

FAIR WORK COMMISSION

Title of Matter:	Four yearly review of modern awards
Section:	s.156 -4 yearly review of modern awards
Subject:	Health Professionals and Support Services Award 2010
Matter Number:	AM2016/31

**SUBMISSIONS IN REPLY BY THE AUSTRALIAN DENTAL ASSOCIATION
AND THE AUSTRALIAN DENTAL PROSTHETISTS ASSOCIATION**

1. On 19 December 2019 the Commission issued a decision which determined that the List in Schedule C of the HPSS Award is to be indicative and that it was premature to determine whether any particular Health Professional occupations should not be covered by the HPSS Award. At the same time the Commission made directions for determining :
 - Which Health Professional occupations should not be covered by the HPSS Award.
2. These submissions are made in reply to the submissions of the Health Services Union filed on 14 April 2020.
3. The question before the Commission falls to be determined within two constraints within the *Fair Work Act*:
 - a. S.143(7) in relation to classes of employees who have not traditionally been covered by awards; and
 - b. S.163(1) in relation to reducing the coverage of a modern award.
4. If the provisions of s.143(7) are met, the HPSS Award must not be expressed to cover that class of employees.
5. Similarly s.163(1) constrains the discretion of the Commission in that if certain classes of employees are covered by the HPSS Award, the Commission must not vary the award to remove them from coverage.
6. Within the boundaries of those two constraints, the Commission has discretion as to whether or not particular employees should be covered by the modern award.

7. The ADA and ADPA have submitted that Dentists and Dental Prosthetists are employees that should not be covered by the HPSS Award, for reasons that include that :
 - a. The professions of Dentists and Dental Prosthetists have traditionally been award free;
 - b. the Award has never been intended to cover professions such as Dentists and Dental Prosthetists; and
 - c. The work of Dentists and Dental Prosthetists is not of a similar nature to those listed in the schedule and recognised as being covered by the award.
8. The submission of the HSU filed on 14 April 2020 dispute these propositions and maintain the position the HSU adopted in the award modernisation process that every employee should be covered, regardless of previous award coverage and role. This includes Dentists and Dental Prosthetists.¹ The one concession the HSU has made is that it now accepts that medical practitioners should not be covered by the HPSS Award.

Dentists and Dental Prosthetists have traditionally not been covered by awards

9. S.143 provides at (5) that modern award coverage in relation to employees must be specified by inclusion in a specified class or s classes and at (6) that a class may be described by reference to a particular industry or part of an industry, or particular kinds of work, although it may also be expressed in other ways.
10. It is in this context that s.143 provides at (7) that a modern award must not cover classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards.
11. There is nothing new about the occupations of Dentists and Dental Prosthetists. The ADA and ADPA have previously submitted that there was no

¹ [Submissions of the ADA and ADPA uploaded on 15 October 2019](#) at [39] and [66] Supplementary submissions of the HSU, page 100 of [Annexures A-J to the Submissions of the Australian Dental Association](#).

significant award coverage for either profession, with the exceptions principally involving employees in the public sector, representing a small percentage of the professions, and in Tasmania.²

12. The expression used in s.143(7) is “have traditionally not been covered”. The effect of the HSU submission in that this requires the absence of award coverage.³ Interpreting s.143(7) in this way would lead the Commission into error.
13. The process of construing a statutory provision involves striving to give meaning to every word of the provision.⁴ Had the parliament intended that the provision required the absence of award coverage, the word “traditionally” would have been omitted.
14. Traditionally does not require that something be universal and without exception. On the contrary it carries with it notions as to the predominant nature of a situation, persisting over time.
15. To give a simple example, Anzac Day marches traditionally occur on 25 April, even though not every ex-serviceperson participates in nor was able to participate in marches in 2020.
16. The HSU appear to submit Dentists and Dental Prosthetists have been traditionally covered by awards. Most of the Awards relied on by the HSU have long been in evidence⁵ and, contrary to the HSU’s submissions, demonstrate that there was no significant award coverage for Dentists,⁶ nor for Dental Prosthetists.

² [Submissions of the ADA and ADPA uploaded on 15 October 2019](#) at paragraph 33.

