



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 TO HEALTH SERVICES UNION RESPONSE (dated 15 November 2019)**

**(Point 4 of Directions of Vice President Catanzariti of 17 September 2019)**

Dental Hygienists Association of Australia Limited (“DHAA”)

Date: 25 November 2019

Lodged by:

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## Introduction

1. This Submission is filed on behalf of the Dental Hygienists Association of Australia Limited (“DHAA”) in accordance with Point 4 of the Directions issued by Vice President Catanzariti on 17 September 2019.
2. As per the Directions, this Reply Submission addresses whether the List of Common Health Professionals contained in Schedule C of the Health Professionals and Support Services Award (“the Award”) should be indicative or exhaustive, and replies to the response submission dated 15 November 2019, filed by the Health Services Union, in relation to Point 2 of the Directions.
3. DHAA is the **employee representative professional association** for Dental Hygienists and Oral Health Therapists. The current DHAA membership is 1,530.
4. DHAA’s membership is of employee Dental Hygienists and Oral Health Therapists in the public and private sectors. DHAA’s membership does not include Dental Therapists.

## Outline of Claim

5. The DHAA’s concern is to clearly and unequivocally maintain the status quo that Dental Hygienist and Oral Health Therapists are not covered by the Award, in such a manner that DHAA members and their employers, most of whom are small business owners, are as clear as possible that the Award does not cover or apply to their occupations of Dental Hygienist and/or Oral Health Therapist.
6. As such, as submitted in its submission of Monday 14 October 2019 and in all previous submissions from DHAA viz 21 August 2015, 5 November 2015, 29 April 2016, 2 August 2016, 17 March 2017, 22 May 2017, 13 June 2017, 11 December 2017, 14 March 2018, 31 July 2019, 14 August 2019 and at arbitration before the Full Bench on 11 and 12 December 2017,<sup>1</sup> the DHAA submits that the List of Common Health Professionals is and should remain exhaustive.

## Reply to HSU

7. The HSU state at point 3 of their 15 November 2019 submission in relation to the decision of the Commission in its decision of 3 December 2018<sup>2</sup> that “The Commission concluded ([at 115]) that the decision of the Full Bench to remove the profession of “Dental Hygienist” from the List in Schedule C<sup>3</sup> should be reconsidered in light of developments in the health profession, in particular, of the subsequent recognition of the occupation of Oral Health Therapist, which combines the skills of Dental Therapists and Dental Hygienists.”<sup>4</sup>
8. However, the Commission did not reach this conclusion at [115] of its decision. It does not assist the resolution of the two outstanding issues which are the subject of Vice President

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<sup>2</sup> [2018] FWCFB 7350 at [115]

<sup>3</sup> [2009\] AIRCFB 948](#).

<sup>4</sup> Reply Submission of Health Services Union, 15 November 2019, p.1

Catanzariti Directions of 17 September 2019 to paraphrase a Full Bench decision inaccurately.

9. The Commission stated at [115], “On 24 December 2009, the Commission issued a decision in relation to an application made by the Dental Hygienists Association of Australia Incorporated (DHAA) to vary the HPSS Award to remove the reference to Dental Hygienist from Schedule C. The grounds advanced by the DHAA in support of their application largely related to the fact that Dental Hygienists have not historically been covered by industrial instruments, apart from in Victoria, and award coverage would result in certain disadvantages to the occupation. The FWC granted the application, observing that no other organisation or person had made any submission on the application.”
10. At [114] of its Decision, the Commission stated, “We note that to support the view that the List is exhaustive, Ai Group relied on a decision made by the AIRC to remove the profession ‘Dental Hygienist’ from the List. Ai Group stated that if the List were not exhaustive, the decision made by the AIRC would be “superfluous”. The ADA echoes the substance of that argument. We agree with the inherent logic of this submission however we consider that the decision of the Full Bench should be reconsidered in light of developments in the health profession.”<sup>5</sup>
11. The Commission has not in any part of its decision said, as claimed by HSU, that “the subsequent recognition of the occupation of Oral Health Therapist” was accepted by the Full Bench as fact and was therefore a reason to reconsider the exclusion of Dental Hygienists from coverage of the Health Professional and Health Services Union.
12. The HSU has repeatedly attempted to argue that the profession of Oral Health Therapy did not exist in 2009, and therefore this explains why the occupation has never been included in the List of Common Health Professionals.
13. The DHAA and ADA have submitted, and provided witness evidence on this matter, that this claim is false.<sup>6</sup> To therefore infer that the FWC Full Bench “concluded” in 2018 that the occupation of Oral Health was “recognised” after the AIRC Full Bench decision in 2009 is unhelpful, at best.
14. In relation to Point 10(g) of the HSU’s response<sup>7</sup>, DHAA submits this is a circular argument. The HSU appears to be evincing that it is outside of the statutory powers of the Fair Work Commission to reduce award coverage by “amending” the List in Schedule C to characterise the List as exhaustive. There is a Full Bench decision, and only one, which goes to the nature and purpose of the List of Common Health Professionals, and that is the AIRC Full Bench Decision that approved the DHAA’s application to vary the Award to render Dental Hygienists award free, and accordingly removed the profession of Dental Hygienist from the List<sup>8</sup>, with no other change to the Award.
15. Clearly, therefore, if the FWC Full Bench decides that the List should be exhaustive rather than indicative, they are certainly not “amending” it, as claimed by the HSU.

