am to 12.30pm	125%
Clerical and Administrative Employees (State) Award (NSW)	Monday to Friday Saturday	6.00am to 7.00pm 6.00am to 12.00pm	Shiftworkers – 150% Day workers - \$14.95/week
Clerks (A.C.T.) Award 1998	Monday to Friday ⁶¹	7.30am to 6.00pm (or 6.00am to 7.30pm by mutual agreement)	Shiftworkers – 150% Day workers – 150% first 3 hours; 200% thereafter
Health and Allied Services - Private Sector - Victoria Consolidated Award 1998	No span specified		150%
Clerical and Administrative Employees (Private Sector) Award (Tas)	Monday to Friday	7.00am to 6.30pm	150% first 3 hours; 200% thereafter
Clerks' (South Australia) Award	Monday to Friday ⁶²	7.00am to 5.30pm	Before noon – 150% After noon – 200%
Clerical and Administrative Employees (Northern Territory) Award 2000	Monday to Friday Saturday	7.00am to 6.00pm 7.30am to 12.00pm	125%
Western Australia	Award free	Award free	N/A

⁶¹ The ACT pre-modern award effectively provided for Saturday work by way of shift work provisions entitling the shiftworker to be paid at time and a half for work on Saturdays.

⁶² The SA pre-modern award enabled work prior to noon on a Saturday as “overtime” to be paid at time and a half.

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 I graduated from Deakin University with a Bachelor of Science (Hons), a Diploma of Human Nutrition and a PhD in 1989. I am also an Adjunct Associate Professor within the School of Dentistry and Health Science, and was awarded a Doctor of Health Studies (honoris causa) in 2013.
- 3 From in or around July 2014, I have been employed in the position of Chief Executive Officer (**CEO**) at the Chiropractors' Association of Australia (National) Limited (**CAA**). Prior to this role, I was the CEO of the Australian Dental Association NSW for 13 years.
- 4 Since in or around January 2015, I have also been a member of the Department of Chiropractic Advisory Board for Macquarie University.
- 5 In my role as the CEO of the CAA, my duties include, among other things, organisational development, strategic planning, operational planning and coaching.

Chiropractors' Association of Australia

- 6 The CAA is the largest chiropractic peak body in Australia which represents chiropractors and their interests. The CAA also coordinates with 8 autonomous chiropractic branches in each state and territory.
- 7 On 23 September 1990, two national chiropractor organisations, the Australian Chiropractors' Association (founded in 1938) and the United Chiropractors' Association of Australasia Ltd (founded in 1961) amalgamated to form the CAA.
- 8 The CAA currently has around 2,700 members of the approximately 5,200 currently registered chiropractors in Australia.
- 9 The majority of chiropractors in Australia are either running or employed in very small private chiropractic practices. The majority of our members' workforce are working in practices consisting of 1-2 chiropractors along with a chiropractic assistant. The vast majority of our members do not employ a dedicated human resources professional as part of their workforce.
- 10 Some of our members operate in multi-disciplinary private practices that include other health professionals. Our members rarely if ever work at public or private hospitals.

- 11 The CAA is a fairly unique peak body as it represents and advocates for a diverse range of members in the chiropractic industry, including both employers and employees, student members, and business owners. The CAA is not a registered organisation under the *Fair Work Act 2009* (Cth).
- 12 The CAA's goals for participating in this review are to ensure that the *Health Professionals and Support Services Award 2010* (**Award**) reflects the interests of both its employer and employee members by making sure the Award is unambiguous and properly caters to the way the industry operates.

History of Award Coverage

- 13 Prior to the commencement of the Award, chiropractors were award-free and chiropractic assistants were generally covered by the relevant state clerical and administrative employee award.

Formulation of the Award

- 14 Unfortunately, chiropractors were not involved in the formulation of the Award. The CAA made a late submission in June 2009 seeking removal of chiropractors from coverage of the already drafted Award.
- 15 A Full Bench of the Australian Industrial Relations Commission (**AIRC**) determined that such a submission was better progressed by way of an application to vary.¹
- 16 An application to vary was made and ultimately rejected.² The Full Bench determined that although chiropractors had traditionally been award-free, the occupation of chiropractor could be regarded as similar in character to those occupations, such as physiotherapists and occupational therapists, which had historically been covered by award regulation, and therefore chiropractors ought to have the same safety net as other health professionals.³ The appropriateness of any of the terms of the Award to chiropractic practices was not considered or addressed in any way.

2012 Review of Modern Awards

- 17 The CAA was one of a number of parties that sought to vary the Award as part of the 2012 review into all modern awards.
- 18 Relevantly, a joint position was advanced by Dr Patrick Sim (on behalf of the CAA), the Australian Medical Association (**AMA**), Australian Business Industrial (**ABI**), Australian Federation of Employers and Industries (**AFEI**), the Australian Dental Association (**ADA**) and Business SA (**Employers**) seeking changes to clause 24 (span of hours), clause 29 (shift work), clause 31.1(b) (quantum of leave for a shiftworker), clause 3.1 (definitions of a shiftworker) and award flexibility.
- 19 In the course of this application, the CAA advanced evidence of the very significant impact the introduction of award conditions into the industry had had, including significant reductions in staff numbers and hours worked throughout the industry.⁴

¹ *Request from Minister for Employment and Workplace Relations – 28 March 2008 (Award Modernisation)* [2009] AIRCFB 800, [147].

² *Health and Professionals and Support Services Award 2010* [2010] FWAFB 324, [6].

³ *Ibid* [5].

⁴ Submissions lodged by Dr Patrick Sim dated 7 September 2012.

- 20 Although Vice President Watson varied the Award in some minor respects, His Honour declined to make a number of the requested changes on the basis that they were substantive and better suited to the 4-yearly review.⁵

Four Yearly Review

- 21 The CAA and its members decided to become involved in the 4-yearly review in order to attempt to address the long-standing issues with the impact of the Award in the industry.
- 22 The primary issues now agitated by the CAA are to do with the current span of hours not being appropriate for the way that chiropractic practices operate and ambiguity in the drafting of certain provisions in the Award.
- 23 In order to assist the Fair Work Commission (**Commission**) to understand the issues confronted by chiropractic practices under the Award, in or around 1 February 2017, the CAA commissioned a survey. A summary of these survey findings is annexed to this witness statement as Annexure 1 (**Survey**). In addition to the Survey, the CAA also 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 are annexed to this witness statement as Annexure 2.
- 24 The Survey was conducted anonymously via an online survey provider, Survey Monkey. Participation in the Survey by the CAA's members was voluntary but strongly encouraged. The Survey required our members who participated to complete 14 questions, which included a range of multiple choice questions and some questions requiring our members to provide some comments in relation to their chiropractic practice's span of hours and their experiences with the Award.
- 25 Between 3 February 2017 and 17 February 2017, we received a total of 686 responses to the Survey.

