

**4 YEARLY REVIEW OF MODERN AWARDS – HEALTH PROFESSIONALS AND
SUPPORT SERVICES AWARD 2020**

SUPPLEMENTARY SUBMISSION OF HEALTH SERVICES UNION

1. This submission is made by the Health Services Union (**HSU**) following the hearing before the Full Bench of the Commission on 27 October 2020.
2. At the hearing, the Full Bench:
 - a. received the further witness statements of the parties filed with the Commission earlier this year;
 - b. heard evidence from Alex Leszczynski, Senior Industrial Officer with the Health Services Union Victoria No. 3 Branch, who was called by the HSU;
 - c. heard evidence from Dr Carol Tran, who was called by the Dental Hygienists Association of Australia (**DHAA**);
 - d. heard evidence from Michelle Kuss, who was called by the DHAA; and
 - e. invited the parties to make any further submission in light of the evidence at the hearing.
3. The HSU makes the following submissions. They are additional to the written submissions already filed by the HSU in respect of this matter. The HSU continues to rely on those written submissions.

HSU Evidence

4. No objection was taken, nor was any challenge made to the evidence called by the HSU from dental prosthetists Gregory Roche, Anastasia Staikopoulos, Craig Whitehead and Anthony Varos.
5. The gravamen of that evidence has been addressed by the HSU in its Submission dated 10 April 2020.

DHAA Evidence

6. The evidence of Dr Tran and Ms Kuss was advanced in support of a series of propositions which are addressed in turn below.

Impact of Award Coverage on Rates of Pay

7. The first proposition advanced by that evidence was that coverage of dental hygienists and oral health therapists by the *Health Professionals and Support Staff Award 2020* (**Award**) would cause a decrease in the rates of pay for those

occupations, and that the ability of those workers to negotiate their pay rates and conditions would be compromised by such coverage (Tran: [4], [5]; Kuss: [4], [5]).

8. The Commission would not accept that evidence, not least because that opinion was expressed in identical terms by both Dr Tran and Ms Kuss, and was adopted by Ms Kuss after Ms Tran circulated her statement to other DHAA witnesses.
9. No basis was disclosed in the evidence for that view. There was no evidence from either Dr Tran or Ms Kuss that any employer had indicated any desire to negotiate wages downwards, or that any employer had expressed a view about their likely response if dental hygienists or oral health therapists were Award covered. Dr Tran's evidence of her most recent negotiations about her pay disclosed that performance issues were a feature of those discussions, and an increase was granted. Dr Tran had elected to remain in a position with a lower rate of pay, and to cease working in another role which offered a higher rate.
10. Ms Kuss's employer had offered her a starting rate which it said was "negotiable". Ms Kuss understood that meant the employer was willing to entertain increasing the rate it had offered. Nonetheless she didn't press for any advance on the rate she was offered. Ms Kuss's opinion about the likely impact of Award coverage was, in any event, based on an understanding that dental hygienists without a three year degree could never progress from the lowest rate at Level 1, which is Pay Point 1. That view is contrary to the terms of clause 17.1, which provide for progression through the pay points in Level 1 annually (or by the equivalent period of experience for part-time and casual workers) following entry at the relevant pay point, which in the case of an employee with a diploma or equivalent (a UG 2 qualification) is Pay Point 1. Given that misconception and the lack of evidence otherwise to support her view, the Commission would give no credence to Ms Kuss's opinion about the impact of Award coverage on her wages or those of others in her profession. Ms Kuss had also communicated that view to DHAA members, many of whom she accepted had two year qualifications (and not the three year degrees currently required for entry to the profession). To the extent the DHAA contends that the views of Ms Kuss and Ms Tran represent those of DHAA members generally, the Commission would not be satisfied that it was based on a correct construction of the Award.
11. The evidence of both Ms Kuss and Dr Tran about their *actual* experience negotiating pay rates (as compared with their *speculation* about what employers would do if they were Award covered) accorded with the observations of Mr Leszczynski in his statement dated 7 August 2019 about the remuneration of sonographers (at [26] – [34]). Sonographers are now covered by the Award, although they were not explicitly referred to in pre-reform awards in Victoria (Leszczynski 7 August 2019 [27]) and are now one of the highest paid professions in enterprise agreements for health professionals in Victoria. The rates applicable to sonographers well exceed the minimum rates specified in the Award. Many employers pay sonographers rates in excess of those specified in their enterprise agreements (ibid).

