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Sent: Friday, 24 April 2020 11:51 AM

To: Chambers - Catanzariti VP <Chambers.Catanzariti.VP@fwc.gov.au>

Subject: RE: AM2016/31 - Health Professionals and Support Services Award 2010 - DHAA submission in reply

Dear Alyce,

Please find attached the DHAA's submission in reply. Procedural issues are addressed at the beginning of the submission, namely that DHAA welcomes and agrees with the Full Bench's proposed way of proceeding with this matter.

We have nominated one witness, the HSU industrial officer, Mr Alexander Leszczynski that we wish to cross-examine.

Regards,

Katrina Murphy

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FAIR WORK COMMISSION

Matter No.: AM2016/31

Four Yearly Review of Modern Awards – Health Professionals and Support Services Award

**REPLY SUBMISSION FROM DENTAL HYGIENISTS ASSOCIATION OF
AUSTRALIA - AM2016/31**

**Directions of Vice President Catanzariti of 19 December 2019 and
correspondence to parties of 1 April 2020**

Dental Hygienists Association of Australia Limited (“DHAA”)

Date: 24 April 2020

Lodged by:

Katrina Murphy, Managing Director

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Introduction

1. This Reply Submission is filed on behalf of the Dental Hygienists Association of Australia Limited (“DHAA”) in accordance with the Directions issued by Vice President Catanzariti on 19 December 2019 and correspondence from Chambers to the parties on 1 April 2020.
2. As per the Directions, this Reply Submission replies to the initial submissions of the parties in relation to which Health Professional occupations should not be covered by the Health Professionals and Support Service Award 2010 (“HPSS Award”).
3. DHAA is an employee representative professional association for Dental Hygienists and Oral Health Therapists. The current DHAA membership is 1,530.

Conduct of the Matter

4. DHAA agrees with the view of the Full Bench expressed in correspondence of 1 April 2020 that the matter could be determined on the basis of written submissions, subject to cross-examination being permitted on any factual conflict between witness statements and questions from the Full Bench and written answers from the parties to be provided to all parties.
5. DHAA wishes to cross-examine Mr Alexander Leszczynski.
6. DHAA welcomes the abbreviated conduct of the matter so that the matter may be concluded.

Outline of Claim

7. DHAA relies on the content, witness evidence and materials of our submissions of:
 - i) 28 February 2020,
 - ii) 9 December 2019,
 - iii) 5 December 2019 (correspondence to FWC with regard to coverage of HSU’s Rules for Dental Hygienists and Oral Health Therapists being limited to private dental surgeries in Tasmania only with no other coverage in public or private sector anywhere in Australia.)
 - iv) 25 November 2019,
 - v) 14 October 2019,
 - vi) 14 August 2019,
 - vii) 31 July 2019,
 - viii) 14 March 2018,
 - ix) 11 December 2017,
 - x) 13 June 2017,
 - xi) 22 May 2017,
 - xii) 17 March 2017,
 - xiii) 2 August 2016,
 - xiv) 29 April 2016,

- xv) 5 November 2015,
 - xvi) 21 August 2015, and
 - xvii) at arbitration before the Full Bench on 2 December 2019 and
 - xviii) at arbitration before the Full Bench on 11 and 12 December 2017.
- that relate to DHAA's position that Dental Hygienists and Oral Health Therapists should not be covered by the HPSS Award.
8. DHAA submits there is no change in the dental industry or industrial landscape of the dental industry since 2009 which justifies a change in private sector award coverage. The only significant change is a decline in numbers of Dental Therapists. It is not logical to default to the award coverage position of a legacy profession.
 9. Witness evidence supports DHAA members' unchanged strong position that award coverage under the Health Professionals and Support Services Award poses significant and permanent harm to Dental Hygienists and Oral Health Therapists in the private sector.
 10. Because of the niche nature of their profession which is characterized by specific high level clinical duties, with little to no managerial responsibilities, coverage under the classification structure of this Award is distinctly unfavourable to the real take home pay of Dental Hygienists and Oral Health Therapists.
 11. DHAA members see and fear a future where their incomes would dwindle inexorably towards the minimum rates of pay in this Award. DHAA submits witness evidence that this deleterious effect occurred with Pharmacists' incomes after award coverage occurred, under the Pharmacy Industry Award.
 12. The existence of State public sector awards or mature iteration Federal public sector enterprise agreements should not alter the status quo of coverage by the HPSS Award. The status quo is that those not covered by State public sector awards or the Higher Education Industry Award 2010, are award-free. This means that all Dental Hygienists and Oral Health Therapists in the private sector, other than those working in Universities and TAFES are award-free.
 13. With regard to the Modern Award Objective and section 134(1)(f), DHAA submits that the best interests of the dental industry are served by maintaining the status quo that Dental Hygienists, Oral Health Therapists and Dentists are not covered by the Health Professionals and Support Services Award. Remaining award-free does not in any way impede the professions' ability to pursue enterprise bargaining, and DHAA see enterprise bargaining in the private sector and working with the CPSU in the public sector as a desirable way forward to secure the real incomes of its members.
 14. Dental Hygienists and Oral Health Therapists are overwhelmingly female with many employees working one or two positions with different private sector employers on a part-time basis. DHAA submits that a decision to change these traditionally award-free occupations to award coverage under this particular award, with an associated expected major decline in their wages contravenes the Modern Awards Objective, specifically section 134(1) (c) of Fair Work Act, "*the need to promote social inclusion through increased workforce participation.*"