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<sup>5</sup> [2018] FWCFB 7350 at [114]

<sup>6</sup> DHAA submission, 31 July 2019

<sup>7</sup> Reply Submission of Health Services Union, 15 November 2019, p.3

<sup>8</sup> [2009\] AIRCFB 948](#).

16. In point 11 (a) of the HSU response, the HSU claims that “nowhere in the Submissions referred to above do any of the employer parties convincingly come to grips with the use of the word “common” in the List in Schedule C.”<sup>9</sup> Whilst DHAA concedes that while presumably the HSU is not referring to DHAA’s submissions since DHAA is not “an employer party” nonetheless, the DHAA submits that the meaning of “common” was determined sufficiently “convincingly” by the Full Bench in its 2009 decision to exclude Dental Hygienists from the List by way of approving an award variation application.<sup>10</sup>
17. The Full Bench accordingly stated,<sup>11</sup> “We agree with the inherent logic of this submission” in relation to the Ai Group’s reliance on the AIRC Full Bench’s decision to remove the profession “Dental Hygienist” from the List to support their argument that if the List was not exhaustive, the decision made by the AIRC would be superfluous.<sup>12</sup>
18. The HSU states at point 11 (d)<sup>13</sup> that “any concern arising in respect of any particular occupation group it is contended was not intended to be covered by the Award when made, may be remedied by an appropriate amendment to clause 4 of the Award.”
19. The HSU fails to address why it has a better solution to award variation matters than the Full Bench of the AIRC<sup>14</sup> where it made no amendment to clause 4 whatsoever, and instead changed the List of Common Health Professionals by a single deletion.
20. The HSU states at point 17 (b) that clarification that the List is not exhaustive will “focus the minds of employers and employees back on the term “health professional employee”, a phrase which has sufficiently (sic) clarity to be understood by them.” It is specious nonsense that employers and employees need merely “focus their minds” on modern award phraseology. Employers<sup>15</sup> and employees want and need simplicity and certainty from awards. A list of occupations that are exhaustively covered by the Award to the exclusion of all others gives them that.
21. With regard to the HSU’s comment in point 19 of its response of 15 November 2019 in relation to the MIERG submission, that it is not “identified whose interest it represents,”<sup>16</sup> DHAA responds that it is similarly not clear whose interests the HSU represents in this matter. This is because the Health Services Union’s Rules do not cover any of the health occupations that are currently not specifically listed in the List of Common Health Professionals, other than dentists and then in very limited circumstances.<sup>17</sup> The Health Services Union’s Rules **do not cover** Dental Hygienists or Oral Health Therapists. The HSU’s rules do cover Dental Therapists. Dental Therapists have always been listed in the List of Common Health Professionals.

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<sup>9</sup> Reply Submission of Health Services Union, op cit. p. 4.

<sup>10</sup> [2009\] AIRCFB 948](#).

<sup>11</sup> [2018] FWCFB 7350 at [114]

<sup>12</sup> Ibid.

<sup>13</sup> HSU submission, op cit., p. 4

<sup>14</sup> [2009\] AIRCFB 948](#).

