

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

25 November 2019

Ai
GROUP

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

Introduction

1. This submission is made by the Australian Industry Group (**Ai Group**) in relation to the issue currently before the Fair Work Commission (**Commission**) concerning whether the List of Common Health Professionals contained in Schedule C of the *Health Professionals and Support Services Award 2010* (**HPSS Award**) should be indicative or exhaustive.
2. In response to paragraph [2] of the Amended Directions of the Commission dated 17 September 2019 (**Amended Directions**), on 18 November 2019 a late submission of the Health Services Union (**HSU Submissions**) was uploaded to the Commission's website which replied, inter alia, to correspondence of Ai Group dated 18 October 2019 which referred to earlier Ai Group submissions dated 31 July 2019 and 19 August 2019.
3. Ai Group makes this submission in accordance with paragraph [4] of the Amended Directions in response to the HSU Submissions.
4. For the reasons outlined herein, Ai Group does not consider that the HSU Submissions raise any convincing points which should deter the Commission from finding that the List of Common Health Professionals should be exhaustive rather than indicative.
5. These submissions are filed without prejudice to, and Ai Group continues to rely on, past submissions made by Ai Group including:
 - [Ai Group Submission of 8 June 2017](#)
 - [Ai Group Submission of 31 July 2019](#)
 - [Ai Group Submission-in-Reply of 19 August 2019](#)

- [Ai Group Correspondence of 18 October 2019](#)
- [Ai Group Submission-in-Reply of 11 November 2019](#)

‘All’ Health Professionals

6. Paragraph [21] of the HSU Submissions read as follows:

The AIG Submission of 31 July 2019, at [14] and following appears to suggest that the Full Bench in the Award Modernisation Process used the word “common” to mean “all, and when it used the word “all” in its decision, it in fact meant only “some”. The Commission would not regard the Full Bench as having so proceeded. Its stated intention in issuing the Exposure Draft was to *accommodate all health professionals (except doctors and nurses) employed in both the health industry and the industry generally.*

7. The HSU has misconstrued both Ai Group’s submission of 31 July 2019 and the Statement of the Australian Industrial Relations Commission (**AIRC**) from which the relevant extract was sourced (emphasis added):¹

[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.

8. As Ai Group stated, at paragraph [15] of our 31 July 2019 Submission, the reference to the necessity of accommodating ‘all health professionals (except doctors and nurses) employed in both the health industry and industry generally’ should be construed in context. At the time this Statement was made, the AIRC was calling for parties to provide advice concerning relevant professions and skills, as the coverage of the HPSS Award had not yet been finalised. Also, the AIRC’s reference to ‘all health professionals’ was in the context of ‘the salary structure and level of salaries’. There was obvious merit in having a salary structure that would be able to accommodate various additional health

¹ [2009] AIRC 50 [78].

professionals that may be brought within the coverage of the award at a later stage.

9. Paragraph [78] of the AIRC's Statement does not evince an intention for the HPSS Award to cover all health professionals (other than doctors and nurses).
10. Contrary to the claim made at paragraph [21] of the HSU Submission, Ai Group has not requested the Commission to interpret the usage of the word 'common' by the AIRC in Award Modernisation Process to mean 'all'.

Automatic Coverage of New Occupations

11. Paragraph [22] of the HSU Submission claims that it is not inappropriate for new occupations to automatically be covered by the HPSS Award. In support of this, the HSU states that the HPSS Award, like many others, defines coverage by reference to a 'general descriptor' i.e. 'Health Professional Employee'.
12. Ai Group contends that the HSU is employing circular logic by assuming the conclusion in this argument. By referring to 'Health Professional Employee' as a general descriptor of wide import beyond the list of occupations referred to in Schedule C, the Union is assuming that the List of Common Health Professionals is indicative rather than exhaustive. Such an argument is of no assistance to the Commission either in determining the current meaning of the List or ascertaining whether the list should be exhaustive or indicative.
13. Ai Group does not dispute the HSU's statement that many awards utilise 'general descriptors' to define coverage. However, Ai Group contends that such general descriptors should have an established and ascertainable meaning of universal application. A classification descriptor which has the potential to broaden coverage of an award to new occupations which may not be suited to award coverage would be contrary to the modern awards objective of providing a 'fair and relevant' minimum safety net.² It would also not be conducive to the need to ensure a simple, easy to understand, stable and sustainable modern

² *Fair Work Act 2009* (Cth), s.134(1).

award system for Australia that avoids unnecessary overlap of modern awards.³

Section 143(2) of the FW Act

14. At paragraph [21] of Ai Group's 31 July 2019 Submission, the point was made that interpreting the List of Common Health Professionals in Schedule C of the HPSS Award as indicative would be contrary to s.143(2) of the *Fair Work Act 2009* (Cth) (**FW Act**) which requires modern awards to expressly cover 'specified employers' and 'specified employees of employers covered by the modern award'.
15. The HSU Submissions claim, at paragraph [23], that Ai Group's argument would result in many modern awards with coverage defined by reference to classifications and descriptors analogous to 'Health Professional employee' being found to be non-compliant with the FW Act.
16. The HSU has not identified any specific classification which it contends would be invalidated on the basis of Ai Group's argument. However, Ai Group submits that classification descriptors in most modern awards contain appropriate indicative skills and tasks which provide sufficient clarity to allow for compliance with s.143(2) of the FW Act. The 'Classification Definitions' in Schedule B of the HPSS Award provide such detail to enable 'Support Services Employees' to be classified. Roles listed for each level in Schedule B are expressed to be 'indicative' only, with classification determined by relevant duties and experience.

Employers outside the health industry

17. At paragraph [34] of Ai Group's 31 July 2019 Submission, Ai Group argued that it would be impractical and confusing to require those not engaged in the health industry to understand whether a specified occupation is likely to be covered based on an indicative List of Common Health Professionals. The HSU

³ FW Act, s.134(1)(g).

Submissions, at paragraph [24], dispute this point, stating that the concept is not 'hard to grasp' and that the availability of advice from industry bodies should serve to assist such employers.

18. As the Commission is aware, classification disputes frequently arise between parties, even where detailed classification descriptors are available. To assert that the definition of a 'health professional' is not 'hard to grasp' appears to ignore the hundreds of submissions provided to the Commission in the context of the 4 yearly review of modern awards on points of contention concerning award provisions which may appear at face value to be relatively simple. If the concept of a 'Health Professional' were simple and easy to grasp, the inclusion of an indicative list in Schedule C would be entirely unnecessary.
19. The HSU Submission references the fact that the same employers interpreting the HPSS Award are already required to 'master the details of workers compensation, superannuation, occupational health and safety and Pay as You Go taxation'. This in no way contradicts Ai Group's argument. These entitlements are, in the main, not industry specific and require no specialist knowledge of the health industry.
20. Ai Group urges the Commission to reject the HSU's argument that the availability of assistance from industry associations should dispel any concerns regarding the difficulty of interpreting an indicative list of Common Health Professionals. Many employers are not members of an industry association. The Commission should not determine that an indicative list would be appropriate based on the availability of specialist advice in interpreting the HPSS Award. The Commission's ongoing task of re-drafting modern awards in plain language is sufficient indication of the Commission's acknowledgment that modern awards should be worded in a manner which enables parties to readily understand relevant provisions.

Requisite 'similarity' with a listed Common Health Professional

21. At paragraph [36] of Ai Group's 31 July 2019 Submission, we contended that the HPSS Award provides no guide as to the threshold that is to be applied in determining the level of similarity with any of the occupations listed in Schedule C, for coverage to be found. In support of this argument, Ai Group referred to the test applied by the Full Bench of the Commission in refusing to grant an application by the Chiropractors Association of Australia (**CAA**) to remove the occupation of chiropractors from the coverage of the HPSS Award. The test applied by the Full Bench in refusing to grant the CAA's application related to the similarity in the nature of the work performed between the relevant occupations. Ai Group contended that the degree of similarity required would be impossible to measure for employers, particularly those engaged outside the health industry. Such a test could be applied by employers haphazardly and in a variety of different ways.

22. The HSU Submissions, at paragraph [25], assert that Ai Group has not provided any example of a health professional role about which such uncertainty would arise. Ai Group contends that that is precisely the point. If the Commission determined that the List of Common Health Professionals at Schedule C of the HPSS Award should be indicative, this would impose upon employers the near impossible task of determining whether an occupation were sufficiently similar to one listed in Schedule C for coverage to be certain. The number of potential occupations where such uncertainty may arise is endless considering the diversity of roles undertaken in various establishments. Tasks and duties undertaken by employees are not standardised but vary between workplaces. Moreover, the potential for an indicative list to expand coverage to new occupations renders the naming of specified examples where uncertainty may arise a futile exercise.

Continuing effect of the HPSS Award

23. Ai Group argued, at paragraph [54] of our 31 July 2019 Submission, that a variation to the HPSS Award to provide for an indicative List of Common Health Professionals would:
- Be inconsistent with the intent, expressed in s.143 of the FW Act to prevent the coverage of modern awards extending to employees not covered by modern awards; and
 - Would be inconsistent with the scheme established by the FW Act which provides for specified processes and conditions for varying modern awards, including coverage of modern awards.
24. The HSU Submissions claim, at paragraph [26], that Ai Group's argument is based on the 'fallacy' that the meaning of 'Health Professional employee' is limited by the facts that existed at the time the term came into effect. The HSU also claims that the Award is not effectively varied by it having application to new 'iterations' of a classification. Ai Group continues to rely on paragraphs [54] to [65] of our 31 July 2019 Submissions in response to these contentions of the HSU. Ai Group does not dispute that industries change over time and that new roles are created to accord for this. Nevertheless, where an employee undertakes duties and responsibilities which were not envisaged by the AIRC in making the HPSS Award, it would be a mistake to assume that coverage by this award would be appropriate.
25. The HSU asserts that 'Ai Group's approach' is not appropriate for a document intended to have continuing effect. However, this is not 'Ai Group's approach'; rather, the system of modern awards, each of which has limited and ascertainable coverage which may be varied only by the Commission in the circumstances provided for in Division 5 of Part 2-3 of the FW Act, is an intrinsic feature of the Fair Work system.

26. Modern awards are not intended to organically expand their coverage to new occupations without the Commission's satisfaction that such would be necessary to achieve the modern awards objective. Modern awards are not, in accordance with this approach, 'limited by the facts that existed at the time' each award was made, as contended by the HSU. A clear process for varying modern awards is provided for in the FW Act.
27. This process can be seen in developments regarding the *Professional Employees Award 2010*. When the award was made it covered various specified professionals (e.g. engineers, scientists). The Award was recently varied to include medical research professionals employed by medical research institutes, after the FWC considered evidence and submissions about the type of work carried out by, and the qualifications of, such professionals.
28. At paragraph [26] of its submissions, the HSU states that coverage of the HPSS Award is conditioned on being a Health Professional employee and that no variation is required to cover new 'iterations' of this concept. Although it is unclear what the HSU intended 'new iterations' to denote, to the extent that this would allow coverage of the HPSS Award to extend to Health Professionals not explicitly referred to in Schedule C of the Award, this is simply an example of circular logic. The Commission has requested parties in the Amended Directions to make submissions on the question of whether the List of Common Health Professionals contained in Schedule C of the award *should* be indicative or exhaustive.