15. By virtue of section 143(7)(b), Dental Hygienists and Oral Health Therapists should remain award-free because the duties, functions, tasks, remuneration and responsibilities of a Dental Hygienist and Oral Health Therapist are much more closely aligned to that of a traditionally award-free Dentist than to a traditionally award-covered Dental Therapist.

Reply to Submission of Optometry Australia (“OA”) 28 February 2020

16. Paragraph 21 of the submission from that Optometrists, states that they are not covered by the HSU’s rules. Similarly, as per DHAA’s correspondence to Fair Work Commission of 5 December 2020, HSU’s rules do not cover Dental Hygienists or Oral Health Therapists in the public or private sector anywhere in Australia, except in Tasmania (private sector only.)¹
17. DHAA concurs with the submission of OA in paragraphs 22 (b)(i) that “instead of acting as a safety net, the minimum rate of pay under the HPSS Award if adopted may significantly decrease the salaries currently being offered and paid ... employee members who have traditionally possessed significant bargaining power in relation to their terms of engagement may have such terms varied or changed to their detriment in line with consultation provisions in the HPSS Award.”² DHAA submits that the same dangers are posed to Dental Hygienists and Oral Health Therapists.

Reply to Submission of Health Services Union (“HSU”) of 10 April 2020

18. The HSU submission³ states at paragraph 16 that “Nothing about the introduction of enforceable minimum standards (which exceed the National Minimum Wage and National Employment Standards, which are otherwise applicable to employed optometrists has the legal consequence of undermining or negating any existing contractual entitlements. As a matter of logic, it does not follow that the improvement of the relevant minimum standards would have the result of diminishing the bargaining power of employed optometrists.”⁴
19. The HSU is wrong in its attribution of “logic” with regard to how they think the private sector works with regard to the negotiation of wage outcomes outside of enterprise bargaining. This may be because the HSU has no knowledge, experience or involvement in wage outcomes in the private sector for Optometrist, Dental Hygienists or Oral Health Therapists.
20. The reality is that the private sector, particularly small health practices, perceive and treat minimum rates awards, as if they were paid rates awards.
21. If award coverage under the HPSS Award occurs, DHAA expects to see Graduate Dental Hygienists and Oral health Therapists classified for an indeterminate time at Level 1, ending up clustered typically at Level 2, with a very few (probably confined only to those working in remote areas) able to progress to Level 3. There will be no scope at all to reach Level 4, even though they are clinical experts and possess extensive tertiary qualifications.

¹ Health Services Union Rules incorporating alterations of 23 May 2018 (R2018/48)

² Submission of Optometry Australia, 28 February 2020, p. 7

³ Health Services Union submission, 10 April 2020, p. 5

⁴ Ibid.

