

FAIR WORK COMMISSION

Matter No.: AM2016/31



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

SUBMISSION FROM DENTAL HYGIENISTS ASSOCIATION OF AUSTRALIA - AM2016/31

Dental Hygienists Association of Australia Limited (“DHAA”)

Date: 2 November 2020

Lodged by:

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Introduction

This Submission is filed on behalf of the Dental Hygienists Association of Australia Limited (“DHAA”) in accordance with verbal Directions issued by Vice President Catanzariti at the conclusion of arbitration (hearing of evidence) on 27 October 2020.

Submission

1. The DHAA’s submission is that Dental Hygienists and Oral Health Therapists should not be covered by the Health Professionals and Support Services Award (“the Award.”)
2. DHAA relies on the following witness evidence, signed statements, submissions and materials as follows:
 - i) Witness statements in the Court Book and evidence given at arbitration on 27 October 2020 by Dr Carol Tran and Ms Michelle Kuss
 - ii) Submission in reply of 1 June 2020
 - iii) Submission in reply of 24 April 2020
 - iv) Submission and witness statements 28 February 2020
 - v) Submission 9 December 2019,
 - vi) Submission in reply 25 November 2019,
 - vii) Submission of 14 October 2019,
 - viii) Submission of 14 August 2019,
 - ix) Submission of 31 July 2019,
 - x) Submission of 14 March 2018
 - xi) Evidence given at arbitration on 11 and 12 December 2017 by Dr Melanie Hayes and Dr Carol Tran
 - xii) Submission – survey - of 11 December 2017,
 - xiii) Witness statements of 13 June 2017,
 - xiv) Submission in reply 22 May 2017,
 - xv) Submission – witness statement - 17 March 2017,
 - xvi) Submission - 2 August 2016,
 - xvii) Submission 29 April 2016,
 - xviii) Submission 5 November 2015,
 - xix) Submission 21 August 2015.
3. Paragraph [28] of the Full Bench Decision [2019] FWCFB 8538 “We are mindful of s. 143(7) of the FW Act that says: (7) A modern award must not be expressed to cover classes of employees:
 - (a) Who because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under the laws of the Commonwealth or the States); or
 - (b) Who perform work that is not of a similar nature to work that has traditionally been regulated by such Awards.”¹

¹ 19 December 2019 [2019]

4. Dental Hygienists, Oral Health Therapists and Dentists have been traditionally award free in the private sector.
5. In 2009, Dental Therapists were non-controversially included the List of Common Health Professionals in the first exposure draft of the HPSS Award and have remained in the List ever since. Dental Hygienists were briefly in the list and were then removed via the award variation application of DHAA in October 2009, by way of the AIRC Full Bench decision in December 2009.²
6. Oral Health Therapists and Dentists have never been covered by the Award or any other Federal Award.
7. Doctors, dentists, Dental Hygienists and Oral Health Therapists have been traditionally award-free in the private sector. By way of contrast, in the public sector, doctors, dentists, Dental Hygienists and Oral Health Therapists have all been subject to State Awards and mature (fourth and fifth) iterations of State and Federal enterprise agreements in the public sector.
8. Therefore, DHAA has submitted that the existence of any State public sector awards 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.
9. For the purpose of s 143(7) of Fair Work Act, Dental Hygienists, Oral Health Therapists, Dentists and Doctors have all been traditionally award-free in the private sector because of the nature of their role prior to and since 2009.
10. Only one significant occupational change has occurred since 2009 in the dental industry. That change is the legacy nature of the profession of Dental Therapist as a profession. All dental therapy training schools are now closed. The only training in that discipline is now in a Bachelor of Oral Health. The Dental Therapist is the only dental profession that has always been covered by award, and the life of that profession is now concluding.
11. In these proceedings, DHAA has submitted via submissions and evidence that the award free profession of Oral Health Therapist has **not** replaced the award-covered profession of Dental Therapist. It is an entirely different and separate profession which existed at the time of the making of the award in 2009. In fact, the profession of Oral Health Therapist has not altered between 2009 and 2020 in terms of duties, skills, tasks or minimum educational requirements.
12. DHAA has submitted that Fair Work Commission should not make a significant variation to the Award such that two award free occupations become covered by an Award **because** one legacy occupation – Dental Therapy – has always been covered by the Health Professionals and Support Services Award, or because that profession is now in decline.
13. DHAA has further submitted via submissions and witness evidence including that of Dr Tran at arbitration on 27 November 2020 that the position of an oral health therapist is much more similar to that of a traditionally award-free dentist, than it is to a traditionally award-

² [2009] AIRC FB 948

covered dental therapist, both in relation to duties and in methods and typical form of remuneration.