Survey

- 26 Overall, the results of the Survey demonstrated that 82.51% of chiropractors who completed the Survey are regularly trading outside the current span of ordinary hours in the Award.
- 27 The factors which dictate the opening hours of the chiropractic industry were reportedly largely driven by patient demand for flexible appointment times, and in some circumstances, determined by employees requesting flexible working hours. In response to the Survey question '*What are the main factors that determine your opening hours?*' (where members had the option of selecting more than one answer choice), the majority of responses were as follows:
- (a) 83.98% answered that patient demand was the main factor for after-hours appointments (i.e. after 6pm on weeknights); and
- (b) 28.87% of responses confirmed that employee/practitioners' needs for flexible evening/weekend shifts dictated appointment times.
- 28 The Survey responses indicated that on weekdays over 80% of practices close after 6pm – demonstrating that an overwhelming majority of practices are usually operating

⁵ *Australian Medical Association and others* [2013] FWC 2182, [34]

outside the Award's span of hours. In addition, the Survey responses demonstrated that fewer than 15% of practices are open before 7am on weekdays indicating that the span of hours in the Award should be shifted to commence not from 6am (as it currently does) but rather to commence from 7am.

- 29 I am also aware that many members have reported feeling that it is unfair that the span of hours for chiropractic practices are different and more limited when compared to other (arguably equivalent) allied health professionals under the Award. The Award sets out a broader span of ordinary hours of work on weekdays and Saturdays for physiotherapy, private medical, dental and pathology practices compared to the more limited span of ordinary hours for chiropractic practices.

Review

- 30 From on or around 3 February 2017 until 28 February 2017, the CAA conducted the Review, collecting data from 200 of its members' websites regarding the days of the week and the opening hours of those chiropractic practices.
- 31 The Review collected data from 200 randomly selected members' websites and included results from chiropractic practices throughout Victoria, New South Wales, Queensland, Western Australia, Australian Capital Territory and South Australia.
- 32 The Review supported the findings of the Survey that the overwhelming majority of our members' standard operating hours are outside of the span of hours in the Award. The Review demonstrates that the usual span of hours that chiropractic practices operate is typically from 7am until between 6pm-8pm on Monday-Friday, and from 7am until between 12pm-2pm on Saturday. In particular, the data confirmed the following in relation to the average span of hours that our members operate on weekdays:
- (a) 98.81% of practices open their practice at 7am or later; and
 - (b) 82.68% of practices close between 6pm and 8pm.
- 33 In relation to Saturdays, the Review demonstrated that 71% of chiropractic practices are open on Saturdays.
- 34 Of the chiropractic practices that opened on Saturdays, the data demonstrated the following:
- (a) 98.59% of practices open at 7am or later on Saturdays; and
 - (b) 76.76% of practices are closing between 12pm-2pm on Saturdays.

Ambiguity Issues

- 35 The CAA's members have experienced significant issues in identifying clearly when overtime and other penalties apply – with particular regard to how the shiftworker loading relates to these. Our members have over many years received inconsistent advice from the FWO on these issues of award interpretation and I understand that, as part of this 4-yearly review, the FWO has also raised these issues as needing to be addressed.
- 36 In order to address the CAA's members' concerns, the CAA is seeking a variation to the Award, including a span of hours reflective of industry practice and more closely aligned to the spans applying in other allied health practices under the Award.

Dated: 17 March 2017

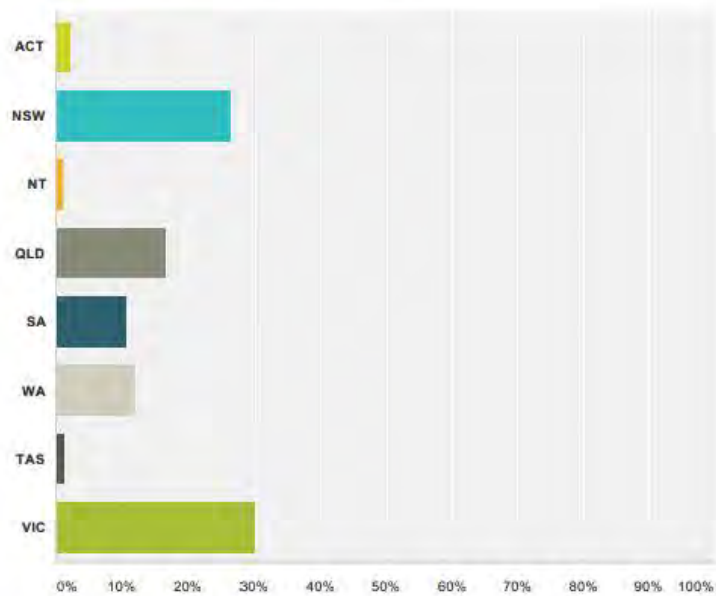
.....
Matthew William Fisher

Annexure 1 – Survey

Fair Work Survey 2017

Q1 Please select the state/territory of your primary clinic. If you practice in 2 or more states, please select the state of your primary clinic, and fill out a separate survey for additional clinics.

Answered: 684 Skipped: 2

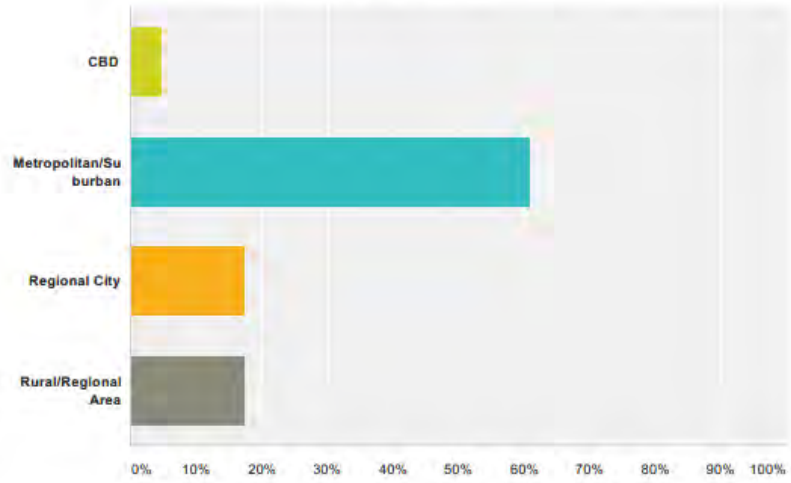


Answer Choices	Responses	
ACT	2.05%	14
NSW	26.46%	181
NT	0.88%	6
QLD	16.67%	114
SA	10.67%	73
WA	11.99%	82
TAS	1.17%	8
VIC	30.12%	206
Total		684

Fair Work Survey 2017

Q2 What type of area is your practice in:

Answers: 684 Skipped: 2

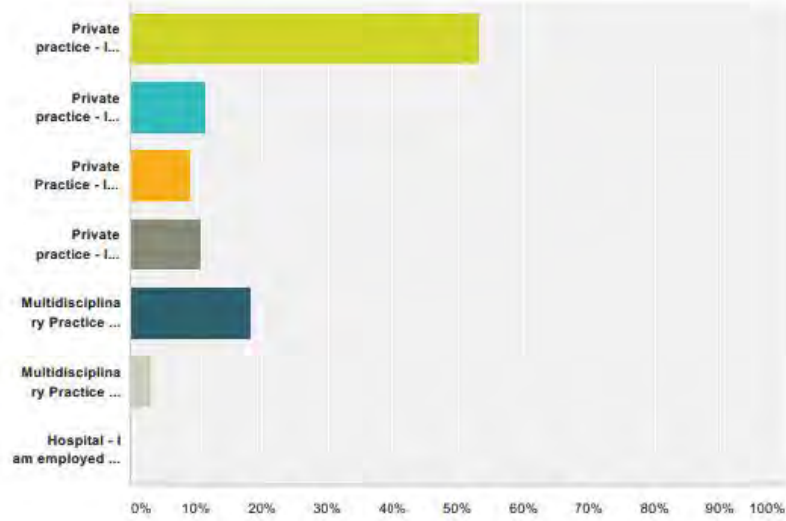


Answer Choices	Responses	
CBD	4.53%	31
Metropolitan/Suburban	60.82%	418
Regional City	17.40%	119
Rural/Regional Area	17.25%	118
Total		684

Fair Work Survey 2017

Q3 What is your Clinic Type?

