



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**JUSTICE HATCHER, PRESIDENT  
VICE PRESIDENT ASBURY  
DEPUTY PRESIDENT O'NEILL  
DEPUTY PRESIDENT SLEVIN  
DEPUTY PRESIDENT GRAYSON**

**AM2024/20**

**s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective**

**Gender undervaluation — priority awards review — Health Professionals and Support Services Award 2020**

**Sydney**

**10.00 AM, THURSDAY, 23 OCTOBER 2025**

**Continued from 22/10/2025**

PN2097

JUSTICE HATCHER: All right. Are there any procedural matters before we start?

PN2098

MR SECK: Only one, your Honour. The order in relation to confidentiality has been I think largely agreed on this side of the table. We're hoping to circulate that very shortly to the Bench, and that's identified the paragraph numbers in the transcript as well as the exhibit numbers over which we seek an order for confidentiality.

PN2099

Other than that, your Honour, there's been discussions amongst the parties, as I said yesterday, to divide up the time between the parties. It's proposed that I will go first on behalf of the ADA, Ms Campbell will go second. I think Mr Lettau will go third, and Ms Schreier-Joffe will go fourth, and if necessary we will have an opportunity to reply to anything which comes on the unions' side.

PN2100

JUSTICE HATCHER: Go ahead.

PN2101

MR SECK: The ADA's submissions this morning will be done in two parts. One dealing firstly with the provisional view that the expert panel has expressed in the first decision, and then secondly dealing with the phasing in. I have had discussions with my learned friend Ms Campbell about ensuring that we don't duplicate each other's submissions on the issue. There might be some overlap, but hopefully there won't be a significant amount, so we won't waste time this morning.

PN2102

The ADA does rely upon its written submissions on this point, and I seek just to expand upon some aspects of those submissions. I obviously accept, your Honour, that there's been no work value assessment that had been previously undertaken prior to this stage 1 process as part of the award modernisation process, and that the expert panel noted in the decision.

PN2103

The current classification structure insofar as it relates to dental assistants appears to have been the product of a generic exposure draft which was prepared by the HSU derived from the Victorian award, the Health and Allied Services Private Sector Award, and that dental assistant classifications were inserted without explanation.

PN2104

For reasons which I will come to shortly there were other probably better starting points to undertake that task, because there were a number of state awards which regulated the terms and conditions of employment of dental assistants as of 2010, including an award applicable in Queensland which had been subject to a proper,

we would say, work value assessment, and as well as a correction for any gender undervaluation.

PN2105

We also acknowledge that the current award classification scale is less than satisfactory for various reasons, and the expert panel has articulated some of those reasons in its decision, chiefly the absence of any clear classification descriptors which assist in identifying the differences between each of the classifications, especially between a level 4 and level 5, what appears to be at least some mechanistic application of the metal trades framework by aligning C10.

PN2106

Having said that we certainly understand that as part of a stable modern award system the use of C10 can have some value in certain circumstances, but it's obviously not the be-all and end-all of undertaking that process.

PN2107

In addressing the expert panel it might be useful obviously to go to the provisional view that's been expressed, and I only do that as a starting point, and that's done at paragraph 289 of the decision, and the two aspects which – sorry, 288 of the decision – the three aspects which seem to be critical is that it assumes that the appropriate method of reclassification to rectify the gender undervaluation is to do it within the existing structure dealing with support services employees.

PN2108

The second point is that there needs to be an assessment of work value which brings the dental assistants above a C10 rate to reflect the failure to value invisible or soft skills. And thirdly that there should be a difference between certified III qualified dental assistants and unqualified dental assistants, and that a margin should be reflected in the classification scale to recognise that it's desirable, firstly, that dental assistants have qualifications, but secondly that Certificate III dental assistants may in some circumstances perform more advanced duties compared to unqualified dental assistants. That last point is a point that we sought to unpack in more detail in our written submissions.

PN2109

The ADA's position is that the existing classification structure is less than satisfactory, and in circumstances where there is clear imperfection in the classification scale, recognising that the expert panel said that there probably needs at a later stage to be a holistic and more fundamental review of that classification scale. If one is assessing the work value, and section 157(2)A obviously does require that work value is assessed by reference to the various factors which are set out there in – which I'll come to very shortly.

PN2110

A more reliable and satisfactory way of addressing it is to look at work value from first principles and that's what we've sought to do in our submissions, and in the evidence which has been elicited in this stage of the proceedings by recognising that from DAPA's submissions, which were made in the first phase of the proceedings, and from the evidence which we've elicited from dentists in this phase, that there appears to be a more reliable guide in assessing work value by

reference to the years of experience that a dental assistant has been working in that particular role, compared to purely based on qualifications or lacking qualification.

PN2111

And that seems to be an approach which had at least some basis in the state awards which existed prior to 2010 and in my respectful submission, has some basis in other rewards as a more orthodox matter in which classification scales are set and that there is normally basis upon which employees within the – who worked within a particular profession in this case, dental assistants, can ascend or escalate through that classification scale.

PN2112

JUSTICE HATCHER: I'm not sure that a number of your witnesses agreed with that proposition, Mr Seck?

PN2113

MR SECK: I accept that it wasn't a universally accepted proposition.

PN2114

JUSTICE HATCHER: And I'd tease out two things. I think one with respect of Figliomeni, thought that there was an administrative burden associated with keeping track of industry experience beyond what is currently required. And secondly, I thought it was a theme amongst at least some of the witnesses that dental assistants' level of expertise doesn't necessarily track, with their use in the business and some, as it were, acquire it quickly and some never acquire it. So

PN2115

MR SECK: I would accept both of those propositions, your Honour. And we certainly don't say it's a universally accepted proposition and one that would be – one that applies in every circumstance. But when one is dealing with a classification scale and seeking to use what are objective factors, as much as one can in determining where to place individuals on that classification scale, the general evidence would appear to be that a useful, if not reliable proxy of determining the level of skill or the amount of responsibilities which are being undertaken by a dental assistant, would be the years of experience as a dental assistant.