22. Award coverage for the overwhelming majority of Dental Hygienists and Oral Health Therapists will mean an Award rate of pay of \$33.89 per hour. Their current rate of pay is typically more than twice this amount.
23. If award coverage under the Health Professionals and Support Services Award comes to pass, dental practices will realise that they are paying massively in excess of the applicable award rate. There is no doubt that the consequence of this will be pressure on employees to agree to Individual Flexible Arrangements and salaried arrangements.
24. Such arrangements will mean that the very limited benefits of award coverage, namely annual leave loading, overtime rates and weekend rates are readily “bought out” with existing rates of pay.
25. As clause 24.2 of the Award states that “*The ordinary hours of work for a day worker will be worked between 7.30 am and 9.00 pm Monday to Friday and between 8.00 am and 4.30 pm on Saturday*” there is little to no scope for overtime or penalty rates for Dental Hygienists and Oral Health Therapists under this Award.
26. Further, imposition of award coverage will mean a reduction in the existing rights of dental hygienists and oral health therapists. The Award states in clause **31.4 Close down periods—dental and medical practices** “Where an employer temporarily closes a dental or medical practice, an employee may be directed to take paid annual leave during part or all of this period provided such direction is reasonable. Where an employee does not have sufficient accrued annual leave for this period, they may be required to take annual leave in advance where such requirement is reasonable.” Currently such a provision must be negotiated with private sector Dental Hygienists and Oral Health Therapist. They will lose this right if the HPSS Award is imposed.
27. Further, as posited by the OA, clause 8A of the Award which is “Consultation about changes to rosters or hours of work” gives employers the right to impose changes on rosters and hours of work which far exceed any existing employer rights under Fair Work Act. Such rights do not exist at all in common law.
28. Therefore, the view of the HSU is false that the award is beneficial with “additional rights.” It is not beneficial to Dental Hygienists and Oral Health Therapists.
29. The economic and health crisis of the COVID19 pandemic has significantly worsened the risk posed by HPSS Award coverage to Dental Hygienists and Oral Health Therapists.
30. Hundreds of Dental Hygienists and Oral Health Therapists in the private sector have either already lost their jobs to redundancy or are likely to in the near future.
31. If the Full Bench decides on HPSS Award coverage for these occupations in the near future, it is highly probable that these Dental Hygienists and Oral Health Therapists will be offered only the minimum award rates of pay when they are re-engaged.
32. The scores of Dental Hygienists and Oral Health Therapists who are currently under pressure to agree to contract variations to reduce their rate of pay due to COVID19, will have this

pressure increased dramatically if private sector employers have an applicable (low) Health Professionals and Support Services Award level to refer to. Their chances of ever returning to previous market rates of pay will be extremely low.

33. Therefore, the notion of the HSU that the Award offers “more robust protections” during the COVID19 pandemic⁵, is false.
34. HSU states in their submission that Dental Hygienists were briefly in the List and were then removed as a consequence of the successful award variation application of DHAA in October 2009, by way of the AIRC Full Bench decision in December 2009.⁶ This is correct.
35. The HSU states at paragraph 40 that the Full Bench should take into account the context in which that decision was made “including the fact that there was no contradictor⁷”
36. The HSU do not in fact know what occurred because they chose not to make a submission opposing or otherwise commenting on the DHAA’s submission.
37. The DHAA’s application to vary the HPSS Award was emailed to Mr Brendan Hower from the Modern Awards Project Team who published the application on the AIRC website on Tuesday 20 October 2009 with the following comment, “Award Modernisation Update – Health and Welfare Services (excluding social and community services)
An application is made by the Dental Hygienists Association of Australia Inc for the variation of the Health Professionals and Support Services Award under section 576H of the Workplace Relations Act 1996. There is link to the application below. The application will be determined by the award modernisation Full Bench by way of written submissions. All subscribers to the Health and Welfare Services (excluding social and community services) industry section of the award modernisation process have been notified by email of these applications.

Directions

The applicants are directed to file full written submissions in support of their applications by 5pm on 30 October 2009. Any other interested party may file full written submissions by close of business on 13 November 2009. Any submissions in reply may be filed by the applicants by 20 November 2009. Please direct any submissions or inquiries to amod@airc.gov.au.”

38. The AIRC was within their statutory discretion to deal with the matter by way of written submissions, as indeed this Full Bench has similarly decided to do in 2020. Written submissions do not mean that a matter is “not fully argued” as claimed by the HSU.⁸
39. Had the Full Bench perceived a need to invite a contradictor, as they have on occasions, for example the 2019 penalty rates case for the Hair and Beauty Industry Award, then presumably they would have done so. HSU cannot have any valid views on how a case should have been conducted by the award modernisation Full Bench, when they chose not

⁵ HSU submission, op cit, p. 8.

⁶ [2009] AIRC FB 948

⁷ HSU, op cit, p. 10

⁸ HSU ibid

to make a submission even though (apparently) they consider themselves to be an interested party.

