

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

4 Yearly Review of Modern Awards
Health Professionals and Support
Services Award 2010
(AM2016/31)

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Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/31 HEALTH PROFESSIONALS AND SUPPORT SERVICES
AWARD 2010 - COVERAGE

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the Directions issued by the Fair Work Commission (**Commission**) on 20 June 2019 (**Directions**) concerning claims relating to the *Health Professionals and Support Services Award 2010* (**HPSS Award**) in the course of the 4 yearly review of modern awards (**Review**).
2. Perceived ambiguity surrounding the nature of the 'List of Common Health Professionals' in Schedule C of the HPSS Award was first raised in the course of the Review by the Fair Work Ombudsman, in a submission dated 14 November 2014. In the submission, concern was expressed that it may be unclear how the "Schedule C list is to be applied (e.g. it may be interpreted as a non-exhaustive list of examples of the types of health professionals covered by the award or as a limit on the scope of coverage of the award)".¹
3. An exposure draft of the HPSS Award was subsequently published by the Commission on 8 December 2014, including the List of Common Health Professionals in Schedule B to the Award. A note in the exposure draft asked parties to "...clarify whether the list of common health professionals contained in Schedule B is an exhaustive list of those covered by the award or whether it is an indicative list of examples of the types of health professionals".
4. On 4 March 2015, Ai Group made submissions stating that the list in Schedule B to the exposure draft is intended to be exhaustive rather than indicative. This position was repeated in Ai Group's 28 August 2015 reply submissions relating to substantive claims directed at a number of exposure drafts issued by the

¹ Fair Work Commission, 4 yearly review of modern awards, submission of the Fair Work Ombudsman, 27 November 2014.

Commission and in Correspondence to the Commission on 5 November 2015.

5. The Health Services Union (**HSU**) made submissions on 16 July 2015, 5 November 2015 and 5 August 2016² claiming that the list of common health professionals was indicative rather than exhaustive.
6. In a report to the Full Bench issued on 27 November 2015, Commissioner Roe stated that the issue of whether the exposure draft of the HPSS Award required variation in respect of the list of common health professionals had become a substantive issue. The Full Bench subsequently referred the issue to a separate Full Bench on 10 October 2016.³
7. A large number of organisations made submissions concerning the coverage of the HPSS Award. Ai Group made comprehensive submissions on this question on 8 June 2017 on which we continue to rely.
8. In a Decision of 3 December 2018 (**December Decision**), the Full Bench, headed by Vice President Catanzariti, considered the parties' submissions and stated at paragraph [113]:⁴

Our preliminary view is that it is undesirable to constrain the coverage by reference to an inflexible list of occupations, the names of which and/or work performed may change over time as advances in the health profession occur.

9. Ai Group seeks to address the Full Bench's concerns expressed above, in addition to various other points made at paragraphs [113] to [125] of the December Decision.
10. In particular, this submission responds to the following matter in paragraph [1] of the Directions:
 - Whether the List of Common Health Professionals contained in Schedule C of the Award should be indicative or exhaustive.

² HSU, Submission, 16 July 2015 at [10] and [23]; HSU, Submission – Report to the Full Bench, 5 November 2015 at [3], HSU, Submission – draft determination, 5 August 2016 at [7].

³ [2016] FWCFB 7254, [101].

⁴ [2018] FWCFB 7350, [113].

11. With regard to the other matter identified in paragraph [1] of the Directions, i.e. whether the occupations of Dental Hygienist and Oral Therapist should be covered by the Award, Ai Group does not have a significant interest in the relevant sectors and therefore we make no submissions on the issue.
12. Acknowledging that most of the submissions made to date on the issue of the nature of the list in Schedule C to the HPSS Award have been directed at the related question of its correct interpretation, Ai Group seeks to rely on and add to our submissions of 8 June 2017 in claiming that the list of common health professionals should be exhaustive.