PN2116

I think as a matter of common sense, people are going to be sometimes quicker in picking up those skills. Some people are going to have greater capacity to perform the job of a dental assistant compared to others and those idiosyncrasies that are inevitably (indistinct) this in any workplace and in any profession obviously are difficult to account for unless one has a classification scale which is purely based on classification scriptures by reference to actual skill used or actual competencies achieved.

PN2117

And that is another potential approach that the expert panel may wish to adopt. It's not one that we urge here for two reasons. Firstly, that there is obviously a more holistic assessment that will be required in seeing to map out the

role by reference to the skills and competence. There would need to be classification scales - sorry, classification descriptions that developed. This part of the proceedings hasn't necessarily been the correct vehicle or forum for seeking to explore those issues, but down the track, we accept that might be a desirable way to have actually realigning some of the classifications in respect of dental assistants.

PN2118

The second - - -

PN2119

JUSTICE HATCHER: Sorry, just before you go on.

PN2120

MR SECK: Yes?

PN2121

JUSTICE HATCHER: So your client's proposal in respect of Level 6, concerning unqualified dental assistants might actually increase the cost in the sense that unlike the provisional view, it allows an automatic method of progression to Level 6 which isn't in the provisional view?

PN2122

MR SECK: No, I accept that. I accept that, your Honour. So what we've sought to balance obviously are some competing issues and one of the matters which arises from the ADA's proposed classification and for the benefit of the expert panel, it's contained at page 19 of the ADA's outline of submissions is that there will be an automatic progression in some cases. And we've sought – we've even at least relative to the current award, bumped a few people up. So for example, there's no longer a Level 2, but there is a Level 3.

PN2123

There's going to be a debate about the number of years of experience for an unqualified dental assistant at Level 3, but we've identified that at two years. But we've also recognised as part of that, that there is a value in dental assistants acquiring qualifications and recognise that there should be a higher level for those who achieve a higher qualification. So it seeks to balance some competing issues.

PN2124

One is having ways, and perhaps to address Dr Figliomeni's concern – well, perhaps not to address his concern, let me go back on that. But to have a more objective basis for determining ascension through the classification scale. Secondly, to align it as much as we can by using – and using easily applicable methods by reference to use of experience but also, thirdly recognising that there is a value in qualifications and that that shouldn't in fact be encouraged to be obtained and therefore, there should be a higher payrate, which should be applicable to dental assistants who acquire those qualifications, but not divorced from the years of experience that a dental assistant may have.

PN2125

It might be quibbled as to the number of years of experience and where people might be placed on the classification scale, but in my respectful submission, the basic principles and the methodology that we've sought to implement in the ADA's proposed classification scales gives effect to those principles.

PN2126

Now, can I go perhaps to the statutory scheme and make just some very simple points which are already evidence from the – just the first phase of the decision. But section 157(3)(a) is the basis for the expert panels making an application – seeking to vary the HPSS Award. And obviously, the issue which is given rise to current proceedings is to seek to consider work value reasons as a – and whether or not that's a safe basis to form the view that the current classifications and pay rates are free of assumptions based on gender by reference to considerations in subsection (2)B of section 157.

PN2127

But ultimately, the issues that arise under subsection (2)B are part of the considerations that the expert panel must undertake in ultimately determining whether or not the current classification scales have been properly assessed by reference to the work value reasons.

PN2128

Now, accepting that the award modernisation process was obviously imperfect in nature and reflected a high degree of expediency in forming the classification scales, the ADA's position is that the use of C10 as the basis for equating dental – qualified dental assistants at Certificate III has a number of inherent limitations. The main one being that qualifications are not going always to be a reliable indicator of the level of skill or responsibility involved. And that's been accepted in a number of authorities of this Commission which I don't need to take the Commission to, but it's a fortiori in the case of dental assistants where firstly, qualifications are not a pre-requisite for performing the role as a dental assistant, and, secondly, the majority of dental assistants are unqualified as opposed to being qualified, and so whilst in other industries, qualifications as a means of determining skill is going to be a much more reliable way of assessing work value because it's an essential part performing the role, especially in the context of professional roles, or roles where there is heavy regulation of that particular occupation which may require a minimum level of skills to perform that role, that is not so in the case of dental assistants. So one has to express - or one has to exercise a level of caution in using C10, in my respectful submission, as a starting point.

PN2129

And the reason why I raise that issue is that the manner in which the - and this is not a criticism, but the manner in which the expert panel sought to address the question of gender undervaluation was to look at C10 and see whether or not the C10, Certificate III for dental assistants, reflected invisible or soft skills as part of that overall valuation.

PN2130

Now, some of the evidence which has emerged from the unions, perhaps, contradicts that, and we don't seek to make too much of a point of it, but I think

DAPA's witnesses were very keen to say that the Certificate III qualifications and the curriculum and training does incorporate a degree of soft skills or invisible skills as a part of the overall curriculum and training that's given to dental assistants.

PN2131

Now, we don't necessarily think that's inconsistent with the overall thrust of the expert panel views on this particular issue because the evidence which was before the expert panel in the first phase of the proceedings appears to suggest that those soft or invisible skills are largely acquired through the practice of being a dental assistant over a period of time as opposed to merely obtaining a certificate or qualification to acquire those soft or invisible skills.

PN2132

Some of the evidence seems to suggest that some employees will never have those skills. Perhaps it's not a question of having or not having those skills. It's probably going to be a question of a spectrum, and some people have them and be able to exercise them to a greater or high level of performance compared to other dental assistants, but we would say that at least in the manner in which the expert panel dealt with the issues, C10 does play a role. It's for that reason we've sought to use - we've sought to supplement C10 as a basis for determining the work value of dental assistants, and the supplementation has used what we say is probably the most reliable indicator of skills and competence which is years of experience as a dental assistant.