Answered: 686 Skipped: 0

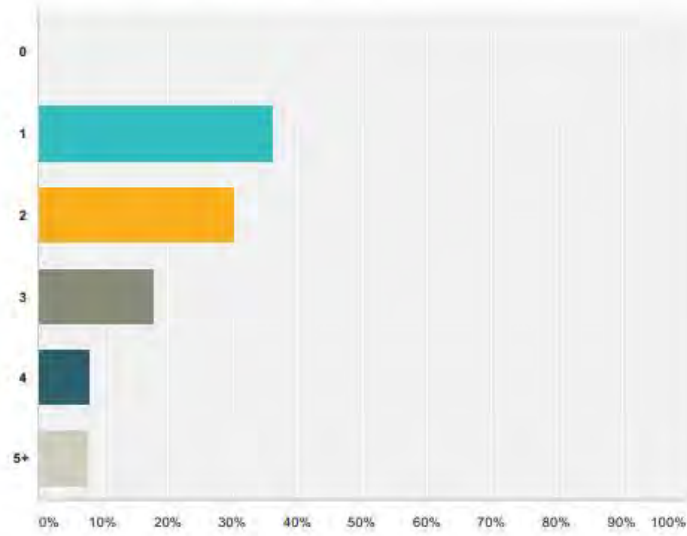


Answer Choices	Responses	
Private practice - I am the principal & employer	53.21%	365
Private practice - I am a Sole Practitioner, I have no employees	11.37%	78
Private Practice - I am a Partner in the Business	8.89%	61
Private practice - I am an Associate	10.64%	73
Multidisciplinary Practice - I am the principal/employer/owner	18.22%	125
Multidisciplinary Practice - I am an Associate	3.21%	22
Hospital - I am employed in a private or public hospital	0.00%	0
Total Respondents: 686		

Fair Work Survey 2017

Q4 How many Chiropractors (including yourself) do you have in your practice?

Answered: 686 Skipped: 0



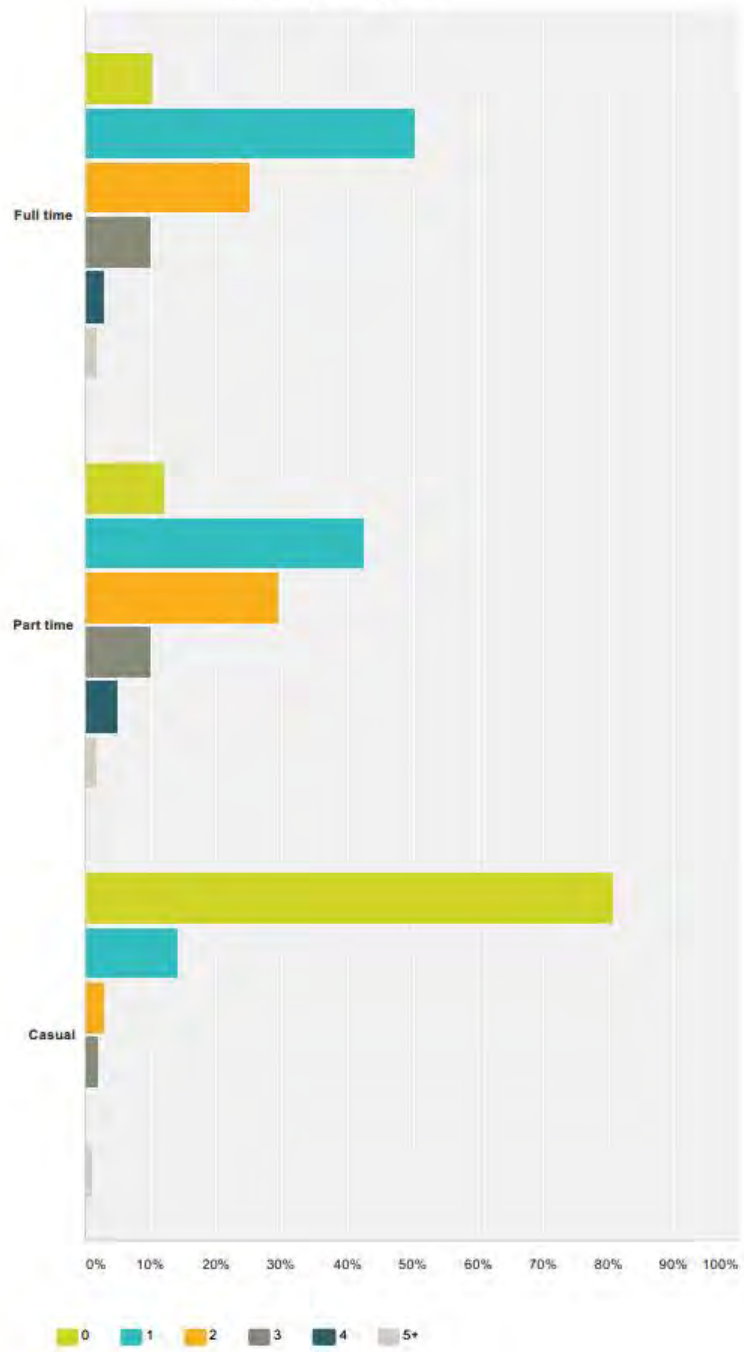
Answer Choices	Responses
0	0.29% 2
1	36.15% 248
2	30.17% 207
3	17.78% 122
4	7.87% 54
5+	7.73% 53
Total	686

Fair Work Survey 2017

Q5 Of these, how many chiropractors in your practice are:

Answered: 686 Skipped: 0

Fair Work Survey 2017



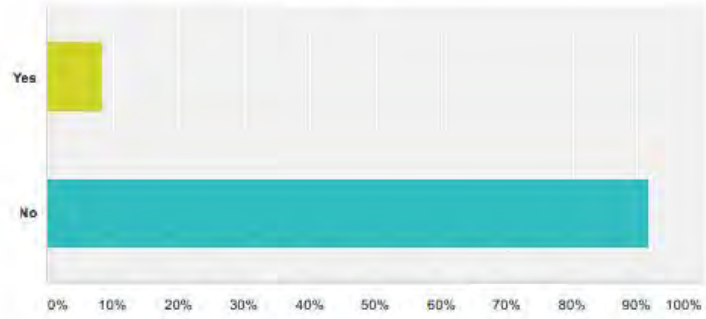
Fair Work Survey 2017

	0	1	2	3	4	5+	Total Respondents
Full time	10.33% 59	50.26% 287	25.04% 143	9.81% 56	2.80% 16	1.75% 10	571
Part time	11.94% 48	42.29% 170	29.35% 118	9.95% 40	4.73% 19	1.74% 7	402
Casual	80.56% 87	13.89% 15	2.78% 3	1.85% 2	0.00% 0	0.93% 1	108

Fair Work Survey 2017

Q6 Do you employ a dedicated Human Resources Manager in your clinic?

