Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

4 Yearly Review of Modern Awards
Health Professionals and Support Services Award 2010

19 August 2019

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/31 HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010 - COVERAGE

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this reply submission in relation to the question raised at paragraph 1(b) of the Directions issued by the Fair Work Commission (**Commission**) on 20 June 2019 (**Directions**) relating to the *Health Professionals and Support Services Award 2010* (**HPSS Award**).

2. The Commission asked parties to file submissions, witness statements, and other materials upon which they seek to rely on outstanding matters which included whether the List of Common Health Professionals contained in Schedule C of the HPSS Award should be indicative or exhaustive.

3. In a submission dated 31 July, Ai Group set out its views on this question and outlined the position that the list contained in Schedule C of the HPSS Award should not be amended as to make it an 'indicative' rather than an 'exhaustive list'. Ai Group continues to rely on this submission as well as submissions provide on 8 June 2017 which argue in support of the position that, on a proper interpretation of the HPSS Award, the list contained in Schedule C is currently 'exhaustive' in nature.

4. Ai Group has considered the submissions of the three other organisations that responded to the questions posed by the Commission and files these submissions in reply pursuant to paragraph [2] of the Directions:

    - Dental Hygienists Association of Australia Limited (**DHAA Submission**) filed 31 July 2019;
    - Australian Dental Association (**ADA Submission**) filed 31 July 2019; and
    - Health Services Union (**HSU Submission)** filed late on 7 August 2019.

5. Save for one point, Ai Group supports the submissions of the DHAA and the ADA as they relate to the question posed in paragraph 1(b) of the Directions.

6. Ai Group does not believe that the HSU submission has raised any cogent arguments which effectively counter the approach detailed in our submission of 31 July 2019.

7. Ai Group does not respond to the other parties' submissions to the extent that they address the question of whether the occupations of Dental Hygienist and Oral Therapist should be covered by the Award.

2. DHAA SUBMISSION

8. Ai Group notes that the DHAA and the ADA submissions broadly agree that the List of Common Health Professionals contained in Schedule C of the Health Professionals and Support Services Award should be exhaustive. However, Ai Group does not support the DHAA's suggestion, expressed at paragraph [21] of its submission, that certainty of coverage may be aided by adding another list of health occupations that are not covered by the HPSS Award, i.e. an 'exclusion list'.

9. The present proceedings have highlighted perceived ambiguity concerning coverage of the HPSS Award generally. If the Commission is minded to accept Ai Group's position that the list in Schedule C is not indicative, the addition of a list of excluded occupations is unnecessary and could lead to more uncertainty.

10. The matter is best resolved by an amendment stating that the list in Schedule C is exhaustive.

3. HSU SUBMISSION

11. In the submissions below, Ai Group responds to the points raised at paragraphs [15]-[31] of the HSU submission in relation to whether the List of Common Health Professionals contained in Schedule C of the Award should be indicative or exhaustive.

12. Two broad points are made by the HSU in support of its position:

- Various health professionals are covered by enterprise agreements for which statutory declarations in support of their approval have been filed, assuming coverage despite such occupations not being explicitly referred to in Schedule C.

- Some professions in the health industry are denoted by nomenclature that is subject to change over time.

13. Ai Group submits that neither of these points favour the Commission exercising its powers to vary the list in Schedule C from an exhaustive to an indicative list. The HSU's arguments should be rejected for the reasons outlined hereunder.

Medical Physicists and IVF Counsellors

14. The first of the HSU's points raised in favour of an exhaustive list relates to the existence of various enterprise agreements that have been approved by the Commission which cover occupations that are not explicitly referenced in Schedule C and for which F17 statutory declarations in support have used the HPSS Award as the reference instrument for the purposes of an assessment under the Better Off Overall Test (**BOOT**) pursuant to section 193 of the *Fair Work Act 2009* (Cth) (**FW Act**).