2. ISSUES RAISED IN THE DECEMBER DECISION

13. Although these submissions are primarily intended to respond to the Directions, Ai Group considers it pertinent to address a number of issues that arise out of the December Decision, with a view to providing additional clarification on matters relating to the proposed amendments to the HPSS Award.
14. At paragraph [109] of the December Decision, the Full Bench considered the following extract from a Statement by the AIRC, issued in the course of the Part 10A Award Modernisation Process (our emphasis added)⁵:

[78] The exposure draft of the Health Professionals and Support Services Industry and Occupational Award 2010 is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, **to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally**. At this stage we have not attempted to attach particular professions or skills to any particular pay point. We invite the parties to examine this and provide advice during the consultations. We have attached as Schedule B to the award a list of **common occupation names** which should also be considered.

...

[81] In relation to both nursing and health professionals the exposure drafts cover employers whether they are in the health industry or not. Employers who provide nursing or other professional health services under contract would be covered in relation to their employees in the relevant classifications.

⁵ [2009] AIRCFB 50.

15. Ai Group contends that the abovementioned extract should not be read as suggesting that the intent of the AIRC was to provide for the coverage under the award of 'all health professionals'. When the above Statement was issued the coverage of the Award had not been finalised, as is demonstrated by the call for parties to provide advice about professions and skills during the consultations. The salary structure was drafted in as broad a manner as possible, at this point in the drafting process, because the coverage of the award had not yet been determined.
16. The statement by the AIRC that Schedule B (now Schedule C) of the HPSS Award was originally added as a list of 'common occupation names' suggest that the intent of the list was to provide merely the ways in which the exhaustive list of occupations were to be denoted. The use of the word 'common' does not, as has been stated in various submissions in the course of these proceedings, suggest that the list in Schedule C is indicative of the classes of health professionals to be covered by the award, with a view to using only the most common examples of the occupations in these classes. Such an interpretation is inconsistent with the words in the AIRC's statement that the Schedule includes common *names* of covered occupations. As Ai Group has previously emphasised, an exhaustive list, as we claim Schedule C provides, does not lock the coverage of the award in time and prevent the award from maintaining relevance as the industry evolves. Provided the occupations remain of the same nature as those denoted in the list in Schedule C, the occupations will remain covered even though different titles may be used. To the extent that the word 'common' is interpreted to suggest an indicative list, Ai Group proposes that it is the names that may be interpreted to be indicative rather than the occupations themselves.
17. As such, Ai Group respectfully disagrees with the premise that underlies the preliminary view expressed by the Full Bench at paragraph [113] of the December Decision that it is undesirable to constrain the coverage by reference to an inflexible list of occupations, the names of which and/or work performed, may change over time as advances in the health profession occur. Interpreting

the list in Schedule C of the HPSS Award as constraining coverage merely because the names of an occupation may change is inconsistent with the stated intent of the AIRC in preparing the list.

18. It is inappropriate for new occupations to be automatically covered by an award that has been drafted to govern the wages and conditions of a specified industry or specified occupations. Should technological or industry advancements introduce new roles or dramatically change the nature of an occupation, such an eventuality may prompt an application under s 157 of the *FW Act* to amend the coverage of the Award. Allowing awards to be automatically updated via an indicative list of occupational titles is inconsistent with the need to maintain “a simple, easy to understand, stable and sustainable modern award system”.⁶
19. That the coverage of Modern Awards is meant to remain relatively static unless a successful application is made for an amendment is strongly suggested by the limited avenues to pursue such a variation under Division 5 of Part 2-3 of the *FW Act*.
20. The view that the HPSS Award is not intended to cover health professionals at large is supported by a reading of the Award that is consistent with s 143 of the *FW Act*. Section 143 relevantly provides:

Coverage terms of modern awards other than modern enterprise awards and State reference public sector modern awards

Employers and employees

- (2) A modern award must be expressed to cover:
 - (a) specified employers; and
 - (b) specified employees of employers covered by the modern award.