Answered: 688 Skipped: 0

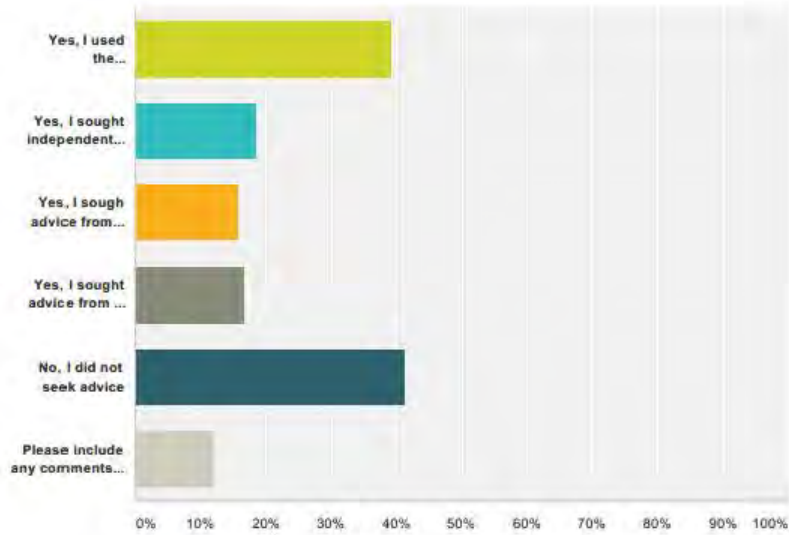


Answer Choices	Responses	
Yes	8.45%	58
No	91.55%	628
Total		686

Fair Work Survey 2017

Q7 Did you seek assistance from the Chiropractors' HR Service or another source prior to contracting staff?

Answered: 686 Skipped: 0

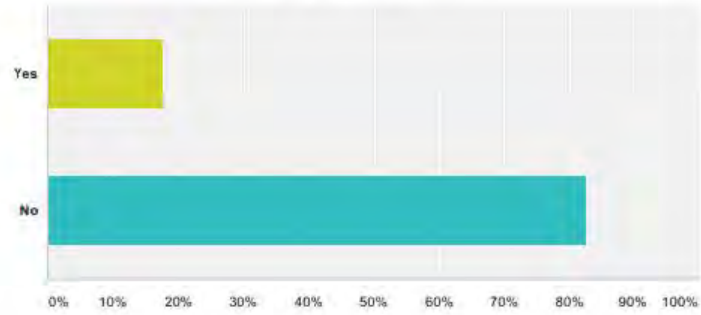


Answer Choices	Responses	Count
Yes, I used the Chiropractors' HR Service	39.21%	269
Yes, I sought independent legal advice	18.37%	126
Yes, I sought advice from Fair Work Australia	15.60%	107
Yes, I sought advice from my fellow colleagues	16.76%	115
No, I did not seek advice	41.25%	283
Please include any comments about your experience.	11.95%	82
Total Respondents: 686		

Fair Work Survey 2017

Q8 Does your practice ONLY operate within the Award's span of ordinary hours (i.e. 6am to 6pm, Monday to Friday)?

Answered: 686 Skipped: 0

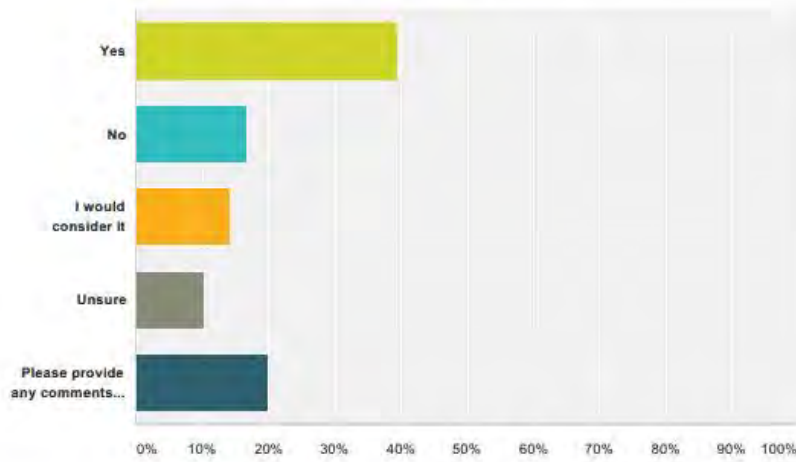


Answer Choices	Responses	
Yes	17.49%	120
No	82.51%	566
Total		686

Fair Work Survey 2017

Q9 If your answer was 'Yes', if the Award permitted you to operate for a longer or different span of hours without incurring penalty or overtime rates, would you likely open longer or different hours?

Answered: 292 Skipped: 394

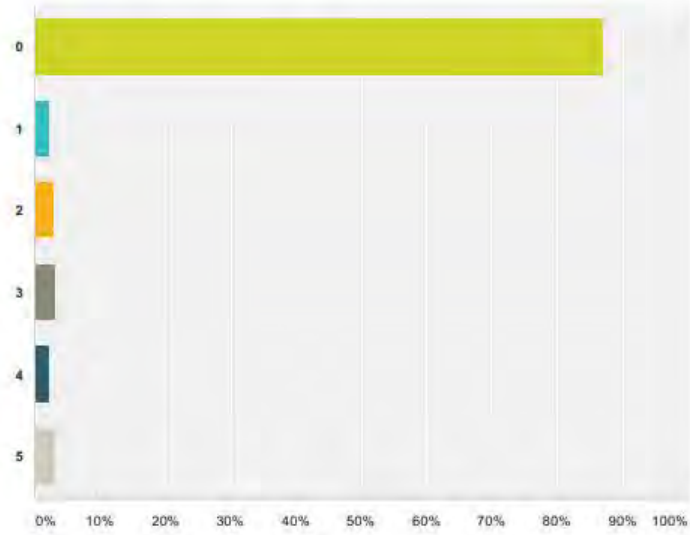


Answer Choices	Responses	
Yes	39.38%	115
No	16.44%	48
I would consider it	14.04%	41
Unsure	10.27%	30
Please provide any comments about the span of hours under the Award.	19.86%	58
Total		292

Fair Work Survey 2017

Q10 How many days per week does your practice open before 7am?

Answered: 686 Skipped: 0

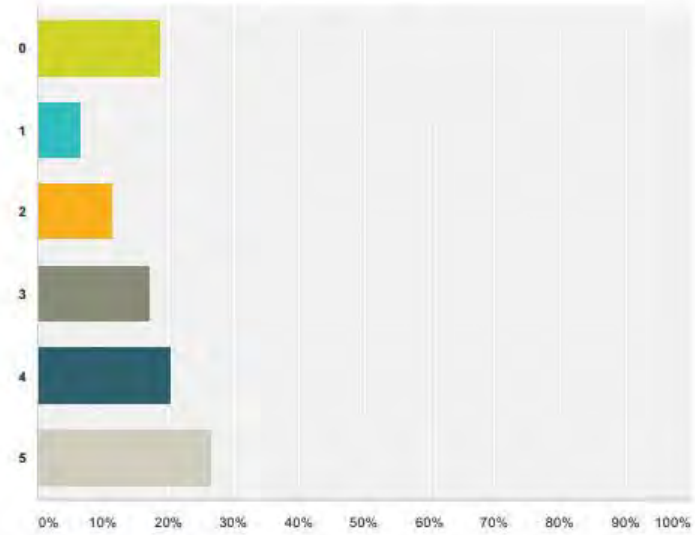


Answer Choices	Responses	
0	86.88%	596
1	2.19%	15
2	2.77%	19
3	2.92%	20
4	2.19%	15
5	3.06%	21
Total		686

Fair Work Survey 2017

Q11 How many days per week does your practice stay open after 6pm?