³ [Submissions of the HSU uploaded on 14 April 2020](#) at paragraph [28].

⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [71].

⁵ [Witness statement of Eithne Mary Irving uploaded on 13 June 2017](#) at paragraph 24 and the Exhibit at pages 172 to 557.

⁶ Award Modernisation: Stage 4 [2009] AIRCFB 865 at [126].

Award coverage in the public service

17. It would appear to be uncontroversial that award coverage for Dentists and Dental Prosthetists in the public service of the states was as follows:
 - a. there were awards covering both professions in NSW,⁷ Queensland⁸ and Tasmania;⁹
 - b. there was no award coverage for either profession in South Australia or Western Australia; and
 - c. only Dental Prosthetists were covered by an award in Victoria.¹⁰
18. The coverage of the HPSS Award is specified by reference to the health industry. The classes of employee covered by the HPSS Award however does not include employees in the public service of a state in that:
 - a. the HPSS Award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award.¹¹
 - b. The public service employees in NSW, Queensland Tasmania, South Australia and Western Australia are not covered by any national system award as those states have not referred their public service employees to the national system.
19. Victoria is the only state to have referred its public sector employees to the national system. There is no state reference public sector award that covers Dentists. Dental Prosthetists are currently covered by the State reference public sector transitional award.¹²
20. The HSU has made an application for a state reference public sector modern award. The Commission has determined that such an Award should be made,

⁷ *Health Employees Dental Officers (State) Award (C4296); Health Employees (Dental Prosthetists and Dental Technicians (State) Award (C7074).*

⁸ *District Health Services Employees' Award – State 2003 (Qld).*

⁹ The confusingly named Dentists Award ([AN170025](#)) which covered all Dental Mechanics and the Dental Employees Award ([AN170024](#)) which covered Dentists in the public sector.

¹⁰ Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 [Transitional] [[AT783945](#)], by reference to the classification of "Advanced dental technician".

¹¹ HPSS Award at clause 4.4

¹² Health and Allied Services - Public Sector - Victoria Consolidated Award 1998 [Transitional] [[AT783945](#)], by reference to the classification of "Advanced dental technician": [statement of Gregory Roche](#) uploaded 14 April 2020 at [5].

which will be given effect once the terms are finalised.¹³ The apparent lack of urgency in this respect would appear to be due to the existence of an enterprise agreement.¹⁴ Consistent with the absence of award coverage for Dentists in the public service in Victoria, the draft award is not proposed to cover Dentists.¹⁵

Dentists

21. The vast majority of Dentists have their principal role in private practice, 84.0% in 2017, while just 11.2% had their principal role in the public sector.¹⁶
22. While the HSU asserts that coverage was dealt with on a state by state basis, the only awards outside of the public sector that covered Dentists were:
 - a. Aboriginal and Torres Strait Islander controlled health services;¹⁷ and
 - b. In Victoria in relation to the Health and Community Services sector.¹⁸
23. In 2017 0.5% of Dentists had their principal role in an Aboriginal health service and 0.5% in other community health care service.¹⁶
24. To the extent that the HSU relies upon the various Awards covering Dentists which applied to Aboriginal and Torres Strait Islander controlled health services,¹⁹ such reliance is misplaced. In the Award modernisation process the

¹³ Application to make a State reference public sector modern award [\[2018\] FWCFB 5557, DRAFT Health Professionals, Medical Scientists and Support Services \(Victoria\) State Reference Public Sector Award](#).

¹⁴ [Allied Health Professionals \(Victorian Public Health Sector\) Single Interest Enterprise Agreement 2016-2020](#).

¹⁵ Health Professionals, Medical Scientists and Support Services (Victoria) State Reference Public Sector Award 20XX [\[MA00001XX\]](#).

¹⁶ [Witness statement of Eithne Mary Irving uploaded on 14 October 2019](#) at Annexure 2, page 63.

¹⁷ The [Health Services Union of Australia \(Aboriginal and Torres Strait Islander Health Services\) Award 2002 \(AP819920\)](#), [Aboriginal Community Controlled Health Services \(Northern Territory\) Award 2002 \(AP817919\)](#) and [Aboriginal Organisations Health and Related Services \(Northern Territory\) Award 2002 \(AP818988\)](#). Each of these awards contain classifications for Dentists and Dental therapists, but not Dental Prosthetists or Dental Technicians.