...

Employees not traditionally covered by awards etc.

- (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

⁶ *Fair Work Act 2009* (Cth) s 134(1)(g).

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.

21. Ai Group contends that interpreting the list of common health professionals as a list of 'indicative occupations' would extend the coverage of the HPSS Award beyond that which was envisaged by s 143. Modern awards are required by s 143(2) to be expressed to cover 'specified employers' and 'specified employees of employers covered by the modern award'. This section provides the reader with certainty that coverage of the Award will be sufficiently ascertainable for the document to be useful in practice. If the list is interpreted as asserted by the HSU, then the Award would likely fail to meet the requirements of s 143(2).
22. Also, not all health professionals were historically covered by a modern award at the time of the Award Modernisation Process. To interpret the coverage of the HPSS Award as covering all health professionals, with the list in Schedule C merely providing a guide as to the meaning of the term 'health professional' would suggest that the Award contravenes s 143(7) of the *FW Act*.
23. Ai Group also refers to the statements made by the Full Bench at paragraph [114] of the December Decision which addressed Ai Group's contention in our 8 June 2017 submissions that if the list of common health professionals contained in Schedule C was not exhaustive, the effect of the AIRC's decision to remove dental hygienists from the list shortly after the award was made would be superfluous.⁷ The Full Bench stated that while it agreed with the 'inherent logic' of this submission, it considered that the decision of the Full Bench should be reconsidered in light of developments in the health profession.

⁷ Re Health Professionals and Support Services Award 2010 [2009] AIRCFB 948; AM2016/31, *Ai Group Submission*, 8 June 2017, [35].

24. Similarly, the Full Bench referred at paragraph [119] of the December Decision to an unsuccessful application by the Chiropractors Association of Australia (CAA) to remove the occupation of chiropractors from the HPSS Award pursuant to s 576H of the *Workplace Relations Act 1996* (Cth). The CAA sought the removal of chiropractors from the HPSS Award on the basis that:⁸
- there were at the time no awards covering chiropractors;
 - chiropractors had historically been award free; and
 - there was a significant variation in employment arrangements including fee for service arrangements.
25. The Full Bench of Fair Work Australia, as it then was, declined to make the variation proposed by CAA on the grounds that paragraph 2(a) of the Award Modernisation Request did not preclude the extension of modern awards where the work performed is of a similar nature to work that has historically been regulated by awards. The Full Bench said at paragraph [5] of its 28 January 2010 Decision:
- The modern award covers physiotherapists and occupational therapists. In our view the occupation of chiropractor can be regarded as similar in character to those occupations that have been historically covered by award regulation. Seen in this light we accept the view of the HSU that chiropractors should have the same safety net as other health professionals.
26. This decision supports the interpretation that Schedule C of the HPSS Award is intended to constitute an ‘exhaustive list’ of covered health professionals. If this were not the case, on the interpretation of the Full Bench in its 28 January 2010 Decision that occupational therapists and physiotherapists are similar in character to chiropractors, the inclusion of ‘chiropractors’ in Schedule C would have no impact on coverage. The indicative nature of the list would, if the HSU’s interpretation is correct, result in the coverage of chiropractors by the HPSS Award regardless of whether the occupation is referred to in Schedule C.

⁸ [2010] FWAFB 324, [2].

27. Finally, Ai Group refers to the Full Bench’s statement concerning the nature of ‘oral health therapists’, ‘dental therapists’ and ‘dental hygienists’ at paragraph [124] of the December Decision:

It is apparent that the occupation of Oral Health Therapist combines the skills of the two other occupations. It appears anomalous to us to have one of these occupations covered by the HPSS Award and not the other two.