Answered: 686 Skipped: 0

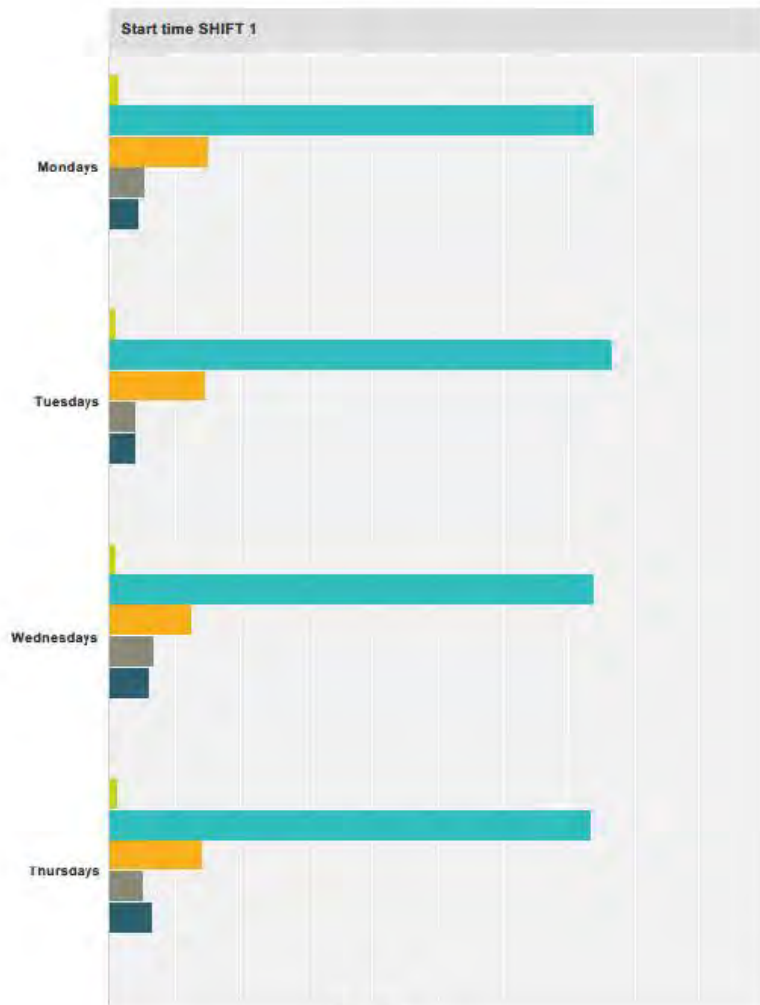


Answer Choices	Responses	
0	18.51%	127
1	6.41%	44
2	11.22%	77
3	17.06%	117
4	20.26%	139
5	26.53%	182
Total		686

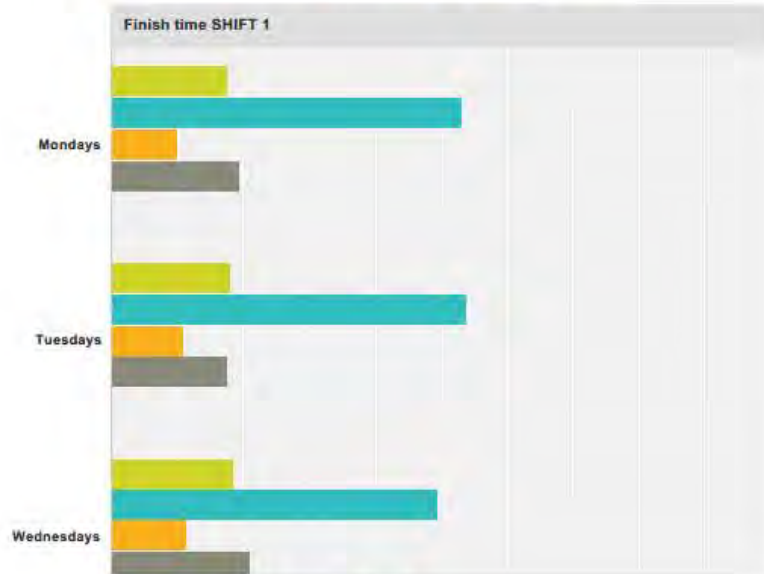
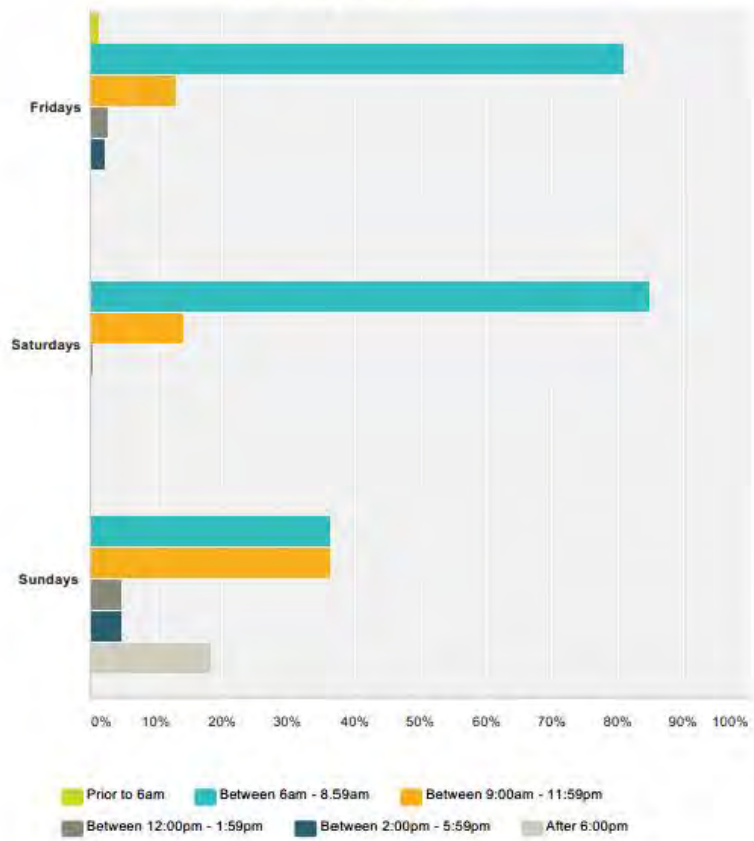
Fair Work Survey 2017

Q12 Please fill in the typical opening hours of your practice (including setting up prior to morning shifts and packing up at the end of the last shift). If one continuous day shift (inc. lunch breaks of one hour or less), please fill out the first two columns. If split shifts (the clinic closes for a lunch break GREATER than one hour), please list the morning and afternoon as two separate shifts by filling in all four columns below.