¹⁸ [Health and Community Services Industry Sector – Minimum Wage Order – Victoria 1997 \(AP784047\)](#).

¹⁹ The [Health Services Union of Australia \(Aboriginal and Torres Strait Islander Health Services\) Award 2002 \(AP819920\)](#), [Aboriginal Community Controlled Health Services \(Northern Territory\) Award 2002 \(AP817919\)](#) and [Aboriginal Organisations Health and Related Services \(Northern Territory\) Award 2002 \(AP818988\)](#). Each of these awards contain classifications for Dentists and Dental therapists, but not Dental Prosthetists or Dental Technicians.

Commission decided that the operation of aboriginal community controlled health organisations should be regulated by a separate modern award.²⁰

25. The Commission should not extend coverage of the HPSS Award to employees in Aboriginal and Torres Strait Islander controlled health services, an industry covered by its own modern award. This is particularly so in circumstances where the Commission has decided that Dentists should not be covered by that modern award²¹ and there does not appear to be any application to vary that award to cover Dentists or Dental Prosthetists.
26. The ADA and ADPA have previously submitted that there was no significant award coverage of Dentists.²² Given the predominance of Dentists being engaged in the private sector, the Commission should conclude that Dentists are a class of employees who have traditionally not been covered by awards.

Dental Prosthetists

27. Dental Prosthetists are similarly predominantly engaged in the private sector. In 2017 86.7% had their principal role in private practice, while just 10.8 % had their principal role in the public sector.²³ The only award to apply to the private sector was in Tasmania.²⁴ Mr Brownlie's evidence demonstrates the lack of significance of this award coverage, in that despite his long involvement in the profession in Tasmania and the small number of Dental Prosthetists in that state, he is not aware of any Dental Prosthetist who is engaged as an employee in the private sector.²⁵
28. Given the predominance of Dental Prosthetists being engaged in the private sector and the absence of most public servants from the national system, the Commission should conclude that Dental Prosthetists are also a class of employees who have traditionally not been covered by awards.

²⁰ Award Modernisation: Stage 4 [\[2009\] AIRCFB 865](#) at [125].

The Aboriginal Community Controlled Health Services Award 2010 [\[MA000115\]](#)

²¹ See for example clause 4.3(a) of the Miscellaneous Award 2010 [\[MA000104\]](#).

²² [Submissions of the ADA and ADPA uploaded on 15 October 2019](#) at paragraph 33.

²³ [Statement of Ms Jenine Bradburn uploaded on 14 October 2019](#) at Annexure 4, page 30.

²⁴ [Statement of Ms Jenine Bradburn uploaded on 14 October 2019](#) at [19] and Annexure 6 at page 40.

²⁵ Statement of Russell Brownlie at paragraph [14].

The nature and seniority of Dentists

29. The HSU submit that the absence of award coverage was likely to be because most Dentists were self-employed or engaged as independent contractors.²⁶ This submission should be rejected by the Commission because it does not explain why there is no significant award coverage for employees as these facts are not alternative explanations. To the contrary, the high level of professional autonomy that underscores the nature and seniority of the role explains not only the absence of award coverage, but also the high levels of independence, whether as self-employed or as contractors.

The nature and seniority of Dental Prosthetists

30. The HSU seeks to group together Dental Prosthetists, Dental Hygienists and Oral Health Therapists. With respect these do not form a class of employees, nor is there any history within the award coverage of such employees being grouped together. Nor is there any evidence of clinical relationship between the roles.
31. Dental Prosthetists have a long history of independent practice, dating back to the 1950s in Tasmania, when Dental Mechanics as they were called were granted chairside status and a direct care relationship with a patient.²⁷
32. As with Dentists, it is true that most Dental Prosthetists are self-employed or engaged as independent contractors. Again the high level of professional autonomy that underscores the nature and seniority of the role explains not only the absence of award coverage, but also the high levels of independence, whether as self-employed or as contractors.