12. When he was cross-examined, Mr Leczszynski also pointed to the example of art therapists, another profession not covered by the pre-reform awards in Victoria. His evidence was that coverage by the Award led to that profession being better recognised, and achieving better wages outcomes through bargaining. He observed that bargained rates were always well above the Award rates.
13. The assertion that Award coverage (which would effect an increase in the statutory minimum rate of pay applicable to dental hygienists and oral health therapists from the National Minimum Wage to the rates in the Award) would put *downward* pressure on wage negotiations defies logic and common-sense. The Commission would reject it.

Similarity of Dental Hygienist/Oral Health Therapist to Dentists Work

14. The DHAA witnesses also express the view (again in strikingly similar terms across a number of witness statements), that their daily duties (either as dental hygienist or as oral health therapist) are *more similar* to a private sector dentist than they are to a public sector dental therapist.
15. That evidence appears to be directed towards a submission about the effect of s.143(7) of the *Fair Work Act 2009 (Act)*. That subsection provides as follows:

(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 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.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

16. Subsection 143(7) of the Act does not require the Commission to make a finding as to the profession to which the work of a dental hygienist or oral health therapist is *most* similar, and then to determine award coverage by reference to that profession. Rather, it prohibits the Commission from extending award coverage to a class of employee if their *work* is not of a similar nature to *work* that has traditionally been award-regulated. Nothing in subsection 143(7) of the Act warrants any distinction being made between work based on whether it is performed in the public sector or private sector.
17. The HSU submits that the work of dental hygienists and oral health therapists is *similar* to work that has traditionally been regulated by awards. It is similar to the work of other health professionals, in particular dental therapists. The role of dental hygienist or oral health therapist in a dental practice is analogous to

that of allied health practitioners such as sonographers and physiotherapists in medical practices. The work need not be *most similar* to that of dental therapists for subsection 143(7) of the Act to present no impediment to Award coverage.

18. A draft order reflecting the variations sought by the HSU is attached to this Submission.

LISA DOUST

Counsel for the Health Services Union

6 St James Hall Chambers

169 Phillip Street

SYDNEY NSW 2000

Tel: (02) 9236 8680

Email: lisa.doust@stjames.net.au

4 November 2020



DRAFT DETERMINATION

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards

(AM2016/31)

HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2020

[MA000027]

Health and welfare

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BOOTH
COMMISSIONER CAMBRIDGE

SYDNEY, XX XXX 2020

*4 yearly review of modern awards – Health Professionals and Support Services Award
2020 – substantive issue – list of common health professionals.*

A. Further to the decisions issued by the Full Bench of the Fair Work Commission on 19 December 2020 [[2019] FWCFB 8538] and XX XXX 2020 [[[2020] FWCFB XXXX]], the *Health Professionals and Support Services Award 2020* is varied as follows:

1. Delete: A.2 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.

And insert:

A.2 Health Professional employees – definitions

An indicative list of common health professionals which are covered by the definitions is contained in Schedule B – Indicative List of Common Health Professionals

2. Delete the title ‘Schedule B – List of Common Health Professionals’

And insert:

Schedule B - Indicative List of Common Health Professionals

3. Insert the following in the list at Schedule B:

Dental Hygienist

Dental Prosthetist

Dentist

Optometrist

Oral Health Therapist

B. This determination comes into operation from XX XXX 2020.

VICE PRESIDENT

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