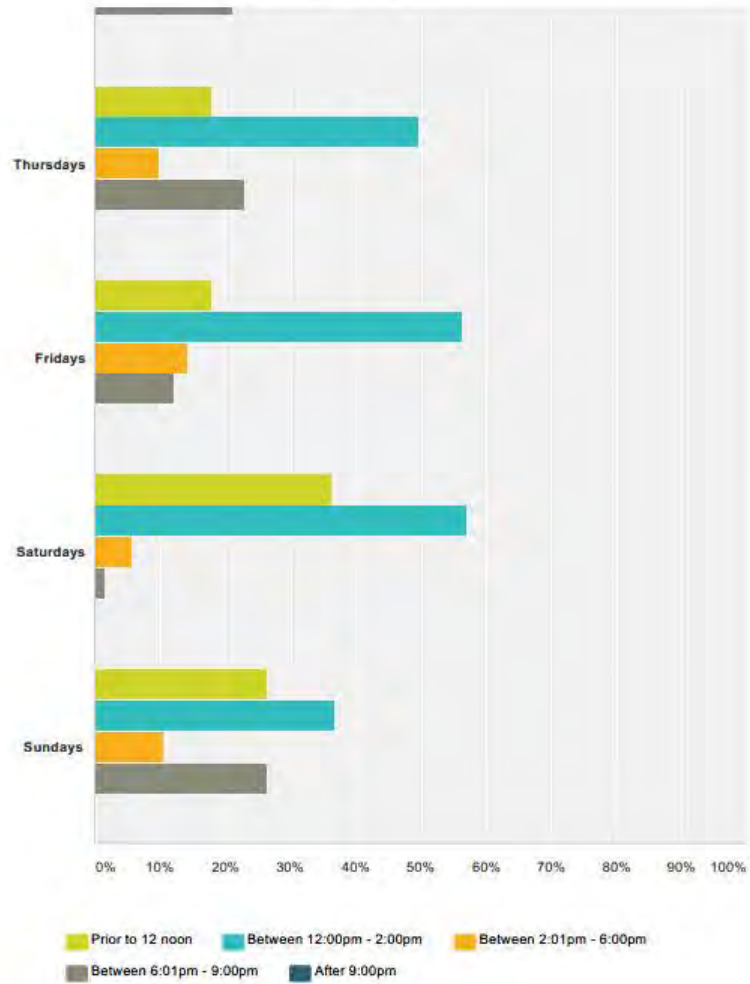
Answered: 562 Skipped: 124



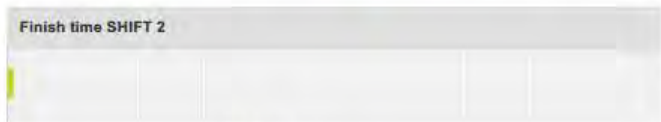
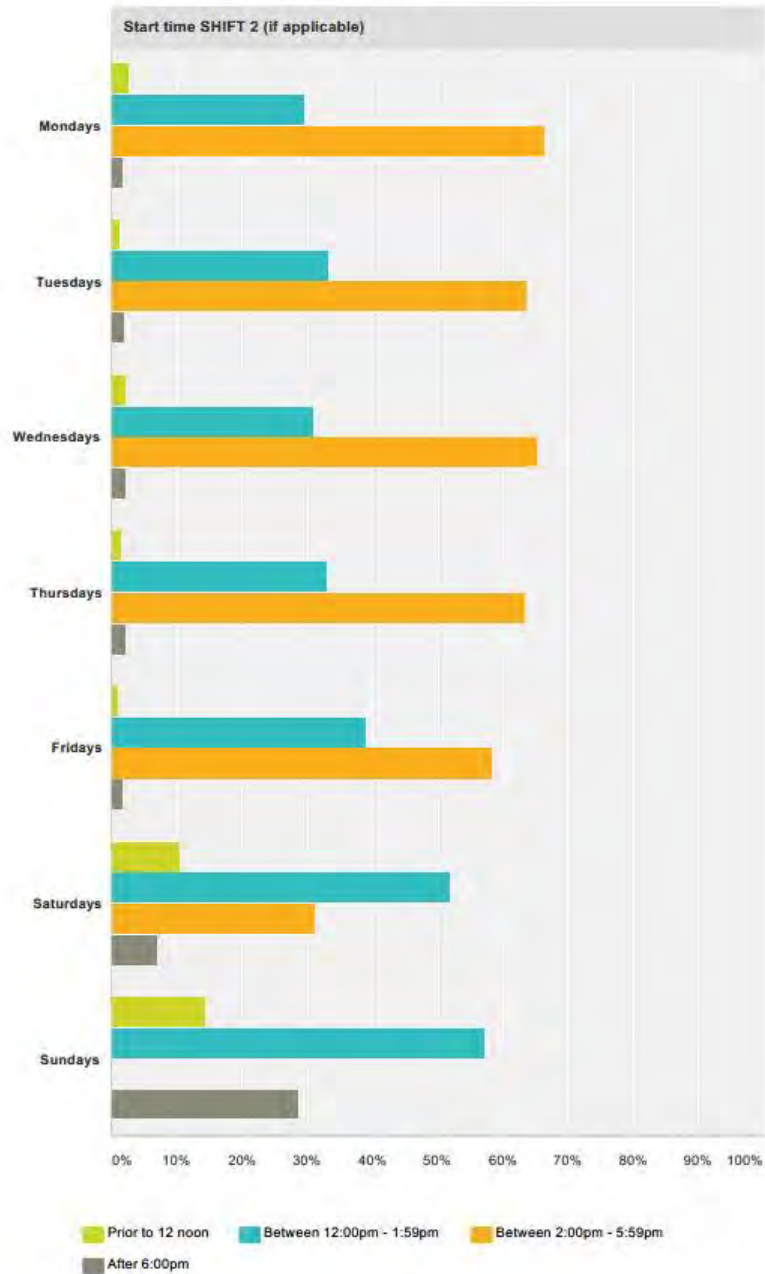
Fair Work Survey 2017