Distinctions between private and public sector employment

33. The HSU accept that Doctors should not be covered by the HPSS Award, and apparently accept the distinction between employment in the what might be described as the quasi public sector, covering hospitals and community sectors, in the very limited way in which doctors are covered by the Medical

²⁶ [Submissions of the HSU uploaded on 14 April 2020](#) at paragraph [28].

²⁷ Statement of Russell Brownlie at paragraph [11].

Practitioners Award 2010 [[MA000031](#)] and the general private sector in which Doctors are not covered by any modern award.²⁸

34. For reasons that are entirely unexplained, the HSU adopt a different approach in relation to Dentists and Dental Prosthetists.
35. The HSU correctly point out the clinical work performed by Dental Prosthetists is substantially the same across both public, community and private sectors.
36. That however ignores the seniority of Dentists and Dental Prosthetists in the private sector. The difference in the nature and seniority of the role is fundamentally illustrated by a range of considerations:
 - a. The *Fair Work Act* creates a separate and distinct provision in relation to state public service employees, by way of a State reference public sector transitional award or State reference public sector modern award.
 - b. Awards or enterprise agreements in the public sector are not minimum rates, but instead are the rates actually paid for work;
 - c. The public service is subject to direct constraints imposed by legislative policy, such as in NSW the policy, imposed by legislative fiat, that caps wage increases at 2.5% per annum;
 - d. Awards in the public sector have traditionally had a coverage that extends well beyond professional roles and into the management of the public service.

The work of Dentists and Dental Prosthetists is not similar to work traditionally covered by an Award

37. The HSU makes no submission that the work of Dentists is of a similar nature to work that has traditionally been regulated by such awards.
38. In respect of Dental Prosthetists the HSU submit that the work is of a similar nature to that of:
 - a. Dental Technicians; and
 - b. Orthotists / prosthetists.

²⁸ *Gourabi v Westgate Medical Centre* [[2019](#)] [FWCFB 3874](#) at [28].

39. Neither alleged similarity withstands scrutiny.
40. In relation to Dental Technicians, there are fundamental distinctions between roles that are elided by the HSU submissions, in that:
- a. A Dental Prosthetist is required to be registered with the Dental Board of Australia, subject to registration requirements, guidelines and codes of practice in relation the conduct of their profession. There is no requirement or capacity for a Dental Technician to be registered;
 - b. A Dental Technician does not have any right of independent dental practice involving the treatment of patients.²⁹
 - c. Mr Roche gives a detailed overview of his clinical role as a Dental Prosthetist.³⁰ None of this clinical work can be performed by a Dental Technician.
 - d. The work of a Dental Technician is limited to the laboratory work referred to by Mr Roche,³¹ being the provision of technical services on the prescription of either a Dental Prosthetist or a Dentist.³⁰
41. The alleged similarity of the work of an orthotist or prosthetist is not supported by any evidence as to the nature of that work. They do not appear to be subject to regulation such as applies to Dental Prosthetists and Dentists. Such evidence as exists is limited to references in two Victorian enterprise agreements. Under both the Public Health Sector enterprise agreement³¹ and the Community Health Centres enterprise agreement,³² the roles of Dental Prosthetist and Orthotist/Prosthetist are treated differently. An Orthotist/Prosthetist is within the AHP1 classification whilst a Dental Prosthetist is within the AHP2 classification.

²⁹ Statement of Russell Brownlie at paragraph [11].

³⁰ [Statement of Gregory Roche](#) uploaded 14 April 2020 at [12]-[19].

³¹ [Allied Health Professionals \(Victorian Public Health Sector\) Single Interest Enterprise Agreement 2016-2020](#) at pages 128, 135 136 and 173.

³² [Victorian Stand Alone Community Health Centres Allied Health Professionals Enterprise Agreement 2017 – 2021](#) at pages 91, 92, .

Conclusion as to Award coverage

42. For the reasons set out above, the Commission should conclude that in relation to the industry covered by the HPSS Award, Dentists and Dental Prosthetists are classes of employees:
- a. who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); and
 - b. who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.
43. It follows from this conclusion that section 143(7) precludes the Commission from varying the HPSS Award to cover Dentists and Dental Prosthetists.