PN2133

Can I then, perhaps, unpack some aspects of the expert panel's reasoning and seek to expose some issues which might be relevant to advancing the ADA's position as to the appropriate classifications that should be implemented. The first proposition is that unqualified dental assistants and C10 qualified dental assistants performed likely the same role. I think that needs to be qualified or at least understood in a particular context.

PN2134

The evidence appears to suggest that that proposition assumes that there is an equal level of experience between a qualified and an unqualified dental assistant, and the evidence which was relied upon by the expert panel in the first phase of the proceedings indicates that both Ms VanZutphen and Ms Gomez were talking about people who are qualified and unqualified on the basis that they had a similar level of experience working as a dental assistant, and without going into the evidence which we've sought to highlight that in our written submissions, Ms VanZutphen at paragraph 14 stated the proposition that skills and experience is acquired over a period of time. She also accepts the proposition that dental assistants reach a level of competence based on on-the-job training and practical experience, and we would say that at paragraph 70 and 82 of her statement.

PN2135

So if one is looking at qualified and unqualified being largely the same and we recognise that that's going to be the case for many dental assistants, we would say that that needs to be seen in that particular context.

PN2136

JUSTICE HATCHER: So under the current structure - I think at least one witness said there was no reason to change it - qualified persons go straight to level 4 because they don't even go through level 1 or 2, and an unqualified person doesn't seem to be able to progress beyond level 2.

PN2137

MR SECK: Yes.

PN2138

JUSTICE HATCHER: So the provision view in the April decision with some qualification, essentially, maintains that progression structure, as it were, moves people up in terms of pay rates.

PN2139

MR SECK: Yes.

PN2140

JUSTICE HATCHER: So again, I mean, nobody in the 15-odd years this award has been in force in respect of dental assistants has complained before these proceedings that there was anything wrong with that structure, have they? And a number of - at least some of your witnesses said there was no reason to change it.

PN2141

MR SECK: I think some witnesses said they want to retain it. I accept that. Some witnesses have said they don't wish to retain it. We've not sought to sanitise their evidence and get them to all give the same evidence, and we certainly accept there's a divergence of - or diversity of views on the particular issue. We would say the preponderance of the evidence, accept that it's not universal, is that there is a value which is assigned by dentists to dental assistants who are more experienced because they are able to perform the job at a higher level of skill and a higher level of competency because of the on-the-job practical training that they've incrementally obtained over time, and that's why we've, in fact, in ADA's proposed classification scale, sought to say people aren't stuck at one particular level as an unqualified dental assistant, and we've inserted additional steps in order to facilitate that progression over time and - - -

PN2142

JUSTICE HATCHER: So I'm just trying to understand the difference. So the provisional view would allow a person with experience assessed to be equivalent to Certificate III to move to level 6.

PN2143

MR SECK: I don't know that show I read the provisional view, your Honour. I read that the only people who'd be at level 6 would be qualified dental assistants as - but I may have misread that. So I think - - -

PN2144

JUSTICE HATCHER: So it's the - well, the provisional view is at paragraph 289.

PN2145

MR SECK: I see what your Honour says, 'or equivalent qualification or experience'.

PN2146

JUSTICE HATCHER: So with the experience. So it's a question of whether there should be an automatic thing by reference to service of whether there should be some greater scope for a judgment to be made independent of the level of service as a combination of the two, I suppose.

PN2147

MR SECK: We've sought to have greater certainty in our proposed classification scale.

PN2148

VICE PRESIDENT ASBURY: I would have thought, Mr Seck, that the way the provisional view is worded actually gives greater flexibility where the person doesn't hold a qualification.

PN2149

MR SECK: It does, but it probably also creates further uncertainty and leaves that with the complaint in one or two of the witnesses. We've sought to have, perhaps, different streams for qualified and unqualified which overlap and to have greater certainty in terms of how that is determined. There's obviously an inherent ambiguity in determining whether or not someone has an equivalent qualification or experience. It's not uncommon wording which is used in awards. I accept that, but that vagueness does give rise to probably or potentially greater difficulty, firstly for dentists, in trying to work out what is an equivalent experience to a Certificate III, and secondly, then, it probably carries greater risk that a dental practice will be in contravention of the award if it doesn't seek to engage in a regular assessment of someone's experience and seek to escalate them through the classification scale.

PN2150

In circumstances where dental practices are small businesses, and whilst they probably do value the flexibility in being able to adjust people's wage rates upwards, what we've sought to create in the ADA's proposed classification scale is probably greater certainty, so that people using HR software programs, which seems to be the manner in which many practices seek to comply with their award obligations, it's a much easier way of seeking to ensure that there's compliance. But I accept that there are benefits both ways, Vice President, in either proposal.

PN2151

VICE PRESIDENT ASBURY: But are you saying the experience is industry experience, or is it with the same employer?

PN2152

MR SECK: Our proposal is industry experience, so it's experience as a dental assistant with whichever employer. So you would have to ask the question at the very start, 'When did you commence work as a dental assistant', which would then be the basis upon which years of experience are assessed. I'm assuming that's the

same for the proposed classification expressed in the provisional view at paragraph 289.

PN2153

VICE PRESIDENT ASBURY: I'm just not understanding how it's less complex to have to recognise and record industry experience, and then – when some of your own witnesses said that was the issue, that it was an administrative burden, to have to do that.

PN2154

MR SECK: It would be administrative burden, but I'm simply comparing it to the provisional view that's been expressed, that you would have the additional burden of not only having to record experience, to determine whether or not someone has that experience at level 6, but you would have to assess whether or not it's equivalent to the Certificate III. So whilst I accept there's a burden either way, I think there's an additional burden which may exist under level 6, understanding there's a corresponding flexibility as well.