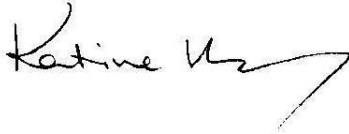
14. At paragraph 13 of her sworn witness statement of 27 February 2020 and under cross-examination on 27 October 2020, Dr Tran referred to academic research which demonstrated that 65% of a dentist's day to day job is spent performing preventive dentistry procedures and 80% of Dr Tran's job as an Oral Health Therapist is to provide preventive dentistry procedures to patients. Dr Tran stated that it was her professional view that the same comparative percentages apply across Australia as they do in the United States of America.
15. Dr Tran's demonstrated professional authority to make such an assessment is supported by the fact that she is an internationally published author in numerous textbooks and industry pieces. Dr Tran is the only Oral Health Therapist globally to have published in '*Clinical Practice of the Dental Hygienist*.' This publication³ is considered to be a cornerstone and seminal textbook in almost every dental hygiene education program in the United States of America. Dr Tran's chapter on 'Dental Implants' is considered ground-breaking by her peers in providing the latest evidence-based research for clinicians and students.
16. This American textbook and Dr Tran's chapter reached over 350 dental hygiene schools and more than 200,000 dental hygienists in the United States of America. DHAA therefore submits that Dr Tran's academic authority to state that American research is applicable in Australia in relation to duties of comparative dental professionals, is indisputable. Dr Tran states that the duties, tasks, functions, skill sets as well as the style and method of remuneration of a private sector Dental Hygienist and Oral Health Therapist are closely aligned to a private sector dentist, and conversely are in no way similar to a public sector dental therapist.
17. The DHAA's opposition to award coverage is not premised on the possible classification of Dental Hygienists who have a diploma. In its submissions to Fair Work Commission and publications to members, DHAA has stated that the classification system of the Health Professionals and Support Services Award would result in Dental Hygienists and Oral Health Therapists in clinical practice being classified at Level 2, at best, Level 3. This is because the requirements of the higher levels of the Award classification structure require managerial, training, mentorship and budgetary responsibilities which do not usually occur for senior clinicians in private dental practice.
18. The extreme disparity of the relevant award minima for Levels 2 and 3 compared to the actual average current salaries of Dental Hygienists and Oral Health Therapists pose a massive risk to their ability to maintain their market rates. Therefore, award coverage poses a significant risk to the well-being and livelihoods of Dental Hygienists and Oral Health Therapists.
19. The award offers no compensating factors particularly because the span of hours of 13.2 (b) of this Award for private dental practices, and the associated flexibility of ordinary hours rostering will mean little to nil availability of overtime penalties for Dental Hygienists and

³ Tran C, Boyd L. Chapter 31: The Patient with Dental Implants. In: Boyd LD, Mallonee L, Wyche CJ, Wilkins' Clinical Practice of the Dental Hygienist. USA, 2020 pp 1553-1590

Oral Health Therapists. Leave loading, a minimum engagement period and a couple of small allowances offer no compensation for the inevitable consequences of the disparity between the relevant award minima and actual current market rates of pay for the two professions.

20. DHAA has submitted that Award coverage will be particularly catastrophic for the Dental Hygienist and Oral health Therapist workforce because it is overwhelmingly female, with many employees working one or two positions with different employers on a part-time basis.
21. As such, DHAA has submitted that the significant disadvantages posed by award coverage of occupations contravenes the Modern Awards Objective, specifically section 134(1) (c) of Fair Work Act, *“the need to promote social inclusion through increased workforce participation.”*
22. 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.”
23. The DHAA’s submissions and witness evidence in these proceedings from 2015 – 2020 demonstrate that the same concerns considered and accepted by the Full Bench in 2009 continue to exist in 2020.
24. No good reason exists for the Commission to disrupt the status quo that Dental Hygienists and Oral Health Therapists are not covered by the Health Professionals and Support Services Award.
25. Change in the dental industry since 2009 does not justify a change in award coverage. Dental Therapy, always been covered by the Award, is now a “legacy” profession. It is not logical or reasonable to default to the award coverage position of the legacy profession.
26. There is no change since 2009 in the similarity in duties, skills set and remuneration methods of dentists, oral health therapists and dental hygienists.
27. There is no change since 2009 in the fact that dental therapists who work only in the public sector have a much narrower skill set, and significantly different duties to dentists/dental hygienists and oral health therapists. Dental Therapists are remunerated solely on the basis of time worked at the appropriate hourly rate, with number of patients/patient retention and revenue being in no way relevant to their salaries, as they are for dentists, dental hygienists and oral health therapists in private practice.
28. Witness evidence supports DHAA’s members’ unchanged strong opposition to award coverage. DHAA members fear a future imposed by a change to award coverage, where their ability to negotiate their livelihoods would be massively compromised by the low minimum rates of pay of the relevant classifications in the Award.