15. Two examples are referred to in the HSU's submissions to lend support to this argument i.e. medical physicists and IVF counsellors.

16. The HSU makes the far-reaching statement that medical physicists and IVF counsellors, despite not being listed in Schedule C of the HPSS Award, are considered to be covered by the Award. Cited in support of this statement are paragraphs [8] through [14] of the Statement of Rosemary Kelly. Ai Group submits that Ms Kelly's Statement does not lend support to any broad contention that these two occupations are generally considered to be covered by the HPSS Award. Ms Kelly's Statement refers to a small number of

enterprise agreements in which an F17 has been provided to the Commission which assumes coverage for one of these occupations.

17. The HSU states, at paragraph [4] of its submissions, that rates of pay for these occupations in enterprise agreements have been compared with the HPSS Award for the purposes of the BOOT test in the approval process. Ai Group contends that such a comparison, located in various F17 forms filed with the Commission in support of enterprise agreement applications, provides no indication of what is considered in industry generally to be the extent of agreement coverage, nor does it in any way suggest that this should be taken as evidence of the Commission's own assessment as to the extent of coverage of the HPSS Award.

18. The F17 statutory declaration requires an employer to provide a comparison of the entitlements afforded to covered employees under the enterprise agreement, subject to the application, with those which would otherwise apply under a relevant reference instrument for the purposes of the BOOT. The choice of reference instrument will not necessarily be the subject of extensive consideration by the Commission, but is referred to by the applicant in the required statutory declaration. The inclusion of a specific reference instrument in a form F17 and a comparison of the conditions of the HPSS Award with those available to medical physicians and IVF counsellors under an enterprise agreement is evidence only of the applicant's own opinion as to the extent of award coverage. It says nothing of how the extent of coverage of the HPSS Award is viewed generally, nor does it provide any clear indication of how the Commission views the extent of the coverage under the HPSS Award.

19. The three enterprise agreements referred to in the HSU's Submission and Ms Kelly's Statement should not be considered a sufficient sample size to enable the Commission to be satisfied that industry generally views medical physicists and IVF counsellors to be covered by the HPSS Award.

20. The HSU claims that the form F17 and comparison table of award entitlements for the *Epworth HealthCare Dietitians, Psychologists, Medical Scientists and*

Medical Physicists Enterprise Agreement 2017-2021, annexed to its submissions indicates that the Commission, the employer and the union all consider that medical physicists are covered by the HPSS Award. Ai Group does not accept this contention. Neither the comparison table nor the F17 were prepared by the Commission. Each, at most, indicates the opinion of the employer and the union as to award coverage. The same may be said for the form F17 documents for the *Victorian Public Health Sector (Medical Scientists, Pharmacists and Psychologists) Single Enterprise Agreement 2017-2021* and the *Melbourne IVF Counsellors Enterprise Agreement 2017* in respect of IVF Counsellors.

21. To contend that the Commission's decision to approve an enterprise agreement on the basis of materials provided by an applicant should be taken as endorsement of all positions stated in the application is to misapprehend the nature of the Commission's obligations under sections 186 and 187 of the FW Act. Section 186(1) requires the Commission to approve an enterprise agreement if an application has been made, relevantly under s.185, and if it is satisfied of the requirements in ss.186 and 187. The Commission's satisfaction as to the matters referred to in ss. 186 and 187 are not contingent upon the content of any reference instrument. Section 186(2)(d) requires that the Commission, in order to approve an enterprise agreement, must be satisfied that it passes the BOOT. The relevant test for passing the BOOT is contained in Subdivision C of Division 4 of Part 2-4 of the FW Act. Meeting the BOOT requires the Commission to be satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

22. Absence of award coverage provides no obstruction to approval of an enterprise agreement. Indeed, it has been established by the Full Bench that an enterprise agreement can cover non-award covered employees. In *Sunnyhaven Limited*, the Full Bench overturned a decision of Commissioner McKenna that an Agreement made with exclusively non-award covered

employees was incapable of approval as no reference instrument could be used for the purpose of applying the BOOT under s 186(2)(d).[1] Rejecting this view, the Full Bench stated at [13] – [14]:

> Absent any clear statutory indication, there can be no distinction between an agreement covering a mixture of award covered and non-award covered employees and an agreement covering exclusively non-award covered employees. In the former case, provided Fair Work Australia is satisfied that each award covered employee and each prospective award covered employee would be better off overall, the agreement could be approved, notwithstanding the non-application of the better off overall test to the non-award covered employees. The same position would apply in respect of an agreement covering only non-award employees.
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> In circumstances where the Act permits the making of an enterprise agreement which covers, in whole or in part, employees not covered by a modern award, the Commissioner was wrong to find that where the employees to be covered by an agreement are exclusively non-award covered employees the better off overall test is effectively incapable of application. The correct view, in those circumstances, is the better off overall test has no application in applying the statutory tests for approval of an agreement of that type.

23. Each of the decisions approving the agreements referred to in Ms Kelly's Statement are less than one page long and provide no indication that the Commission has accepted, or indeed was required to accept, that each employee covered by the enterprise agreement was also covered by any reference instrument.[2] Each decision includes a statement to the effect that the Commission was satisfied that the requirements of ss.186, 187 and 188 as were relevant to this application for approval were met. Such a statement should not be taken as an endorsement of the factual accuracy of all the materials contained in a relevant Form F17. Neither of the decisions approving the agreements referred to in the HSU submissions mentions the HPSS Award.

24. It is also notable that two of the enterprise agreements referred to in the HSU Submissions did cover occupations referred to in Schedule C of the HPSS Award. The *Epworth HealthCare Dietitians, Psychologists, Medical Scientists and Medical Physicists Enterprise Agreement 2017-2021* covers medical scientists and psychologists and the *Victorian Public Health Sector (Medical*

[1] [2012] FWAFC 9086.

[2] [2017] FWCA 6092; [2017] FWCA 6881; [2018] FWCA 3489.

Scientists, Pharmacists and Psychologists) Single Enterprise Agreement 2017-2021 covers medical scientists, pharmacists and psychologists. The *Melbourne IVF Counsellors Enterprise Agreement 2017* covers IVF Counsellors. However, it may be arguable that this classification may be encompassed by the occupation title 'Counsellors' which is included in the List of Common Health Professionals in the HPSS Award.

25. The absence of any reference to non-award covered employees in the decisions to approve the enterprise agreements referenced in the HSU's submissions should not be taken as acceptance of the award coverage as proposed in the Form F17 provided by the respective employers. Section 601(1)-(3) of the FW Act requires the Commission to record decisions made in writing and affords a measure of discretion as to whether to provide reasons for any decision that it makes. Where the Commission issues a written decisions and reasons, these must be expressed in plain English and be easy to understand in structure and content. The explanatory memorandum to the *Fair Work Bill 2008* says, in respect of the proposed s.601(2):

> 2310. Subclause 601(2) provides that FWA may give written reasons for any decision that it makes. It is expected that FWA will provide written reasons for all decisions of significance. An example where a written decision may not be necessary is a procedural decision."

26. Ai Group considers that in the context of an enterprise agreement approval application, where approval is uncontested (as in the relevant approval applications referenced in the HSU Submissions) or where the question of coverage is not in contention, it is not unreasonable to expect the decision to approve an enterprise agreement to omit reference to the issue of coverage where this would not necessarily have caused an agreement's failure to meet any of the requisite thresholds required by ss 186 and 187.

27. Ai Group also refers to paragraph [11] of Ms Kelly's Statement which reads as follows:

> It is my understanding that when the FWC applies the BOOT test to HSU VIC negotiated agreements the rates of pay for all classifications are tested against the relevant health professionals [sic] rates of pay under the Modern Award

including for health professions which are not specifically named such as medical physicists and IVF Counsellors.