PN2155

JUSTICE HATCHER: I mean, on the competing proposals, there appears to be a bit of a unity ticket between DAPA, yourselves, and Ms Campbell's client. But then, that requires an arbitrary judgment to be made, as to how many years it is, given that you've all got different proposals in that respect, and I'm not sure how we resolve that on the evidence, rather than just pick a number.

PN2156

MR SECK: I accept that, inevitably, there's going to be some arbitrary component there, because there's a divergence of views as to that issue, and we've sought to at least provide some evidentiary foundation for it. But I accept, your Honour, that in seeking to try to reconcile the competing views of the different parties, it may be difficult, because of divergence of that evidence, and so there's going to be that arbitrary element to it. I don't know if it's going to be more or less arbitrary than what's being suggested in the provisional view, which does require also an assessment of what's equivalent. So whichever approach is taken, there's going to be that inherent difficulty, in my respectful submission. We say our one is at least slightly less, because it is based on years of experience, which does have an objective component to it.

PN2157

VICE PRESIDENT ASBURY: So it will give employers the option to say, 'We're going to recognise that you've got equivalent experience, regardless of your years of service', and then there's an automatic movement, once they have achieved the required years of service.

PN2158

MR SECK: Is your Honour the Vice President referring the ADA's proposal?

PN2159

VICE PRESIDENT ASBURY: Yes.

PN2160

MR SECK: We would say that there's no arbitrary assessment at the very start, because that's going to be an objective assessment, as to how many years of experience the dental assistant has. So once they start working as a dental assistant, then that is an objective fact, and you'll work forward based on that starting date.

PN2161

VICE PRESIDENT ASBURY: It gives the employer the option to say, after one or two years, 'I accept this person is very skilled, and I'm going to recognise that they have equivalent experience and move them to this level, regardless of the fact that they haven't got the five years'.

PN2162

MR SECK: Is your Honour the Vice President referring the ADA's proposal or the expert panel's proposal? Because I don't think the ADA's proposal has that ability to make that evaluation. It's more objectively based. I would accept that the expert panel's proposal does involve an evaluative assessment as to whether or not someone's experience is equivalent to a Certificate III or Certificate IV.

PN2163

VICE PRESIDENT ASBURY: But where you've got the Cert III, where the person holds the Cert III or equivalent – your proposal says, 'or equivalent experience'.

PN2164

MR SECK: Sorry, I'm probably looking at our proposal at paragraph 59. I think the one on the right-hand side, we haven't used the words 'or equivalent experience'.

PN2165

Dpone Isn't that what the second-last row, column on the right in paragraph 58 says, 'Level 6', brackets, '(qualified Certificate III or equivalent experience)'?

PN2166

MR SECK: Pardon me. Level 6 probably does say that. Your Honour Deputy President O'Neill is right on that point. Level 6 does say that. I apologise for that. It doesn't say it for the other ones, but level 6 does involve that assessment. I apologise to the Vice President for that confusion.

PN2167

JUSTICE HATCHER: And just so we understand the proposal, is the equivalent experience deemed to be the three years' industry – is that the way we're meant to read it?

PN2168

MR SECK: I might need to get some instructions on that, but I suspect that's right, your Honour. But that probably doesn't make sense, because then, level 6, unqualified, talks about five years' experience. So I'll probably need to just clarify that with my client on that issue. I apologise, your Honour, the President, for that confusion, because, looking above that, it does talk about five years' industry experience.

PN2169

VICE PRESIDENT ASBURY: Well, I'm asking because some of your witnesses said that they had dental assistants with one or two years' experience, who, they were quite comfortable, had the equivalent to a qualification, or were competent to do work that one would expect from a qualified dental assistant, and there were others, that had been there for longer, who they weren't confident about. So the proposition really is that you could end up with a person with the actual five years being in the same level as a person with less.

PN2170

MR SECK: I accept that some witnesses said that. I think that some of them also put the converse proposition, that merely having a certificate doesn't necessarily mean you've got a certain level of competence as well. So I think the evidence does seem to suggest that there are differences which may exist between qualified and unqualified dental assistants which are not related to either their qualifications or their years of experience.

PN2171

So I certainly accept that the evidence of some of the witnesses suggests that either certification or years of experience is not a reliable indicator of skills and experience. One is obviously seeking to use approximation by reference to particular criteria. The only other alternative would be to then use skills and experience as a criterion itself, which is often used in classification scales. So it's probably a way of recognising that there are imperfections in the proposal that ADA is advancing, as well as DSBC and DAPA.

PN2172

JUSTICE HATCHER: Well, while we on the subject of imperfections, under the current award, I think as we've discussed, a qualified person starts immediately at level 4.

PN2173

MR SECK: Yes.

PN2174

JUSTICE HATCHER: And you've moved them down to level 3, so that's actually a reduction of the rate, which I'm not sure finds any support in the findings of our decision. That is, for the first two years, you've moved them down to level 3, which would - - -

PN2175

MR SECK: Yes, I accept that. So we've sought to say there's less experience for those people who – less value for those people who are less than two years - - -

PN2176

JUSTICE HATCHER: The purpose of this exercise is to give effect to the April decision and its findings. How does that relate to the findings in the April decision?

PN2177

MR SECK: We would say it gives effect to the findings in a different way, and that is to recognise in the higher levels, especially at a Cert III and above, that people should have recognition of the higher work value by recognising those invisible and soft skills.

PN2178

As part of that we have sought to use years of experience as a proxy, which means that for some people they're downgraded, at least for a short period of time. So it does in some cases for a limited cohort mean that they're lower than what they would be otherwise than the draft determination. But they are - - -

PN2179

JUSTICE HATCHER: Not the draft determination, the current award.

PN2180

MR SECK: Well, I think in reference to the current award I'm just looking at the table at paragraph 58. Those who are at level 3, that's only unqualified people.

PN2181

JUSTICE HATCHER: Yes. I'm talking about Certificate III qualified people, and tell me if you think I'm wrong, but as I read the award currently qualified people must go straight to level 4. Level 1 only applies to unqualified people.

PN2182

MR SECK: I think on our proposal, your Honour, and I might be misunderstanding your Honour's question, level 4 employees are qualified people.

PN2183

DEPUTY PRESIDENT GRAYSON: You're looking at the table on page 19 I think, Mr Seck, is that right?

PN2184

MR SECK: Yes. I think what your Honour is saying to me, and I now understand it, that the people who have less than two years experience with a Cert III they be - - -

PN2185

DEPUTY PRESIDENT O'NEILL: It's level 4.

PN2186

JUSTICE HATCHER: Level 4.

PN2187

MR SECK: If they're level 4 then the way I read it as that they would be a level 4 under the current award.

PN2188

VICE PRESIDENT ASBURY: But they don't need to have years of industry experience. The way that that's worded is and up to two years. You've added an extra requirement of years of service, which doesn't appear to be in the award.

PN2189

MR SECK: But that I think only applies from three months to two years, so maybe where the difference arises. I may have misread level 4, but I read level 4 as anything from zero to two years you're a level 4.

PN2190

JUSTICE HATCHER: I'm sorry, Mr Seck, I've got a summary of a proposal which appears to have an error. Now we've worked that out I'm satisfied.

PN2191

MR SECK: So I think that means that there is no downgrading.

PN2192

JUSTICE HATCHER: Sorry for confusing you.

PN2193

MR SECK: So I think everything is actually an uplift against the current award, because if one looks at level 3 that is higher than level 2 when you look at unqualified dental assistants. So there's no material reduction, or there's no reduction whatsoever based on that proposal.

PN2194

DEPUTY PRESIDENT GRAYSON: I don't think everything is an uplift, but - - -

PN2195

MR SECK: Everything is an uplift compared to the current award. It's not necessarily an uplift relative to the draft determination. I accept that.

PN2196

DEPUTY PRESIDENT GRAYSON: No.

PN2197

JUSTICE HATCHER: It's the same rate for a Certificate III in the first two years.

PN2198

MR SECK: Correct.

PN2199

JUSTICE HATCHER: Yes.

PN2200

DEPUTY PRESIDENT GRAYSON: And a level 1 also not an uplift.

PN2201

MR SECK: Correct.

PN2202

VICE PRESIDENT ASBURY: Can you - - -

PN2203

MR SECK: Sorry.

PN2204

VICE PRESIDENT ASBURY: You go on.

PN2205

MR SECK: No.

PN2206

VICE PRESIDENT ASBURY: I was just going to take you back to my question about level 6, because again, and correct me if I'm wrong, but it seems that level 6 has got a Cert III or equivalent experience, which implies on that wording that you can have a person that you deemed to simply have all equivalent experience at level 6. But in the other levels where the Certificate III, it's just a certificate – is your intention to say a Certificate III and certain amount of experience, because the way it's worded now it's 'or equivalent experience.'

PN2207

MR SECK: I accept that. I suspect there's a typographical error, and I just want to get instructions on that, your Honour Vice President. So I think the words 'or equivalent experience' probably should be deleted, and that may have been inserted inadvertently, and I apologise for that, so I - - -

PN2208

VICE PRESIDENT ASBURY: Because the level 5 is a Cert III qualification and over two years and less than three years.

PN2209

MR SECK: Correct.

PN2210

VICE PRESIDENT ASBURY: And your proposed level 6 is a Cert III or equivalent experience.

PN2211

MR SECK: I accept that. There is a disconformity in that descriptor 'or equivalent experience' relative to the other classifications that are proposed. My strong suspicion is that that's a typographical error. So can I confirm with the expert panel shortly that we can delete the words 'or equivalent experience', and that hopefully will address the problem, or not problem, but the potential uncertainty that might be arising from the use of that language, because I think it probably is incoherent with the other criteria for escalating through the proposed classification scale of the ADA.

PN2212

JUSTICE HATCHER: Sorry, with a Certificate IV where do they start?

PN2213

MR SECK: They are level 7 on our proposal, but you would have to also have five years industry experience.

PN2214

JUSTICE HATCHER: So if you have got a Certificate IV and you don't have five years where do they go?

PN2215

MR SECK: I think the evidence reveals that if you have a Cert IV you probably also have a Cert III at the same time. So you'd be probably in one of the Cert III classifications.

PN2216

JUSTICE HATCHER: I see.

PN2217

MR SECK: Obviously the way that we've sought to deal with Cert IV is to not think it purely the classifications, but also five years industry experience. But recognising a Cert IV usually will build upon someone already having a Certificate III, and we would say that largely accords with the evidence on this particular issue, but also accords with the approach taken under the state awards.

PN2218

As the expert panel noted one occasion upon which there's been a proper work value assessment was done by the Queensland Industrial Relations Commission. I just wanted to draw to the expert panel's attention just some of the reasoning in that decision, because it's a useful way of at least understanding how the classification scale could work, albeit we recognise there are differences between what's being proposed by the ADA here and what the Queensland Industrial Relations Commission is addressing.

PN2219

Does the Full Bench hopefully have a copy of the Queensland Industrial Relations Commission decision which I asked my instructing solicitors to send to the expert panel this morning?

PN2220

JUSTICE HATCHER: Just give us a second. Yes, we do.

PN2221

MR SECK: Now, regrettably this decision was not referred to explicitly in the award modernisation process, and can I invite the – sorry, I might try to find my copy which I have highlighted.

PN2222

DEPUTY PRESIDENT GRAYSON: Mr Seck, just before you go there, so I'm just working through the Certificate IV issue. So on my reckoning on your proposal somebody who has a Certificate IV and potentially a Certificate III and only one year – as I understood (indistinct) yesterday you would have one year with a Certificate III. They could potentially sit at level 4 on your proposal; is that right, which would be less than the current situation, which is they're at level 5?

PN2223

MR SECK: I accept that's theoretically possible.