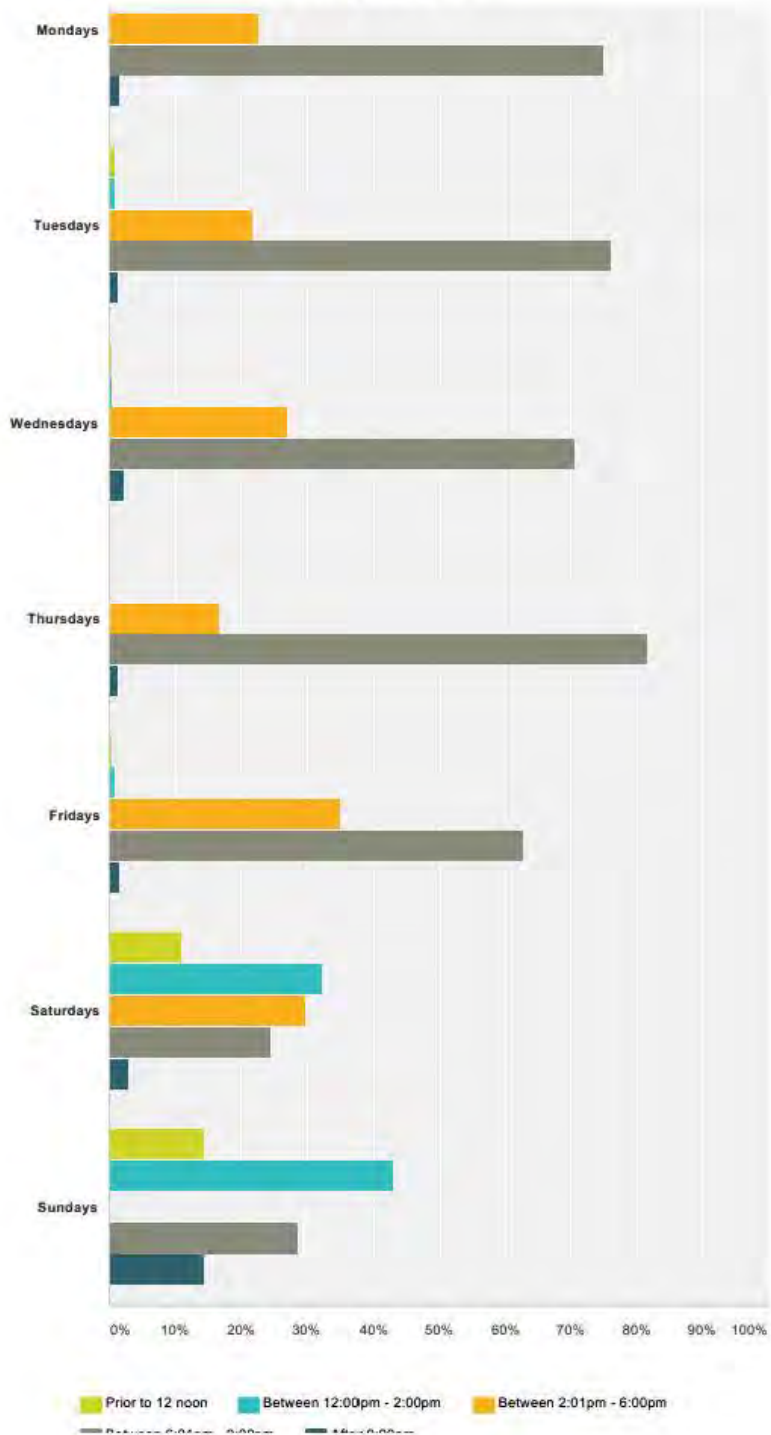
Fair Work Survey 2017



Fair Work Survey 2017



Fair Work Survey 2017



Fair Work Survey 2017

■ between 8:01pm - 9:00pm ■ After 9:00pm

Start time SHIFT 1							
	Prior to 6am	Between 6am - 8:59am	Between 9:00am - 11:59pm	Between 12:00pm - 1:59pm	Between 2:00pm - 5:59pm	After 6:00pm	Total
Mondays	1.53% 8	73.75% 385	14.94% 78	5.17% 27	4.41% 23	0.19% 1	522
Tuesdays	0.98% 5	76.47% 390	14.71% 75	3.92% 20	3.92% 20	0.00% 0	510
Wednesdays	1.04% 5	73.60% 354	12.47% 60	6.65% 32	6.03% 29	0.21% 1	481
Thursdays	1.17% 6	73.24% 375	14.06% 72	5.08% 26	6.45% 33	0.00% 0	512
Fridays	1.36% 7	80.81% 417	12.98% 67	2.52% 13	2.13% 11	0.19% 1	516
Saturdays	0.25% 1	84.73% 333	13.99% 55	0.51% 2	0.25% 1	0.25% 1	393
Sundays	0.00% 0	36.36% 8	36.36% 8	4.55% 1	4.55% 1	18.18% 4	22

Finish time SHIFT 1						
	Prior to 12 noon	Between 12:00pm - 2:00pm	Between 2:01pm - 6:00pm	Between 6:01pm - 9:00pm	After 9:00pm	Total
Mondays	17.55% 83	53.07% 251	9.73% 46	19.45% 92	0.21% 1	473
Tuesdays	17.89% 83	53.66% 249	10.78% 50	17.46% 81	0.22% 1	464
Wednesdays	18.35% 80	49.31% 215	11.24% 49	21.10% 92	0.00% 0	436
Thursdays	17.67% 82	49.57% 230	9.70% 45	22.84% 106	0.22% 1	464
Fridays	17.81% 83	56.22% 262	13.95% 65	11.80% 55	0.21% 1	466
Saturdays	36.07% 123	56.89% 194	5.57% 19	1.47% 5	0.00% 0	341
Sundays	26.32% 5	36.84% 7	10.53% 2	26.32% 5	0.00% 0	19

Start time SHIFT 2 (If applicable)					
	Prior to 12 noon	Between 12:00pm - 1:59pm	Between 2:00pm - 5:59pm	After 6:00pm	Total
Mondays	2.57% 9	29.43% 103	66.28% 232	1.71% 6	350
Tuesdays	1.23% 4	33.23% 108	63.69% 207	1.85% 6	325
Wednesdays	2.05% 6	30.82% 90	65.07% 190	2.05% 6	292
Thursdays	1.53% 5	33.03% 108	63.30% 207	2.14% 7	327
Fridays	1.06% 3	39.01% 110	58.16% 164	1.77% 5	282
Saturdays	10.34% 3	51.72% 15	31.03% 9	6.90% 2	29

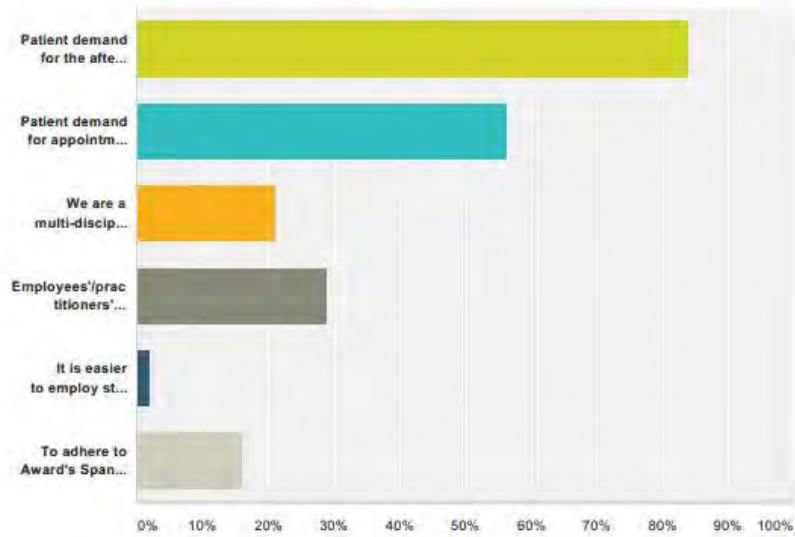
Fair Work Survey 2017

Sundays	14.29%	57.14%	0.00%	28.57%		
	1	4	0	2		7
Finish time SHIFT 2						
	Prior to 12 noon	Between 12:00pm - 2:00pm	Between 2:01pm - 6:00pm	Between 6:01pm - 9:00pm	After 9:00pm	Total
Mondays	0.86%	0.29%	22.57%	74.86%	1.43%	350
	3	1	79	262	5	
Tuesdays	0.61%	0.61%	21.65%	75.91%	1.22%	328
	2	2	71	249	4	
Wednesdays	0.34%	0.34%	26.87%	70.41%	2.04%	294
	1	1	79	207	6	
Thursdays	0.30%	0.30%	16.72%	81.46%	1.22%	329
	1	1	55	268	4	
Fridays	0.35%	0.71%	34.98%	62.54%	1.41%	283
	1	2	99	177	4	
Saturdays	10.81%	32.43%	29.73%	24.32%	2.70%	37
	4	12	11	9	1	
Sundays	14.29%	42.86%	0.00%	28.57%	14.29%	7
	1	3	0	2	1	

Fair Work Survey 2017

Q13 What are the main factors that determine your opening hours? You can pick more than one option below.