28. The similarity of these occupations was outlined in the extract from the website of the Australian Dental Association at paragraph [123] of the Full Bench decision. If the list in Schedule C of the HPSS Award were indicative, as claimed by the HSU, then the Full Bench’s statement that it would be anomalous to have one of these occupations covered by the HPSS Award and not the other two should support the interpretation that the list is exhaustive.
29. An exhaustive list of occupations in Schedule C is consistent with a finding that that including the two occupations in the Schedule is necessary to achieve the modern awards objective. If the list is indicative, the inclusion of two occupations that are similar in character in Schedule C would be superfluous and therefore fail to meet the threshold set by s 138 of the *FW Act* that “a modern award may include terms that it is permitted to include, and must include terms that it is required to include, **only to the extent necessary** to achieve the modern awards objective ...”.

3. WHETHER THE LIST OF COMMON HEALTH PROFESSIONALS CONTAINED IN SCHEDULE C OF THE AWARD SHOULD BE INDICATIVE OR EXHAUSTIVE

29. The bulk of submissions that have been filed in the Commission to date in the context of these proceedings relate to the question as to whether the list of common health professionals in Schedule C to the HPSS Award is correctly interpreted as exhaustive or indicative. Ai Group continues to rely on the position expressed in our submissions of 8 June 2017 which argue that Schedule C is correctly to be interpreted as an ‘exhaustive list’.

30. At paragraphs 37 – 52 of our 8 June 2017 submissions, a number of arguments were made which relate to the potential consequences of the HSU’s claim. The following submissions should be read consistently with the arguments in our earlier submissions.
31. Ai Group maintains that amending Schedule C to state that the list is indicative only of common health professionals is not necessary to achieve, and would be inconsistent with, the modern awards objective.

Amending the Schedule as proposed by the HSU would lead to an inappropriate level of uncertainty concerning coverage of the HPSS Award

32. It is axiomatic that an exhaustive list of occupations determining relevant aspects of the coverage of the HPSS Award provides much needed certainty for employers seeking to apply the award to their workforce. The coverage provision of the HPSS Award relevantly provides at clause 4.1:

4.1 This industry and occupational award covers:

- (a) employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14—Minimum weekly wages for Support Services employees and 15—Minimum weekly wages for Health Professional employees to the exclusion of any other modern award;
 - (b) employers engaging a health professional employee falling within the classification listed in clause 15.
33. The applicable rates of pay for ‘support service’ employees are provided for in clause 14 of the Award. Clear descriptors of the relevant levels of ‘support service employees’ are included in Schedule B - Classification Definitions. A number of indicative roles are provided in Schedule B in respect of the ‘support service employees’ as well as various descriptors which outline the applicable skills and roles at each classification level. Similar descriptors are provided in Schedule B for relevant health professionals. However, in a departure from the approach taken in respect of the ‘support service employees’, the occupation list is included separately in Schedule C.

34. The provision of indicative roles and classification descriptors in Schedule B for ‘support services employees’ is appropriate considering the fact that such employees may only be covered by the HPSS Award where their employer is ‘in the health industry’. Owing to the joint industry and occupational coverage of the award, health professionals may be engaged by employers that are ‘in the health industry’ as well as those which are not included in the industry. It would be impractical and confusing to require those who are not engaged in the health industry to understand whether a specific occupation is likely to be covered based on an indicative list of common health professionals. It is appropriate to maintain this important division in order to recognise that employers may employ health professionals under the HPSS Award in a wide range of industries e.g. schools, universities, spas and retreats.
35. Amending the HPSS Award to make Schedule C an indicative, as opposed to exhaustive, list of common health professionals would be contrary to the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.⁹
36. An indicative list of ‘common health professionals’ would not simplify existing award terms but would rather introduce greater uncertainty and lead to more frequent disputes concerning coverage. Employers and employees need to be able to determine from Schedule C whether they are covered by the HPSS Award. The award contains no guide as to the threshold that is to be applied in determining the level of similarity with any of the occupations listed in Schedule C to be covered. The test applied in the Full Bench’s decision not to grant the CAA’s application to excise chiropractors from the HPSS Award concerned the similarity in the nature of the work performed between the relevant occupations.¹⁰ The level of uncertainty that would be introduced into the HPSS Award by the variation proposed by the HSU would be detrimental to the interests of both employers and employees.