PN2224

DEPUTY PRESIDENT GRAYSON: So that uplift you were talking about earlier tends to be fairly confined.

PN2225

MR SECK: That's probably right, though I think realistically most people once they get a Cert III will work for a while before they get a Cert IV. But I accept that there is a hypothetical possibility that for Cert IV – let me just go back to - - -

PN2226

DEPUTY PRESIDENT GRAYSON: Yes.

PN2227

MR SECK: - - - employees, if there is someone who has a limited number of years of experience there might actually be a downgrade relative to the current award.

PN2228

DEPUTY PRESIDENT GRAYSON: All right. Thank you.

PN2229

MR SECK: Can I invite the Full Bench to go to paragraph 105 of the decision. I probably should go back a few steps. The manner in which the Queensland Industrial Relations Commission dealt with the issue of gender undervaluation was to look at the award history and then apply the criteria that was developed by Justice Glynn in the New South Wales pay equity inquiry, and determine that, prima facie, there were characteristics of dental assistants working in Queensland which were consistent with those employees being undervalued relative to male work performed. That's apparent from the analysis at paragraph 56 onwards, and in particular at paragraph 64.

PN2230

Then that led the Full Bench of the Queensland Industrial Relations Commission to look at the classification scale that applied to dental assistants under the then Queensland award, and one can see a comparison between the award and the various proposals of the LHMU and the employer group at paragraph 69. The Expert Panel will note that the way that it was analysed was by reference to the relativity to C10 and, without going through it, there are details there which also link to training and time period under the relevant award.

PN2231

That led to an assessment of whether or not there had been a failure to recognise particular aspects of dental assistants' work and then to work out whether or not there should be a rectification to ensure there's comparable value. The conclusions which were reached by the Full Bench of the Queensland Industrial Relations Commission on this issue were that when one goes through the classification structure, and that's set out at 109, it should be rectified in the manner which was set out there and, in effect, they used, in part, years of experience but primarily qualifications, as the basis for seeking to rectify that particular issue, and so Cert III - dental assistants who had a Certificate III and dental assisting were given a C10, 100 per cent relativity.

PN2232

JUSTICE HATCHER: If you look at that structure, except that level 2 refers to 12 months instead of three months, it's essentially the same as the provisional view, isn't it?

PN2233

MR SECK: I accept that there's – I think there's - - -

PN2234

JUSTICE HATCHER: Leaving aside the relativities, but just the four-level structure is essentially the same, isn't it?

PN2235

MR SECK: In terms of the four levels, it's essentially the same. I think there might be differences in the relativities against them.

PN2236

JUSTICE HATCHER: Yes.

PN2237

MR SECK: But we accept it's essentially the same. There's obviously a difference in that Cert III people are at a higher level, above 100 per cent C10, but the structure is largely the same.

PN2238

I want to compare that very shortly to the South Australian award that existed at that time. That resulted in the Full Bench expressing a prima facie view, at paragraph 182, that pay equity had been achieved by equating a Certificate III with C10, but then an additional component was added on, which is called the ERC component, of 11 per cent, and that's dealt with at paragraph 192 to 194.

PN2239

It really doesn't reflect the methodology and approach which the Expert Panel adopted here, because what was done was to have a look at enterprise agreements and have regard to the fact that dental assistants historically haven't been able to operate collectively to negotiate an enterprise agreement and, therefore, there's a delta between what others might be paid as a result of being able to negotiate higher conditions under a collective agreement relative to the award, and there was an 11 per cent equal remuneration component added on top of the C10 to give effect to the pay equity obligations under the Queensland Industrial Relations Act.

PN2240

JUSTICE HATCHER: But once you take that element of their decision into account, that is, the structure and this – I must admit I find it very difficult to quite follow the logic of this – but that 11 per cent uplift, you end up with something very close to the provisional view.

PN2241

MR SECK: For different reasons.

PN2242

JUSTICE HATCHER: Which is really exposed to the logic of (indistinct).

PN2243

MR SECK: Yes, for different reasons, obviously. That was based on industrial strength, as it were.

PN2244

JUSTICE HATCHER: Yes.

PN2245

MR SECK: And an inability to negotiate a higher amount, but perhaps the end result was not dissimilar to the one which was reached by the Full Bench in this case.

PN2246

JUSTICE HATCHER: And on the Justice Glynn methodology, that was seen as an element of gender pay inequity and that is the incapacity to bargain through unions collectively.

PN2247

MR SECK: Yes. Which is obviously different to having regard to work value reasons, which is the statutory obligation placed upon this Commission, albeit one which is to be free of any gender-based assumptions. So the pathway to trying to reach that outcome will be necessarily different, and is in fact necessarily different, to the approach which is taken by the Queensland Industrial Relations Commission, but one can see at least that was – it was assumed that C10 was equivalent to 100 per cent – sorry, Certificate III dental assistant qualifications.

PN2248

Can I invite the Commission to go to the South Australian instrument, which we've also provided, to highlight what we say might be a method which is more consistent with the approach taken by the ADA, and it's the South Australian Dental Technicians and Attendants Award. Using the page numbers at the bottom, it's page 37 of the document, which is page 38 of the PDF. The stage 2 report fails to refer to the South Australian instrument, but it clearly was an instrument that was in effect prior to modern awards being made, and the Expert Panel can see at part A there's, in this case, five levels for dental assistants.

PN2249

Putting aside the trainee level at level 1, which talks about a three-month period not dissimilar to level 1 here, there's level 2, and there are different streams which follow from level 3 onwards, which is on page 38. So there's an unqualified stream and there's a qualified stream. Part of it is based on period of time, but part of it is based on the nature of the duties performed. Likewise at level 4, there's a similar approach taken, so both unqualified dental assistants and qualified dental assistants can be at a level 4, depending upon those criteria, and then there's a level 5.