28. Ms Kelly provides no cogent evidentiary support for this contention. Therefore, Ai Group recommends that the Commission give no weight to the assertion.

29. Ai Group notes that paragraphs [15] – [21] of the HSU Submission pertains to two discrete professions, namely medical physicists and IVF counsellors. Considering the limited scope of the HSU's arguments in this part of its submission, Ai Group submits that even if the Commission is minded to accept that the evidence provided is sufficient to demonstrate that the Commission has considered these two professions covered by the HPSS Award, such a conclusion does not establish that the List of Common Health Professionals in Schedule C should be indicative in nature. In the absence of any detailed explanation as to how these occupations were viewed by the Commission in the process of making the relevant decisions in favour of approval, it is possible that each were considered to fall under the definition of one of the occupations explicitly referenced in Schedule C. Counsellors are included in the List of Common Health Professionals. Ai Group's consistent position in these proceedings has been that the List in Schedule C is exhaustive but this does not imply that varying occupational titles would exclude a relevant employee from coverage.

Cardiac Technologists

30. Paragraphs [22] to [29] of the HSU Submission make the broad point that the capacity for nomenclature to change with respect to occupational titles in the health industry is supportive of the argument that the List of Common Health Professionals in Schedule C of the HPSS Award should be indicative as opposed to exhaustive. Ai Group notes that this argument has been addressed in our earlier submissions on which we continue to rely.

31. The relevant approach for interpreting the coverage clause of an award was considered in *Re City of Wanneroo v Michael Lindsay Holmes*.[3] In this case,

[3] *Re City of Wanneroo v Michael Lindsay Holmes* [1989] FCA 369.

Justice French said that "the interpretation of an award begins with a consideration of the natural and ordinary meaning of its words" and that "[t]he words are to be read as a whole and in context" with "[a]mbiguity if any... resolved by a consideration, inter alia, of the history and subject matter of the award".[4]

32. Any perceived ambiguity as to the current meaning of the Award may be examined through a consideration of the AIRC's statements with respect to early drafts of the Award. In the process of making the HPSS Award, the Full Bench of the Australian Industrial Relations Commission (**AIRC**) referred to the initial list that was to ultimately become Schedule C as a 'list of common occupation names'. At paragraphs [78] and [81] of the Decision, the Full Bench said:

> **[78]** The exposure draft of the Health Professionals and Support Services Industry and Occupational Award 2010 is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally. At this stage we have not attempted to attach particular professions or skills to any particular pay point. We invite the parties to examine this and provide advice during the consultations. We have attached as Schedule B to the award a list of common occupation names which should also be considered.
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> …
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> **[81]** In relation to both nursing and health professionals the exposure drafts cover employers whether they are in the health industry or not. Employers who provide nursing or other professional health services under contract would be covered in relation to their employees in the relevant classifications.

33. No Statement or Decision of the AIRC or the Commission since the Part 10A Award Modernisation Process has provided any indication that the list was intended to be other than a list of common occupational names. Ai Group submits that reference to a list of 'common' names is suggestive of an intent to ensure the HPSS Award retained sufficient flexibility to allow coverage of employees whose roles may be within the definition of relevant occupations denoted by the list of common occupational names in Schedule C. Such

[4] Ibid, [43].

flexibility should be capable of accounting for and avoiding any perceived rigidity referred to in the HSU's submissions. Changes in nomenclature should not result in loss of award coverage where the duties, skills and responsibilities of a covered occupation remain the same.

34. If the HPSS Award was varied to impose a list of indicative occupations, in order to account for alterations in nomenclature, uncertainty about award coverage would greatly increase. Numerous awards contain lists of occupation titles that are subject to change over time. For example, the classification descriptors in Schedule B of the *Building and Construction General On-Site Award 2010* contain lengthy lists of broadbanded classifications which were originally in the various pre-modern awards which applied in the building and construction industry. It would be absurd to suggest that variations in occupational titles which may occur over time or even between organisations should remove an employee from coverage under a modern award. Amending the HPSS Award to radically change the nature of the list in Schedule C would be a disproportionate response to a problem which only arises from an overly literal approach to the construction of Schedule C.

35. Paragraphs [24] - [25] of the HSU Submission reflect an excessive emphasis on occupational names. The HSU claims that where an earlier occupational title, namely 'cardiac technologists' is superseded by new terminology, 'cardiac physiologists', with the latter title covering different duties, such evolution in nomenclature supports the inclusion of an indicative list of common health professions in Schedule C. Ai Group does not accept this argument. Where the duties, skills and responsibilities of a particular occupation change dramatically to the point that a new occupation is created, coverage by the HPSS Award should not necessarily follow. If the commonly used name of an occupation referred to in Schedule C changes but the relevant features of the occupation remain substantially the same, this should not result in an alteration in coverage.

36. Paragraphs [24] and [34] of the Statement of Alex Leszczynski, annexed to the HSU Submission state (emphasis added):

> **[24]**…when it comes to Health Professionals, the name of Health Professions change, the profession can be called different names, a person can be classified as part of more than one profession and professions can emerge out of or merge into other professions. It is therefore again quite clear when one looks at the list in Schedule C of the Award that the list is problematic if it is exhaustive rather than indicative, particularly if one takes an overly literal approach to deciding whether a health profession is covered by the Award.
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> **[34]** New health professions emerge, often performing similar work to existing health professions, and health professions can change their name.

37. As outlined in Ai Group's earlier submissions, it would be inappropriate to bypass the mechanisms contained in the FW Act which enable a party to apply for an expansion in modern award coverage. To amend the HPSS Award to allow new professions to be covered through a process of gradual evolution would be contrary to the clear legislative intent to confine avenues for variation to modern awards to the those available under Division 5 of Part 2-3 of the FW Act. The Commission has considered itself bound by the principle of that which is prohibited directly cannot be done indirectly (*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*).[5]

38. Confirmation that the List of Common Health Professionals is exhaustive rather than indicative would not, as the HSU suggests, at paragraph [30] of its submission, "make the Award rigid and stuck in time". Such an assertion relies on an overly literal approach to the interpretation of an exhaustive list as being confined to rigid occupational *titles*.

39. Ai Group submits that the Commission should confirm that the List of Common Health Professionals in Schedule C of the HPSS Award is exhaustive rather than indicative. For reasons outlined in Ai Group's submissions of 31 July 2019, amending the award to insert an indicative list would dramatically increase uncertainty regarding coverage, especially as new occupations are created over time. If a party seeks the inclusion of a new classification under the HPSS Award, the FW Act provides an adequate process for such a variation which ensures that coverage of the award is not expanded where this would not be

[5] *Construction, Forestry, Mining, and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551, [51], *4 yearly review of modern awards – Proposed Norfolk Island Award* [2018] FWCFB 4732, [45].

necessary to achieve the modern awards objective. To allow this process to be bypassed would be contrary to the spirit of the FW Act, result in significant unfairness to employers and potentially extend coverage to new types of work that are unsuitable to the conditions mandated under the HPSS Award.

40. Paragraph [34] of Mr Leszczynski's statement claims that:

> "if the List of Common Health Professionals in Schedule C of the Award were exhaustive, it could exclude health professionals from being covered by the Award, even though they are doing similar work to and have similar qualifications to health professionals who are covered by the Award.

41. It is unclear what test the HSU asserts should be applied in determining the requisite level of similarity with a 'named' health professional in Schedule C for an occupation to fall within an indicative list. Considering the restrictions on reducing coverage of a modern award by s.163 of the FW Act, Ai Group urges the Commission to exercise a high level of caution in making any variation which extends coverage of the HPSS Award to an unknown number of existing and new occupations that bear an uncertain level of similarity to an occupation listed in Schedule C.