⁹ *Fair Work Act 2009* (Cth) s 134(1)(g).

¹⁰ [2010] FWA FB 324, [5].

37. It is in the interests of maintaining a stable and sustainable modern award system to ensure that the coverage provision of the HPSS Award is able to be understood by a lay person who is unfamiliar with the development of modern awards. This point is especially pertinent in the case of a modern award that, as in the present proceedings, is expressed to cover employers that are not engaged in a particular industry.

The modern awards objective

38. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Amending Act)* removed the requirement for the Commission to conduct 4 yearly reviews from the beginning of 1 January 2018. Schedule 4 of the Amending Act inserted Part 5 of Schedule 1 of the *FW Act* which allows for the continued application of Division 4 of Part 2-3, (including s.156) in the context of the current 4 yearly review proceedings.
39. In exercising its powers under the transitional arrangements, the Commission must apply the modern awards objective in s 134(1).
40. Subsection 134(1) of the *FW Act* provides that the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account” the considerations listed in s 134(1)(a)-(h).
41. The imperative language used at s 134(1) that has been highlighted above suggests that in applying the modern awards objective, the Commission must be reasonably capable of reaching an appropriate level of certainty concerning the projected impact of a proposed exercise of its modern awards powers.
42. We note that in a decision of 20 February 2018 in the *4 Yearly Review of Modern Awards – Annualised Wage Arrangements Case*, the Full Bench placed the following interpretation on the word “ensure” in s 139(1)(f)(iii) of the Act:

[105] ... To “ensure” there is no disadvantage is, on the ordinary meaning of the language used, to make certain that it does not happen, so the safeguards required must be sufficient to allow that state of certainty to be achieved. ...

43. Considering the level of uncertainty that would be created by amending Schedule C to make it an 'indicative list', it would be extremely difficult to determine what impact the variation would have regarding the extent of the coverage of the HPSS Award.
44. That the Commission is required to reach an appropriate level of satisfaction, based on clear evidence in determining whether a variation would be necessary to achieve the modern awards objective is suggested by the wording in s 138 of the *FW Act* that provides:
- A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.
45. In view of the considerable ambiguity that would arise if the Commission were to vary Schedule C to state that it is an indicative list, Ai Group contends that the Commission would be incapable of reaching the requisite level of satisfaction that such a variation would be necessary to achieve the modern awards objective.
46. In the December Decision, the Full Bench referred to advances in the health profession over time and developments that have taken place since the decision of the AIRC to remove dental hygienists from the list of common health professionals. Ai Group contends that the occurrence of any significant developments in the health industry in the 10 years since the HPSS Award was made, that have resulted in the introduction of new occupations potentially covered by an indicative list, should support the position that the Commission would not be capable of forecasting how coverage under such a list would evolve in the future. As such, Ai Group urges the Commission to take a cautious approach and to reject the variation proposed by the HSU. Amending Schedule C to introduce an indicative list of occupations would open the coverage of the HPSS Award to potentially dramatic expansion well beyond the intended coverage.

Special criteria relating to changing coverage of modern awards

47. In considering whether to vary the HPSS Award to state that the list of common health professionals in Schedule C is indicative rather than exhaustive, the Commission should consider the limited capacity under the *FW Act* to reduce the coverage of a modern award.

48. Section 163 of the *FW Act* relevantly provides:

Special rule about reducing coverage

- (1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

Special rule about making a modern award

- (2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.

49. It is apparent that once a modern award has been varied to include certain employees or employers, award coverage cannot be reduced by a variation. The Commission is only capable of changing which award covers a relevant employee. The requirements of s 163 of the Act necessitate that the FWC take a cautious approach when extending the coverage of an Award because the FWC's ability to address any unintended consequences through a later variation is constrained by s 163.