Dentists and Dental Prosthetists should not be covered by the HPSS Award

44. If the Commission were to conclude, contrary to these submissions, that section 143(7) does not preclude the HPSS Award from covering Dentists and Dental Prosthetists, it is a matter for the Commission's discretion whether the HPSS Award should cover these professions.
45. The ADA and ADPA have previously submitted that
- a. There has been no significant award coverage of Dentists and Dental Prosthetists within the scope of coverage of the HPSS Award;
 - b. the HPSS Award was not previously intended to cover Dentists and Dental Prosthetists;
 - c. The work of Dentists and Dental Prosthetists is not of a similar nature to those listed in the schedule and recognised as being covered by the HPSS Award;
 - d. The members of the associations who are employees do not seek to be covered by the HPSS Award;
 - e. there is no application to extend the coverage of the Award;

- f. there is no evidence to support extending the Award to include Dentists and Dental Prosthetists;
 - g. there have been no submissions as to how the coverage of Dentists and Dental Prosthetists it is necessary to achieve the modern awards objective.
46. The HSU, in opposing the clarification confirming that the HPSS Award does not cover Dentists and Dental Prosthetists, are proposing a significant change. Regrettably the position of the HSU is not supported by reference to the objects of the Act set out in s.3 and the object of Part 2-3 as expressed in s.134, nor how each of the matters set out in paragraphs 134(1)(a) to (h) should be treated as matters of significance in the decision-making process.
 47. While the HSU have filed voluminous evidence, none of it suggests that Dentists or Dental Prosthetists are low paid, nor that being covered by the Award would improve the pay or conditions of Dentists or Dental Prosthetists.
 48. The HSU does not address in any way the valid concerns that, far from acting as a safety net, the stipulation of an award rate of pay for Dentists or Dental Prosthetists may in fact reduce their remuneration by suggesting that a fair and reasonable wage is significantly less than those employees are currently receiving.
 49. The HSU, as the party seeking to expand the coverage of the HPSS Award, must demonstrate that, if that coverage is expanded to cover Dentists or Dental Prosthetists, the HPSS Award would only include terms to the extent necessary to achieve the modern awards objective.
 50. What is "necessary" in a particular case is a value judgment based on an assessment of the s.134 considerations.
 51. The ADA and the ADPA submit that no such necessity has been demonstrated. There was no significant award coverage prior to 2010 and the HPSS Award which makes no provision for them has been in place since then. If there was any legitimate concern as to the absence of coverage for Dentists or Dental Prosthetists in that extended period, the HSU would have been able to lead evidence about it.

52. Instead the position that the HSU adopt is a philosophical approach that every employee should be covered by an award. This philosophical approach is inconsistent with the *Fair Work Act* and was rejected by the Commission in the making of the HPSS Award and should be rejected now.
53. The lack of any significant award coverage and the absence of any issues associated with that non-coverage are matters that strongly suggests that, in the exercise of the Commission's discretion, Dentists and Dental Prosthetists should not be covered by the HPSS Award as varied.

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13 May 2020

IN THE FAIR WORK COMMISSION

Matter No: AM2016/31 formerly AM2014/204

Re: Health Professionals and Support Services Award 2010

WITNESS STATEMENT OF RUSSELL JAMES BROWNLIE

DATED 11 May 2020

1. My full name is Russell James Brownlie. I have been a Dental Prosthetist in Tasmania for 52 years. I was the Vice President of the ADPA Tasmania from 1989 until 1996 and President from 1996 until 2011. I have been a member of the board of the ADPA Ltd and its previous entities since 1988.
2. I was a member of the Tasmanian Dental Mechanics Registration Board from 1989 to 1996 and a member of the Tasmanian Dental Prosthetists Registration Board from 1996 until 2002. I was consulted in relation to the drafting of the *Dental Prosthetists Registration Act 1996* (Tasmania).
3. I was registered as a Dental Mechanic since 1974 and am currently registered as a Dental Prosthetist.
4. I have run my own dental prosthetics business in Tasmania, for 44 years under the business name of The Denture Centre. I practice out of Launceston, Scottsdale and Deloraine and I am a contract service provider to the Royal Flying Doctor Service in Smithton and Swansea.
5. I don't employ any other dental prosthetists and my wife is my business partner employed as the Practice Manager.

