



IN THE FAIR WORK COMMISSION

Matter No: AM2014/204 and AM2016/31

Title: Health Professionals and Support Services Award
2010 – substantive issues

SUBMISSIONS IN REPLY

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Filed on behalf of:	Health Services Union		
Filed by:	Leigh Svendsen Senior National Industrial Officer	Mobile:	0418 538 989
Address:	Suite 46, 255 Drummond St Carlton VIC 3053		
Phone:	03 9020 1870	Email:	leighs@hsu.net.au

HSU National

Suite 46, 255 Drummond Street, Carlton VIC 3053

PO Box 98, Carlton South VIC 3053

(03) 9020 1877 | hsu@hsu.net.au | www.hsu.net.au | ABN 68 243 768 561

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Introduction

1. The Health Services Union [HSU] makes these brief submissions in reply in relation to the *Health Professionals and Support Services Award 2010* [HPSS Award], in accordance with Directions of Vice President Catanzariti dated 23 November 2016 and further directions dated 24 March 2017.
2. The HSU continues to rely on previous submissions filed in AM 2014/204 and more recently in AM2016/31.

Preliminary matters

3. The legislative basis for the Fair Work Commission’s four yearly review of the modern awards is s 156 of the FW Act, which sets out the requirement to conduct the review.
4. In its foundational decision concerning the 2014 4 yearly review,¹ the FWC Full Bench outlined the preliminary jurisdictional issues which are required to be met in order for a substantive variation to be made to a modern award.
5. Firstly, the Commission must ensure that the 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 modern award objective set out in s 134(1) of the FW Act.²
6. Secondly, any variation to a modern award must adhere to the requirements surrounding the content of modern awards, according to s 136 of the FW Act, which sets out the matters that may and may not be included in a modern award.³
7. In seeking to ensure a ‘stable’ system of modern awards, in accordance with the modern awards objective, in particular s 134(1)(g), the Full Bench held that where a ‘significant change’ to a Modern Award is proposed in the four yearly review process, ‘it must be supported by a

¹ [\[2014\] FWCFB 1788](#) 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues.

² *ibid*, [23].

³ *ibid*, [40].



*submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation’.*⁴

Medical Imaging Employment Relations Group

8. The Medical Imaging Employment Relations Group [MIERG] has submitted a claim to insert a new Schedule M in the HPSS Award.⁵
9. MIERG’s submission that the pre-modern *Medical Imaging Employment Relations Group and Health Services Union of Australia Consent Award* be wholly reinstated by making it a schedule to this Award dismisses the entire award modernisation process, which was intended to streamline and simplify the award system.
10. The HSU believes it is problematic that MIERG’s proposal is not accompanied by any probative evidence (indeed any evidence at all) supporting its proposal to effect such a significant change to the HPSS Award. Neither has it outlined any cogent reasons as to why it is appropriate or necessary to insert separate provisions for medical imaging practices under an entirely new schedule, thereby excluding medical imaging practices from the current provisions of the Award.
11. It does not meet the modern awards objective, in particular with regards to s 134(1)(g), and the criterion set out by the Fair Work Commission Full Bench at the outset of the 4 yearly review. Indeed the very application for a separate schedule which only applies to the medical imaging employers under this award, in the HSU’s submission, contradicts s 134(1)(g), in that it creates unnecessary complexity in the award, making it more difficult for users to understand.
12. The very brief reasons that MIERG provide in favour of their submissions are also vague, unsubstantiated, and frankly somewhat fanciful. It is unclear what precisely is meant by ‘...a spectrum of options for employees to meet theirs and their families’ needs by working creatively long days in short to short days in long weeks in a culture of ongoing harmonious relationships, innovation and productivity improvements’.⁶
13. It is the HSU’s contention that the award provides sufficiently for flexible work practices, and that MIERG have provided no evidence or cogent reasons as to how the current award is deficient in this regard.
14. Relevantly, the HPSS Award already provides for a method to vary the application of certain terms of the award to meet the needs of the employer and individual employees, under the Award Flexibility provisions in clause 7. Clause 7 already meets the requirement of the modern award objective per s 134(1)(d), to promote flexible modern work practices.