Answered: 568 Skipped: 118



Answer Choices	Responses
Patient demand for the after hours appointments (e.g. after 6pm)	83.98% 477
Patient demand for appointment times on weekends	56.16% 319
We are a multi-disciplinary practice with other health professionals that work evenings and/or weekends	20.95% 119
Employees/practitioners' needs for flexible evening/weekend shifts	28.87% 164
It is easier to employ staff to work after business hours	1.94% 11
To adhere to Award's Span of Hours (6am - 6pm, Mon-Fri)	15.85% 90
Total Respondents: 568	

Annexure 2 – Review

MONDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	0	0%	Earlier than 6pm	16	8%
6am and before 7am	2	1%	6-8pm	176	88%
7am and later	191	94.5%	Later than 8pm	1	0.5%
Not open Monday or open by appointment only	7	3.5%	Not open Monday or open by appointment only	7	3.5%
Total	200	100%	Total	200	100%

TUESDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	0	0%	Earlier than 6pm	23	8%
6am and before 7am	1	0.5%	6-8pm	160	88%
7am and later	183	91.5%	Later than 8pm	1	0.5%
Not open Tuesday or open by appointment only	16	8%	Not open Tuesday or open by appointment only	16	8%
Total	200	100%	Total	200	100%

WEDNESDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	0	0%	Earlier than 6pm	26	13%
6am and before 7am	2	1%	6-8pm	146	73%
7am and later	172	86%	Later than 8pm	2	1%
Not open Wednesday or open by appointment only	26	13%	Not open Wednesday or open by appointment only	26	13%
Total	200	100%	Total	200	100%

THURSDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	0	0%	Earlier than 6pm	16	8%
6am and before 7am	2	1%	6-8pm	173	86.5%
7am and later	189	94.5%	Later than 8pm	2	1%
Not open Thursday or open by appointment only	9	4.5%	Not open Thursday or open by appointment only	9	4.5%
Total	200	100%	Total	200	100%

FRIDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	1	0.5%	Earlier than 6pm	73	36.5%
6am and before 7am	3	1.5%	6-8pm	109	54.5%
7am and later	178	89%	Later than 8pm	0	0%
Not open Friday or open by appointment only	18	9%	Not open Friday or open by appointment only	18	9%
Total	200	100%	Total	200	100%

SATURDAY

Opening Times	Number of chiropractors opening at this time	Percentage	Closing Times	Number of chiropractors closing at this time	Percentage
Prior to 6am	1	0.5%	11am and earlier	15	7.5%
6am and before 7am	1	0.5%	After 11am and before 12pm	10	5%
7am and later	140	70%	12-2pm	109	54.5%
Not open Saturday or open by appointment only	58	29%	After 2pm	8	4%
Total	200	100%	Not open Saturday or open by appointment only	58	29%
			Total	200	100%

SUNDAY

- Majority of chiropractic practices are closed (98.5%)
- 1 chiropractic practice is open by appointment only (0.5%)
- 2 chiropractic practices (1%) are open on Sunday (one from 10-2pm and the other 9am-4pm)



Australian Government

Fair Work OMBUDSMAN

Reference number: 4848141
1 June 2012

Ms Jane O'Brien
lobrien@cornwalls.com.au

Dear Ms O'Brien

Thank you for your enquiry to the Fair Work Ombudsman dated 15 May 2012 and your previous enquiries regarding shift penalties.

You are seeking information regarding the the applicable penalty when the employee described works a Saturday under the Health Professionals and Support Services Award 2010 [MA000027] (Health Professionals Modern Award).

Background

The employee works the following shifts:

- Monday to Friday 4:00 pm – 8:00 pm
- Saturday 8:00 am – 12:00 pm

The employer is a chiropractic practice.

We are of the view that the employee would be considered a shiftworker.

The employee would be entitled to a shift loading while working Monday – Friday, but would not be entitled to any loading when working on Saturday.

Reasoning

Span of hours

Clause 24 of the Health Professionals Modern Award provides the span of hours for private medical, dental and pathology practices; private medical imaging practices; and physiotherapy practices. Clause 24.1 also provides a general span of hours for businesses which do not fall within one of these categories. It is our view that a chiropractic practice would not fall within the categories listed above and would therefore use the general span of hours detailed in clause 24.1. Clause 24.1 states:

Unless otherwise stated, the ordinary hours of work for a day worker will be worked between 6.00 am and 6.00 pm Monday to Friday.

Shift allowances/penalties

Clause 3 of the Health Professionals Modern Award defines the term 'shiftworker' as follows:

shiftworker is 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.



Australian Government

Fair Work OMBUDSMAN

We have interpreted this to be a reference to an employee who performs the majority of their work outside the span of hours defined in clause 24.1. Therefore, it is our view that the employee described fits the above definition of a shiftworker.

Clause 29 of the award provides the following:

Where the ordinary rostered hours of work of a shiftworker finish between 6.00 pm and 8.00 am or commence between 6.00 pm and 6.00 am, the employee will be paid an additional of 15% of their ordinary rate of pay.

Therefore, the employee is entitled a 15% loading for the shifts worked from Monday to Friday, as those shifts finish between 6.00pm and 8.00am. However, the shift performed on Saturday does not fall within the span described in clause 29. Therefore this shift would not attract the 15% loading.

Saturday penalty

Clause 26 of the award provides weekend penalties as follows:

26. Saturday and Sunday work

26.1 For all ordinary hours worked between midnight Friday and midnight Sunday, a day worker will be paid their ordinary hourly rate and an additional 50% loading.

The weekend penalty described above is applicable to day workers only. As the employee is considered to be a shiftworker and not a day worker, they would not be entitled to the penalties described in clause 26.1.

Ordinary hours and overtime

The ordinary hours of work under the award are as follows:

23. Ordinary hours of work

23.1 The ordinary hours of work for a full-time employee will be an average of 38 hours per week in a fortnight or four week period.

23.2 Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.

Clause 28 of the Health Professionals Modern Award provides for overtime, as follows:

28. Overtime penalty rates

28.1 Overtime rates

(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:

- (i) time and a half for the first two hours; and
- (ii) double time thereafter.

(b) All overtime worked on a Sunday will be paid at the rate of double time.



Australian Government

Fair Work OMBUDSMAN

(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.

It is our view that overtime penalties would be applicable if the employee works outside their ordinary rostered hours, over 38 per week, or over 10 hours per day.

We emphasise that our views as set out above are not determinative and that a Court or tribunal asked to consider these issues may come to a different conclusion.

I trust this information has been of assistance. If you require further clarification, please contact me directly on (03) 9954 2749 between 8.00 am and 6.00 pm, Monday to Friday, quoting the above reference number.

Yours sincerely

Conrad Kotnik
Team Leader (A/g) – Fair Work Infoline
Fair Work Ombudsman

IMPORTANT: Sign up for updates about the 2012 Annual Wage Review

You can sign up for email updates about the 2012 Annual Wage Review. We'll let you know when the decision is coming, when it's announced and how you can prepare for the changes. We'll also let you know when your award has been updated in our system so you can find up-to-date obligations in PayCheck Plus and our other wage tools.

To sign up for updates, please click [here](#).

Important note: Disclaimer

FWO is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws. There are a number of factors that might affect the applicability of the information written here

These include:

- whether you have provided us with all the relevant and correct information about your situation;
- changes in your circumstances; and
- changes in the law.

It is your responsibility to comply with workplace laws that apply to you. FWO's information is not legal advice. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered.