

IN THE FAIR WORK COMMISSION

AM2016/31

S 156 - Four Yearly Review of Modern Awards

Health Professionals and Support Services Award 2010 – substantive issues

REPLY SUBMISSIONS OF THE HEALTH SERVICES UNION

1. The Health Services Union (**HSU**) make these reply submissions in response to the Directions issued by Vice President Catanzariti on 20 June 2019 (**the Directions**), directing parties to file materials in relation to the following outstanding matters in relation to the four yearly review of the *Health Professionals and Support Services Award* (**the Award**):
 - a) whether the occupations of Dental Hygienist and Oral Health Therapist should be covered by the Award; and
 - b) whether the List of Common Health Professionals (**the List**) contained in Schedule C of the Award should be indicative or exhaustive.
2. The HSU relies on our submissions of 7 August 2019. We also rely on our previous submissions filed in this matter on 17 March 2017, 22 May 2017 and 12 February 2018.
3. We make these submissions in reply in response to the submissions of:
 - a) Australian Industry Group (**AIG**), dated 31 July 2019.
 - b) Dental Hygienists Association of Australia (**DHAA**), dated 31 July 2019.

Reply to submissions of AIG

4. AIG argues in their submission that the use of the word '*common*' in the List of Common Health Professionals title, '*suggest[s] that the intent of the list was to provide merely the ways in which the exhaustive list of occupations were to be denoted*'.¹ They claim the AIRC Statement [2009] AIRCFB 50 (**AIRC Statement**) provides support for this interpretation.²

¹ AIG Submissions, 31 July 2019, [16].

² Ibid, [14]-[16].

5. This argument should not be accepted. It is by no means clear from the four paragraphs on the HPSS Award in the AIRC Statement that the Full Bench attached the meaning to '*common*' that AIG suggest.
6. On the contrary, the Full Bench's statement that the award should apply to '*all health professionals (except doctors and nurses) employed in both the health industry and industry generally*'³ supports the reading that the List was intended to be indicative, as the intention was for the Award to apply to *all* health professionals, not simply the occupations appearing on the list at the time of drafting. There is no indication in the AIRC Statement referred to by AIG that the Full Bench intended for coverage to be restricted to the occupations stated in the List.
7. AIG further argues that the List should be exhaustive because '*coverage of Modern Awards is meant to remain relatively static*'.⁴ It asserts that '*the HPSS Award is not intended to cover health professionals at large*' and that an indicative list would '*likely fail to meet the requirements of s 143(2)*'.
8. This argument should not be accepted as it relies on a misreading of s 143(2). AIG omit to mention s 143(5) – (6), titled 'How coverage is expressed', and which refer to how s 143(2)-(4) should be read:

How coverage is expressed

(5) For the purposes of subsections (2) to (4):

(a) employers may be specified by name or by inclusion in a specified class or specified classes; and

(b) employees must be specified by inclusion in a specified class or specified classes; and

(c) organisations must be specified by name; and

(d) outworker entities may be specified by name or by inclusion in a specified class or specified classes.

(6) Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.

9. It is clear from s 143(5)-(6) that s 143(2) does not require the rigidity that AIG are attempting to impose on how coverage is expressed in an Award.

³ Ibid, [78].

⁴ AIG Submissions, 31 July 2019, [15]-[20].

Reply to submissions of DHAA

10. The crux of the DHAA's submission, that award coverage would work to drive down wages and conditions of dental hygienists, should be disregarded. The argument is false, illogical, and displays a fundamental misunderstanding of the industrial relations system in Australia.
11. An employee who is award free is still subject to a minimum wage set by the Fair Work Commission. This minimum rate is lower than the minimum rate in the HPSS Award. It is illogical to say that a lower minimum wage for dental hygienists will lead to higher pay.
12. Even if one entertains the argument that award coverage could somehow work to reduce wages, the evidence of Alex Leszczynski demonstrates that in the case of Sonographers, this is not true at all. Sonographers are some of the most highly paid health professionals in the country, and yet they are explicitly covered by the Award and have a history of award coverage.⁵
13. Further, the evidence submitted by DHAA comes from employees who are earning, as stated in their witness statements, wages between 35% - 150% higher than the Award rates.⁶ The Full Bench should exercise caution in making a decision to exclude employees from the Award, on the basis of evidence from a handful of very highly paid employees in this profession for whom award coverage will, in truth, make no or little difference to their take home pay. By contrast, it is low paid dental hygienist and oral health therapist employees whose '*family finances*' will actually be affected if the Full Bench decides to exclude them from the Award.
14. We also raise a number of issues with the evidence submitted in their submissions below.
 - a) Witness Statement of Kay Ball (16 June 2019)
 Paragraphs 9 – 19 should be inadmissible or given no weight as they express the witness's opinion. The statement makes or relies on a number of suppositions about what the witness's employer would or might do, and how award coverage would affect her '*family's finances*', for example, without any proper basis for such assertions.
 - b) Witness Statement of Alison Taylor (19 June 2019)
 Paragraphs 6 – 8 should be inadmissible or given no weight as they express the witness's opinion.
 - c) Witness Statement of Susan Melrose (26 June 2019)
 Paragraphs 7 – 17 should be inadmissible or given no weight as they express the witness's opinion.
 - d) Witness Statement of Christina Zerk (24 June 2019)

⁵ Statement of Alex Leszczynski, [26]-[33] and Attachments AL-17 - AL-24 (pages 149 – 383).

⁶ Witness Statements of Kay Ball [7], Susan Melrose [5], Christina Zerk [5] and Lyn Carman [8].

Paragraphs 7 – 17 should be inadmissible or given no weight as they express the witness's opinion.

e) Witness Statement of Lyn Carman (30 July 2019)

Paragraphs 9 – 18 should be inadmissible or given no weight as they express the witness's opinion.

f) Witness Statement of Benjamin Merchant (16 July 2019)

The evidence should be inadmissible or given no weight as it is not relevant to these proceedings, and expresses the witness's opinion.

g) Witness Statement of Samson Chan (30 July 2019)

The evidence should be inadmissible or given no weight as it is not relevant to these proceedings, and expresses the witness's opinion.

Health Services Union

22 August 2019