29. The best interests of the dental industry are served by maintaining the status quo that Dental Hygienists and Oral Health Therapists are not covered by the Health Professionals and Support Services Award.

A handwritten signature in black ink, appearing to read 'Katrina Murphy', with a stylized flourish at the end.

Katrina Murphy for
Dental Hygienists Association of Australia Limited
2 November 2020

DHAA Annexure – SCHEDULE OF PROPOSED VARIATIONS

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4. Coverage

4.1. This industry and occupational award covers:

- (a) employers throughout Australia in the health industry and their employees in the classifications listed in Schedule A—Classification Definitions to the exclusion of any other modern award; and
- (b) employers engaging a health professional employee in the classifications listed in Schedule A—Classification Definitions.

4.2. The **health industry** means employers whose business and/or activity is in the delivery of health care, medical services and dental services.

4.3. This award covers any employer which supplies labour on an on-hire basis in the health industry in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. Clause 4.3 operates subject to the exclusions from coverage in this award.

4.4. This award covers any employer which supplies on-hire employees in classifications set out in clause 17—Minimum rates for Health Professional employees and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. Clause 4.4 operates subject to the exclusions from coverage in this award.

4.5. This award covers employers which provide group training services for apprentices and trainees engaged in the health industry and/or parts of that industry and those apprentices and trainees engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. Clause 4.5 operates subject to the exclusions from coverage in this award.

4.6. This award does not cover:

- (a) employees excluded from award coverage by the [Act](#);
- (b) employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees; or

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- (c) employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)), or employers in relation to those employees.
- (d) **employees performing the duties of an Oral Health Therapist and/or Dental Hygienist**

4.7. Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

A.1 Health Professional employees—definitions

A list of common health professionals which are covered by the definitions is contained in Schedule B—List of Common Health Professionals. **These definitions to not apply to the occupations of Dental Hygienist and Oral Health Therapist. These occupations are not covered by this Award.**

A.1.1 Health Professional—level 1

- (a) Positions at level 1 are regarded as entry level health professionals and for initial years of experience.
- (b) This level is the entry level for new graduates who meet the requirement to practise as a health professional (where appropriate in accordance with their professional association's rules and be eligible for membership of their professional association) or such qualification as deemed acceptable by the employer. It is also the level for the early stages of the career of a health professional.

A.1.2 Health Professional—level 2

- (a) A health professional at this level works independently and is required to exercise independent judgment on routine matters. They may require professional supervision from more senior members of the profession or health team when performing novel, complex, or critical tasks. They have demonstrated a commitment to continuing professional development and may have contributed to workplace education through provision of seminars, lectures or in-services. At this level the health professional may be actively involved in quality improvement activities or research.
- (b) At this level the health professional contributes to the evaluation and analysis of guidelines, policies and procedures applicable to their clinical/professional work and may be required to contribute to the supervision of discipline specific students.

A.1.3 Health Professional—level 3

- (a) A health professional at this level would be experienced and be able to independently apply professional knowledge and judgment when performing novel, complex, or critical tasks specific to their discipline. At this level health professionals will have additional responsibilities.

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- (b)** An employee at this level:
 - (i)** works in an area that requires high levels of specialist knowledge and skill as recognised by the employer;
 - (ii)** is actively contributing to the development of professional knowledge and skills in their field of work as demonstrated by positive impacts on service delivery, positive referral patterns to area of expertise and quantifiable/measurable improvements in health outcomes;
 - (iii)** may be a sole discipline specific health professional in a metropolitan, regional or rural setting who practices in professional isolation from health professionals from the same discipline;
 - (iv)** is performing across a number of recognised specialties within a discipline;
 - (v)** may be accountable for allocation and/or expenditure of resources and ensuring targets are met and is responsible for ensuring optimal budget outcomes for their customers and communities;
 - (vi)** may be responsible for providing regular feedback and appraisals for senior staff to improve health outcomes for customers and for maintaining a performance management system; and
 - (vii)** is responsible for providing support for the efficient, cost effective and timely delivery of services.

A.1.4 Health Professional—level 4

- (a)** A health professional at this level applies a high level of professional judgment and knowledge when performing a wide range of novel, complex, and critical tasks, specific to their discipline.
- (b)** An employee at this level:
 - (i)** has a proven record of achievement at a senior level;
 - (ii)** has the capacity to allocate resources, set priorities and ensure budgets are met within a large and complex organisation;
 - (iii)** may be responsible to the executive for providing effective services and ensuring budget/strategic targets are met;
 - (iv)** supervises staff where required; and
 - (v)** is expected to develop/implement and deliver strategic business plans which increase the level of care to customers within a budget framework.