⁴ *ibid*, [23].

⁵ [MIERG 17 March 2017](#)

⁶ [MIERG submissions 17 March 2017](#), p 2



Span of hours

15. The Chiropractors Association of Australia submits that the current provisions in the HPSS under the span of hours clause do not meet the needs of chiropractic practices, and submits that an additional span of hours should be included at 24.5 of the award.
16. The MIERG submissions include, albeit in a proposal for a new schedule, a new span of hours.
17. These submissions, if granted, would take the number of applicable 'span of hours' sub-clauses from five to seven. There were in fact others proposed by parties who have not lodged substantive submissions in support of their applications lodged in 2014 in this award.
18. The HSU reiterates its submissions that attempts to meet the varied needs of each specialised sub-sector of the health industry is inappropriate and conflicts with the underlying objectives of modern awards.
19. Modern awards, together with the National Employment Standards, must provide a '*fair and relevant minimum safety net of terms and conditions*'⁷, taking into account (among other things), *134(1)(b) the need to encourage collective bargaining*'.
20. We accept that this requires that the Commission exercises its powers in a balancing act, that no specific objective takes primacy is attached to any of the s134(1) provisions. However we submit that the ability to negotiate enterprise agreements, in addition to the flexibility provisions of the award, enable negotiated agreements between employers and their employees which facilitate a span of hours that would meet the specific needs of a chiropractic practice without an additional span of hours clause in the award.
21. In the HSU's submission the perception that chiropractors require a specific span of hours arises from the numerous specific spans currently included in the award. Indeed HSU believes the CAA application inadvertently supports the HSU position for a single span by highlighting the inequity of multiple spans which do not meet the exact span required by a specific sub-sector of health.

List of common health professionals

22. The question concerning the emphasis to be placed on the Schedule B List of common Health Professionals was first raised by the Award Modernisation team during the drafting process of the Exposure Draft of the HPSS Award. The question was confined to whether or not the list was exhaustive or indicative.
23. The HSU made substantial submissions in July 2015⁸, in particular at paragraphs 10-24, on which it continues to rely.
24. The Dental Hygienist Association of Australia [DHAA] submitted at that time that the list must be exhaustive because they had successfully applied to vary the initial award in 2010 to have Dental

⁷ s134

⁸ [HSU Submissions 16 July 2015](#)



Hygienists removed from the Schedule. They also sought to effectively extend, or in their submission, confirm an exclusion for Oral Health Therapists.

25. The DHAA relies essentially on the decision⁹ [2009] AIRFCB 958 [sic] during the making of the HPSS Award to remove the occupation 'Dental Hygienists' from the provisional drafts of the award.

26. At the time of the application and decision no alternate position was put concerning the views of dental hygienists, and no application was made concerning oral therapists. The decision notes at [PN4]

"We have no reason to believe that the DHAA does not represent a significant number of dental hygienist employees. Further, no other organisation or person has made any submission on the application."

27. On 28 February this year the Australian Dental and Oral Health Therapists Association, as a peak national representative body for dental and oral health therapists, filed submissions supporting the inclusion of oral health therapists in the HPSS Award.

28. The HSU, prior to the emergence of another relevant association, believed that the DHAA position could be accommodated within a general position that the list of common health professionals is an indicative list by a specific exclusion for dental hygienists. With the change in circumstances evidenced by the application from another representative body, the HSU now believes the Commission should review its decision in light of the information now available.

29. Modern awards provide a minimum set of terms and conditions¹⁰ specific to an industry and/ or occupation. At no point in the legislation or the awards are there provisions preventing or impeding employees and employers from negotiating terms and conditions in excess of the modern award floor.



Leigh Svendsen
Senior National Industrial Officer

⁹ [\[2009\] AIRCFB 948](#)

¹⁰ s134.1