PN2250

VICE PRESIDENT ASBURY: They seem to be differentiated on the basis also of whether they perform reception and clerical duties, which is - - -

PN2251

MR SECK: I think the evidence suggests that obviously some dental assistants in this case perform reception duties in this case. Perhaps the role has moved on from when the award was made in South Australia, and it may not necessarily be the same criteria which this Commission would use if it decided to adopt a similar approach, but it does demonstrate at least there was a method used under the South Australian award which sought to stream both qualified and unqualified in parallel in the classification scale.

PN2252

I won't take the Commission to the New South Wales – sorry.

PN2253

JUSTICE HATCHER: What level, if any, aligns with the C10 rate in this?

PN2254

MR SECK: I don't think it's apparent looking at this document. So if one looks at – and maybe we can undertake this exercise – the schedule operated from 2005. Looking at page 37, if one was using C10, I don't think one can really ascertain that from - - -

PN2255

JUSTICE HATCHER: I think this is pretty close in time to the Queensland decision.

PN2256

MR SECK: It probably would be, so it might be useful to look at the wage rates. I don't know if there's any variance in terms of the South Australian - - -

PN2257

VICE PRESIDENT ASBURY: The dental technicians have got a percentage of the trade rate but not the dental assistants.

PN2258

MR SECK: I see that, yes. It might be because dental technicians are all qualified, that it was much easier to do it that way compared to dental assistants. Certainly, I don't think there's any decision to indicate it was ever subject to a proper work value assessment in South Australia. So we certainly recognise that as an issue. We've obviously drawn parallels with the manufacturing award and the more conventional progression in the classification scale under that award.

PN2259

The difference between what the structure that's been proposed in the provisional view by this Commission and by the ADA is that there's a linkage to having to use the skills and competence in that particular role. In this case, there is no requirement to use those particular skills in that particular classification to obtain the pay rate for that particular level, but we would say that, perhaps, a useful benchmark or comparison point is looking at the Manufacturing Award.

PN2260

We've set out in our submissions the propositions which we say can be drawn from the evidence of the witnesses regarding the linkage between experience and the level of skill and competence that's exercised. I've asked my solicitors to prepare a document which cross-references that evidence to those particular propositions. That's currently being completed, but the propositions that I'm referring to are the ones which we've set out in our submissions at paragraph 56 subparagraphs (a) to (i), but they're largely aligned to the central proposition that there's a linkage between levels of experience and skills and competence exercised by dental assistants increasing over time.

PN2261

Unless the Full Bench has any further - sorry, the expert panel has any further questions, I'll move on to the question of phasing in. Ms Campbell is going to largely deal with the issues that emerged out of the cross-examination of the witnesses yesterday. I just want to highlight some aspects of the evidence given by the dentist on behalf of the ADA. The level of profitability, obviously, varied between dental practices. I think at the lower end, it was around 10 per cent. Probably went as high as 27 to 30 per cent for some of the dental assistants. In some cases, it was trending upwards. In some cases, it was trending downwards.

PN2262

There's a variance, obviously, across the board. There's a geographical spread of those dental assistants. All of them are small businesses in the sense that they're not earning a huge amount of money, and a number of employees employed in those dental practices are generally around 10 or less.

PN2263

JUSTICE HATCHER: In terms of profit margins, obviously you say there's always going to be variations, but is there any reason why as a generalisation we wouldn't rely upon the IBISWorld report about this which has a figure of 25.8 per cent at page 3?

#### **CONFIDENTIAL TRANSCRIPT PN 2264 TO 2267**

PN2268

MR SECK: Probably wasn't explored in detail as to try to reconcile those numbers, and perhaps there is an explanation for that, but I accept that the arithmetic was, perhaps, not fully exposed in the evidence that's given. However, I think looking at the headline issues, it does seem that the profitability of each of those practices fell within that particular range. Particular themes did emerge from the evidence, for example, Dr Weerakoon was saying whilst she earned a profit, a lot of those profits were really for a rainy day in case there are unusual events such as COVID. I think others gave similar evidence.

PN2269

I think Dr Rakkas said there might be significant one-off expenses that might be incurred by dental practices given the nature of their practice and the equipment that they have to use as part of their daily work, and that equipment can be particularly expensive. A chair breaks, or I think he used the example of a - the suction motor breaking down and costing \$15,000, and in any small business, one

obviously has to keep at least an amount of money available for those contingencies.

## **CONFIDENTIAL TRANSCRIPT PN 2270**

PN2271

So they're all small businesses which whilst they do make a profit, they run a very tight ship, as it were. Those are all factors which need, in my respectful submission, to take into account in determining whether or not any variation that is, in fact, made to the classification scale which increases wages is phased in over a period of time. The ADA's position is that a three-year phasing in period should be adopted which is 50 per cent in the first year and 25 per cent in subsequent years. In my respectful submission, that's consistent with the approach which has been taken in other variations accepting that there's obviously a range that's going to be dependant upon the circumstances of each industry.

PN2272

The evidence that was given by Dr Stanford about the fact that any actual cost to the dental industry will be very small, in my respectful submission, need to be treated with some caution because of the imperfect nature of the data that's been used and the methodologies necessarily at an aggregate level making assumptions which may not necessarily be born out for each practice, and whilst it's very easy to look at things at, perhaps, an aggregate level, one has to look at it for those dental practices which may be operating as a marginal business, and that's going to be the case certainly for those practices which might be in rural, regional areas, or service lower socioeconomic clientele, and some of the dentists gave evidence that they did perform work which is government funded, and that is done without making any money out of it and, in some cases, at a loss. Whilst it can be recognised the government may increase that funding, there's no guarantee it will increase that funding.

PN2273

JUSTICE HATCHER: Well, I was going to ask about it. Is there anything in the evidence which explains how the government funding mechanisms works and how it's adjusted from time to time?

PN2274

MR SECK: No.

PN2275

JUSTICE HATCHER: So, for example, do we know that if there's an adjustment to award rates of pay, whether that feeds somehow into some sort of indexing mechanism?