<sup>15</sup> Jennifer Hodges and Matthew Bond, “A Qualitative Research Report on Citizen Co-Design with Small Business Owners” Prepared for the Fair Work Commission, Reference Number 24210, 13 August 2014, Volume 1, appended to DHAA submission on 14 October 2019.

<sup>16</sup> HSU submission, op cit. p.6

<sup>17</sup> Registered Rules of the Health Services Union, [051V: Incorporates alterations of 23 May 2018 (R2018/48)]

22. The comments from the Health Services Union in points 24, 27 and 28 of their submission<sup>18</sup> default back to what appears to be their real position which is that all health professionals are and should be covered by the HPSS Award.
23. Consistent with this default position, the HSU opines that an employer or an employee only need to know that they are a “health professional” to know they are covered by the Award and according to the HSU, “the concept is really not that hard to grasp.”<sup>19</sup>
24. This comment from the HSU is inaccurate, dismissive and unhelpful. Even if all Australian health professionals were covered by an award, which they are not, there are a variety of modern awards and State awards which could potentially cover them, other than the Health Professionals and Support Services Award, including the Medical Practitioners Award 2010 and the Aboriginal Community Controlled Health Services Award 2010.
25. It should be the agreed objective of all the interested parties in this matter to seek clarity, certainty and simplicity for the employees and employers with regard to award coverage, not to disparage their uncertainty. In any event, if correct award coverage was as simple and straightforward as Pay as You Go taxation, as the HSU appears to believe<sup>20</sup>, presumably the parties involved in this matter would not have been arguing about it for the last five years.
26. The HSU states [at 25]<sup>21</sup> that “the AIG’s submission at [36] about the difficulty of discerning whether a role is sufficiently similar to award-covered health professionals is entirely theoretical. The AIG proffers no concrete example of a health professional role about which there could be the sort of crippling uncertainty it deplors.”
27. This is a curious argument when the HSU has been running a (flawed) argument for the last three years that an Oral Health Therapist is sufficiently similar to a Dental Therapist to warrant OHTs being covered by the HPSS Award because Dental Therapists already are. By way of contrast, the HSU’s very exhaustive and specific Rules coverage is of **Dental Therapists only**, not Oral Health Therapists or Dental Hygienists.)<sup>22</sup>
28. With regard to clause 37 of the HSU’s submission,<sup>23</sup> which relates to the AIRC’s decision to remove Dental Hygienists from the Award in 2009 by way of award variation, the HSU did not avail itself of its opportunity to oppose the submission to vary the Award. Therefore, it is difficult to see what their point is. The DHAA was prepared but not required to argue against any submissions from the HSU in 2009, because the Union failed to make any. Hence, the HSU’s comments about the value of the Full Bench decision should be disregarded by the Commission as holding no weight.
29. The HSU fails to identify which occupations not already specifically listed in the List of Common Health Professionals would be classified as Health Professional Employee Level 1, Pay Points 1 and 2.<sup>24</sup>

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<sup>18</sup> HSU submission, op cit., p. 7

<sup>19</sup> Ibid, p. 7-8

<sup>20</sup> Ibid, p. 7

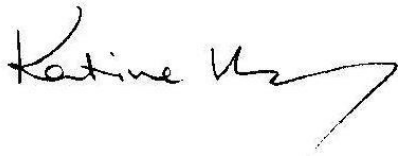
<sup>21</sup> Ibid, p. 7

<sup>22</sup> HSU Rules, op cit.

<sup>23</sup> Ibid, p.10

<sup>24</sup> Ibid, p. 11

30. The HSU offers no evidence to support their opinion that universal award coverage for all health professionals creates an incentive to bargain.<sup>25</sup> Unless the HSU intends to put on evidence to support this view, the assertion should be disregarded by the Commission.
31. The HSU contends that minimum rates of pay will likely aid attraction and retention of employees.<sup>26</sup> The DHAA have previously submitted evidence that disproves this with regard to Pharmacists, Dental Hygienists and Oral Health Therapists.<sup>27</sup> Unless HSU intends to put on witness evidence to support this view, this assertion should be disregarded by the Commission.



Katrina Murphy for  
Dental Hygienists Association of Australia Limited  
25 November 2019

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<sup>25</sup> Ibid, p. 11

<sup>26</sup> Ibid.

<sup>27</sup> DHAA Submission, 31 July 2019