Lodged by: Australian Dental Prosthetists' Association	Telephone: 1300 232 462
Address for Service: C/O Wentworth Advantage Pty Ltd Suite 7, Level 3, North Tower, Chatswood Central 1-5 Railway Street CHATSWOOD, NSW 2067	Fax: (02) 8448 3299 Email: DWilkinson@myadvantage.com.au

6. The business name of The Denture Centre includes two other dental prosthetists, Mr Jay Long who practises in Hobart and Moonah and Mr Lachlan Nixon who has a practice in Ulverstone. We trade under the same business name but operate independently and share costs on common needs, i.e. web site hosting etc. As I understand it, both Mr Long and Mr Nixon are sole traders. The previous owner of The Denture Centre Moonah, Mr Rodney Williams also employed office staff, a Dental Technician and Dental Prosthetist was engaged as an associate for a short period.

Background

7. When I commenced work in 1968 I was employed by George C Debnam, a Registered Dental Mechanic and I worked with him for four and a half years as an apprentice Dental Mechanic.
8. Prior to 1968 a Dental Mechanic did not necessarily have any qualifications other than a rudimentary course provided by the Tasmanian Health Department. This was significantly changed from 1968 when tertiary training was introduced, being a Diploma of Dental Technology from the Royal Melbourne Institute of Technology. This qualified a person as a Dental Technician.
9. I moved to Launceston in 1972 and was employed by Leslie John Hollingsworth from 1972 until 1976. I became a Registered Dental Mechanic in 1974.
10. Registration as a Dental Mechanic in 1974 required completion of an apprenticeship and then completion of a registration course conducted by the Health Department in Hobart. This course was held over two years and required both written and practical examinations.
11. Registration as a Dental Mechanic allowed me to work unsupervised on my own. This was under the *Dentists Act 1957 (Tasmania)*. Tasmania was the first jurisdiction in the world to grant chairside status and a direct care relationship with a patient.
12. One of the changes introduced in 1996 was that the title of Dental Mechanic was changed to Dental Prosthetist.

Dental prosthetists in Tasmania

13. Tasmania has a significant proportion of Dental Prosthetists working in public sector employment. I understand there are approximately 46 Dental Prosthetists working in

Tasmania and around half of these are in public employment. The ADPA Ltd currently has 26 members in Tasmania and two or three of those members are in public employment.

14. As far as I understand there are no Dental Prosthetists currently engaged as an employee in the private sector in Tasmania.
15. I agree that the work DENTAL PROSTHETISTS perform, involving treating patients, including the taking of impressions and the provision of dentures for patients, is substantially the same across both public, community and private sectors.
16. Whilst it is true that a Dental Prosthetist could work simultaneously across the public health, community health and private health sectors, that is not my experience in Tasmania. As far as I am aware there may be one Dental Prosthetist who is employed in the public sector who occasionally performs work in the private sector.
17. I also agree that the work of Dental Prosthetists is regulated by the Australian Health Practitioner Regulation Agency, and like the other professionals, Dental Prosthetists are required to undertake continuing professional development in their field in order to maintain accreditation.
18. I understand it has been suggested that a Dental Prosthetist performs similar work to a Dental Technician. This is not quite correct in that it is only a Dental Prosthetist who has a right to practice autonomously, make clinical assessments, create treatment plans, direct to the public providing services in the areas of removable dental prostheses and mouthguards, including taking impressions. This differentiates them from a Dental Technician who provides technical services to the profession on the prescription from either a Dental Prosthetist or Dentist.
19. A Dental Technician is not registered and has no right of independent dental practice, involving the treatment of patients. A Dental Technician wouldn't normally even see the patient, except possibly in the case of crown and bridge work where a Dental Technician might be involved in taking a shade to ensure the colour matched the surrounding teeth.
20. In relation to my own practice, having consulted with the patient and taken any impressions I perform my own technical work with the exception of metal castings which are outsourced.
21. As I understand it there are very few Dental Technicians in Tasmania.

22. I am unaware of the work of an orthotist or prosthetists outside of the dental area and could not comment on whether the work is similar.

Signature:



Date: 11 May 2020