50. If the Commission made the variation proposed by the HSU, the coverage of the HPSS Award will be extended to an unspecified degree. Such a variation would result in the modern award automatically covering new occupations as they develop provided that they retain some indeterminate level of requisite similarity with the nature of an existing occupation listed in Schedule C. It would be very difficult for employers to determine when a new employee is covered or when an existing employee's duties develop to the point that they are covered by the award. Such an outcome could act as a deterrent to employers engaging staff to undertake new and innovative roles that support the

development of the health industry.

51. Employers often rely on notification of an award amendment from either the Commission or a relevant industry association in determining whether a new occupation would be engaged under a specific award. If an employer were to hire an employee to perform a recently developed occupation, without such a notification, employers could potentially be exposed to significant backpay or penalties if it became apparent that various provisions of the award had not been complied with.
52. Considering the near unlimited potential for occupations to diverge from those currently provided for in the HPSS Award, it would be impractical to expect newly developed roles to necessarily suit the various provisions of the HPSS Award.
53. An exhaustive list of names of common health professionals protects employers from unwittingly failing to apply the provisions of the HPSS Award to occupations that are not listed in Schedule C. This is especially important considering the capacity of the industry to develop in unforeseen ways. It is also necessary, considering the limited capacity to reduce modern award coverage, that parties should have the opportunity to make detailed submissions to the Commission prior to the extension of coverage of a modern award to new occupations.

Limits to coverage of modern awards

54. Varying Schedule C, as proposed by the HSU, would be inconsistent with the intent expressed in s 143 of the *FW Act* to prevent the coverage of modern awards extending to employees not traditionally covered by awards.
55. Subsection 143(7) of the *FW Act* relevantly provides:

Employees not traditionally covered by awards etc.

- (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.

56. The above provision appears in Subdivision C of Division 3 of Part 2-3 of the Act. Any award provision that is inconsistent with s.143(7) is of no effect as a result of s.136(1)(b) and s.137 of the Act. Again, this warrants that the Commission take a cautious approach when determining the coverage provisions of modern awards.
57. The coverage of the HPSS Award should be drafted in a manner that is consistent with the scheme established by the *FW Act* that only provides for amendments to a modern award in the circumstances listed in Division 5 of Part 2-3. Outside of the ongoing 4 yearly review of modern awards, these are:
- Variation of a modern award if necessary to achieve the modern awards objective (s 157);
 - Variation of modern award to update or omit name of employer, organisation or outworker entity (s 159);
 - Variation of default fund term of modern award (s 159A);
 - Variation of modern award to remove ambiguity or uncertainty or correct error (s 160); and
 - Variation of modern award on referral by Australian Human Rights Commission (s 161).
58. That the *FW Act* envisages the evolution and updating of modern awards not to take place organically, outside of the oversight of the Commission, is clear from the fact that variations to correct even obvious errors may only be made by the Commission.

59. To assume that a significant provision in a modern award providing for coverage was intended to progressively update itself to accord with relevant developments in the health industry, runs contrary to the clear intent that oversight is required for relevant amendments to be made to a modern award.
60. The Act emphasises the need to ensure a simple, easy to understand, stable and sustainable modern award system (s 134(1)(g)). This objective requires that award provisions are clear and certain.
61. The Full Bench referred, in paragraph [119] of the December Decision to the decision of the Commission made on 28 January 2010 to refuse an application of the CAA to remove the occupation of 'chiropractors' from the HPSS Award. As mentioned in these submissions, the decision to refuse the proposed amendment was made, taking into account paragraph [2(a)] of the Award Modernisation Request.
62. The decision of the Commission to refuse the CAA's proposed variation included the following statement:

[4] CAA submits that the creation of modern awards was not intended to cover persons who have traditionally been award free. It relies upon paragraph 2(a) of the award modernisation request. It is worth setting the paragraph out in full:

"2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;"

[5] It can be seen that it is not a blanket exemption to persons who have not been covered by awards as the request goes on to say that it does not preclude the extension of modern awards where the work performed is of a similar nature to work that has historically been regulated by awards. The modern award covers physiotherapists and occupational therapists. In our view the occupation of chiropractor can be regarded as similar in character to those occupations that have been historically covered by award regulation. Seen in this light we accept the view of the HSU that chiropractors should have the same safety net as other health professionals.

[6] On this basis and given the objection of HSU, we reject the application.

63. Ai Group notes that, unlike the present proceedings, FWA’s decision was not made in the course of the 4 yearly review of modern awards. The application was made pursuant to s.576H of the *Workplace Relations Act 1996* (Cth) and item 14 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).
64. The Award Modernisation Request was made by the Hon Julia Gillard under section 576C(1) of the *Workplace Relations Act 1996* (Cth). It was relevant to the AIRC’s task in making the HPSS Award but not necessarily relevant in the context of the Commission’s task in the 4 yearly review of modern awards.
65. The statement in paragraph 2(a) of the Award Modernisation Request that the applicable exemptions from coverage do not “preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards” is by no means a required consideration where the Commission exercises its modern award powers under the *FW Act*.

Expansion of coverage to new occupations

66. Refraining from amending Schedule C to provide for an indicative list of professional occupations would not remove the flexibility to extend the coverage of the HPSS Award to new occupations on a case-by-case basis where to do so is necessary to achieve the modern awards objective.
67. The HSU claims in its 17 March 2017 submissions that an indicative list will be of value for emerging health professions whose professional titles have emerged in recent years. At paragraphs [24] – [25], the HSU claims¹¹:

Health and health professionals, including doctors and nurses, are constantly changing in response to advances in understanding of the human body, health, wellness and diseases processes. Each of the substantial advancements in our understanding has led to new specialists practicing within a newly defined scope of practice and in new or advance treatment options.

¹¹ AM2014/204, Submission of HSU 17 March 2017, [24] – [25].

It is our strong view that, given this evolving nature of health professional terminology, the list in the Schedule must be indicative, and should be clarified to be such. Otherwise, the HPSS Award would be stuck with the health professional nomenclature of a particular point in time, and would become quickly out of date, not adequately reflecting contemporary terminology and health and medical advances.

68. The HSU's claims fail to recognise the fact that where advancements in the medical profession lead to the creation of new occupations, it is by no means certain that award coverage will be beneficial for such occupations or, as appears to be the case in these proceeding for dental hygienists, the relevant members of a specified occupation do not want to be covered by the HPSS Award.¹²
69. Nevertheless, if it is apparent that there are benefits for a new professional occupation in the medical field to be covered by the HPSS Award and such coverage would be necessary to achieve the modern awards objective, clarifying that the list in Schedule C is exhaustive in nature would not preclude an application being made to extend the list to include the specific occupation. It is appropriate that a merit-based case be brought in support of the extension of award coverage in each case, especially considering (as demonstrated above) that once covered by a modern award, an occupation cannot be removed from award coverage through a variation.
70. As discussed above, the *FW Act* provides a clear process for the variation of a modern award. Such variations may be applied for in respect of the coverage of an award. Failing to provide for an indicative list of health professionals in Schedule C would not lock the HPSS Award in time and consign it to the status of an antiquated document, incapable of application in a modern and dynamic health industry. The *FW Act* clearly provides appropriate avenues for relevant parties to pursue an amendment to 'update' the award where necessary. The safeguards in the Act which ensure that such alterations in coverage are appropriate should not be circumvented through the inclusion of an indicative list in Schedule C.

¹² AM2016/31, Submission of the Dental Hygienists' Association of Australia, 14 March 2018.