40. The HSU posits the view that that enterprise bargaining is not possible under Part 2-4 of Fair Work Act and s 186 in particular, for award free employees at paragraph 41(e)⁹ where they claim that award free members of a dental team would be excluded from enterprise bargaining. No such statutory or practical impediment exists. DHAA is very supportive of enterprise bargaining in both the public and private sectors.
41. In relation to s 143(7) of Fair Work Act, Dental Hygienists and Oral Health Therapists have been traditionally award-free in the private sector. With regard to the HSU's extensive remarks on State public sector awards, as with Doctors and Dentists, professions which have been traditionally award-free in the private sector, Dental Hygienists and Oral Health Therapists in the public sector have been subject to public health service State Awards and mature (fourth and fifth) iterations of State and Federal enterprise agreements.
42. The DHAA submits that the existence of public sector State award should have no relevance to a consideration of coverage for Dental Hygienists and Oral Health Therapists of the HPSS award. The status quo remains unchanged since 2009 that some dental professionals in the public sector are covered by state awards. All other Dental Hygienists, Oral Health Therapists and Dentists working clinically in the private sector remain award-free.
43. The same occupations in the public sector were and still are covered by a State Award applying only to the public sector and in some cases, a mature iteration of a State or Federal enterprise Agreement. For example, in Victoria, the Victorian Public Health Sector (Dental Therapists, Dental Hygienists and Oral Health Therapists') Enterprise Agreement 2018-2022 [2019] FWCA 1399 is negotiated between the CPSU and the Victorian Hospitals' Industrial Association (VHIA). This Federal Agreement covers Dental Hygienists, Oral Health Therapists and Dental Therapists. This Agreement and its previous iterations do not reference the HPSS Award in relation to coverage of Dental Therapists, nor is the HPSS Award referenced for the purposes of the Better Off Overall Test as per s186(2)(d) of Fair Work Act.
44. Another example of long-term EBA coverage of dental professionals in the public sector is the South Australian Modern Public Sector Enterprise Agreement; Salaried Employees 2017, File No. 372. This State Agreement negotiated between the PSA division of CPSU and SA Dental does not reference any State award, including for Dental Therapists.
45. Therefore, the existence of state awards covering dental professionals does not warrant a change in coverage of the HPSS award by including Dental Hygienists or Oral Health Therapists.
46. The HSU states at paragraph 76¹⁰ that "the role of oral health therapist is one of relatively recent provenance, as the DHAA Submission accepts." What in fact DHAA have said in every submission, supported by extensive witness evidence and scholarly articles, is that the profession of Oral Health Therapist existed at the time of the making of the HPSS modern award in 2009. The Oral Health Therapist was a recognised, working, registered occupation in every State and Territory of Australia in 2009.

⁹ HSU op cit p. 11

¹⁰ HSU submission, op cit. p. 20

47. DHAA submits that Fair Work Commission should not make a significant variation to the Award such that two award-free occupations become covered by the HPSS Award **because** Dental Therapy has always been covered by the HPSS Award, or because that profession is now in decline.
48. No witness evidence is provided in the HSU's submission, or in any previous submission, or by any other parties, as to why Dental Hygienists and Oral Health Therapists should be covered by the HPSS award.
49. DHAA has provided witness evidence as to why such a change should **not** be made and provided reasons why its employee members believe they would be harmed by such a change.¹¹ In their evidence at arbitration in 2017, Dr Melanie Hayes and Dr Carol Tran expressed a view that Dental Hygienists and Oral Health Therapists would be harmed if Fair Work Commission quashed their award-free status.
50. DHAA has also submitted witness evidence from Ms Kay Ball, Oral Health Therapist; Ms Alison Taylor, lecturer and clinical tutor in dental hygiene at TAFE Australia; Ms Susan Melrose, Dental Hygienist; Ms Christina Zerk, Dental Hygienist; and Ms Lyn Carman, Dental Hygienist. These witness statements relate to their own experience and circumstances concerning how and why they believe HPSS award coverage would be detrimental to their future wages.
51. In the 2009 Decision of the AIRC, at [3] the Full Bench stated, "it (DHAA) further submitted that award coverage of Dental Hygienists would disadvantage its members in the following ways: (a) The award would act to erode Dental Hygienists' real high hourly wage both immediately and over time which they have maintained successfully for decades via private individual negotiations, without any industrial instrument benchmarks being used or desired; (b) The existence of the Award minimum rate of pay would be used by their employers as a benchmark to disadvantage Dental Hygienists in negotiations on remuneration; (c) The Award's classification structure would be used to limit promotion and progression for Dental Hygienists; (d) The Award's classification structure and low entry pay rates for graduates would significantly disadvantage new graduates in comparison to current award-free conditions."
52. The DHAA submits that the same concerns considered and accepted by the Full Bench in 2009 continue to exist in 2020. DHAA further submits that those concerns are even more serious in the context of the economic crisis of the COVID19 pandemic.



Katrina Murphy for
Dental Hygienists Association of Australia Limited
24 April 2020

¹¹ Witness Statement of Dr Melanie Hayes of 9 June 2017 and Witness Statement of Dr Carol Tran of 9 June 2017 referenced in [107] and [108] of [2018] FWCFB 7350 p16.