PN2276

MR SECK: The answer is there's no evidence on that other than people say they rely upon whatever funding is given to them. The type of funding is going to differ depending on the scheme. So I think the evidence reveals that there's funding for child dental and about 50 per cent of all children can – or children have their dental care subsidised to a certain extent. First Nation people, veterans, other classes of people who didn't receive some Government funding. I don't

think there's any indication one way or the other whether or not it's increased or not. And the evidence will suggest that it doesn't necessarily increase because the dentists who've given evidence say they'd have a limited capacity to go back to the Government to seek a (indistinct).

PN2277

That's not to say it wouldn't happen. Obviously the Commonwealth could dissipate and implicate what their position on those issues are, similar to Aged Care. We don't have their submissions on that particular issue. Some of the schemes are state-based as well, so their voucher systems for those who might qualify, usually those who are low-paid or in particular areas. Ms Campbell will talk more about the fixed fee arrangements that exist where private insurers are under preferred provider arrangements, but again the suggestion is because dental practices are small. There's limited capacity to renegotiate those rates over a period. And if they are, they're not usually done immediately. It might take 12 months or 18 months or two years depending on the length of the arrangement that exists between the dental practice and the private insurer.

PN2278

The other thing to note is that at least from the ADA's point of view, the vast majority of employers in the industry, I think, 93 per cent is the IBISWorld report's figure, are practices which are less than \$2 million. And so they're going to be small businesses ultimately and the capacity to absorb these increases are going to vary across the board, depending on the business structure of the dental practice, the nature of their clientele, the fees that they charge and their ability to pass that on.

PN2279

VICE PRESIDENT ASBURY: Sorry, can you just identify where that figure is in the IBIS report?

PN2280

MR SECK: Yes. If your Honour goes to the – I took the witness to it yesterday. Page 19 of the IBISWorld report, second bullet point in the first column. The last sentence:

PN2281

*Around 93 per cent of enterprises - - -*

PN2282

*- - - et cetera.*

PN2283

VICE PRESIDENT ASBURY: Yes. Right. Thank you.

PN2284

MR SECK: And as a result of that, the evidence would seem to suggest that the ability to provide more profitable services are going to be much less for those smaller businesses compared to larger corporate dental practices. And in circumstances where things like Invisalign or other more lucrative services are capable of being provided by larger practices compared to the smaller

practices. There's going to be less ability to in effect use the profit or revenue from those other services to, in effect, cross-subsidise any increases in dental fees charged to customers in order to pay for any increase in wages.

PN2285

So in my respectful submission, that is a factor which needs to be taken into account in phasing in. It's also going to be the case in my respectful submission that those dental practices were just smaller and less profitable, are likely to be reliant upon the award in paying the dental assistants. I accept that's not going to be the case for all dental practices and some of them, as the evidence reveals, are paying above the award. But using the figures that are being adopted by Dr Stanford yesterday of 33 per cent being award reliance, that is a significant proportion in my respectful submission and taking into account the fact that he also accepts that in order to maintain internal relativities within the new practice, other employees who might be paid amounts who have their – were paid higher than dental assistants might have to have their amounts – or amounts paid – also adjusted correspondingly.

PN2286

The last point I wish to make is that under the modern award objective, a relevant consideration that the expert panel will need to take into account is the likely impact of the exercise in the modern award powers on sustainability performance and competitiveness of the national economy.

PN2287

Dr Stanford did not express any views about the impact of any increase in patient fees on the ability of patients to access dental services and the consequential impact that may have on the oral health of that segment of the population which can no longer afford dental services and how that might impact more generally on the general health of the population and the economic impact of that.

PN2288

There is, however, some material in the report which I think has been provided to the expert panel at the Australian Institute of Health and Welfare and hopefully the expert panel has a copy of that. I just wish to just draw out some propositions from that report - if the expert panel excuses me whilst my one loads up.

PN2289

The first is, looking at page 4 of the PDF, is that:

PN2290

*Poor oral health affects Australian children and adults and contributes 4.5 per cent of all burden of non-fatal burden diseases placed in the community in 2022.*

PN2291

So there's a direct correlation between oral health and general health and if one goes to page 5, there's a section on the impact of poor oral health and that certain segments of societies are disproportionately impacted by poor oral health compared to the general population. And that's set out at the bottom of page 5 onwards, which includes people who are socially disadvantaged, First Nations

people, people who live in regional and remote areas and people with specialised health care needs such as people with disabilities or older people.

PN2292

That may obviously consequentially have an impact is people have to – if they do have chronic diseases, as a results of poor oral health and that's dealt with at the top of page 5 including stroke and cardiovascular disease. And obviously if there is – if there are broader health problems, that may lead to people being sick and off work, which may impact upon workforce participation which may also impact upon the general health system because if people are likely to seek medical services, it'll likely increase the risk of public hospitalisation and there will be reliance placed upon the public health system to deal with those more general health concerns.

PN2293

The report does deal with these issues in more detail. And I don't want to burden the expert panel with each of the propositions, but there seems to be a direct correlation that exists between oral health and preventative dental care and whilst it is not measured in any precise terms, one can infer that if a segment of the population can no longer afford to obtain preventative dental care, and therefore, there's likely there's going to be a decline in oral health, there's also likely to be consequential impacts upon the more – the fiscal position of the Government, because people who rely upon the public health system deal with those more general health issues and diseases. There's likely to be higher risk of hospitalisation and there'll be long workforce participation.

PN2294

In my respectful submission, at least in the general sense, those are factors which the expert panel may bear in mind in considering the modern award objective under subsection (1) paragraph (h).

PN2295

JUSTICE HATCHER: It may be accepted as general propositions, but when you do the mathematics it's pretty hard to get to a result where the national economy is affected, isn't it? There's (indistinct) on Dr Stanford's figure of a 1 per cent increase to direct employment costs overall, and it would be a smaller figure of all costs, and then there's a question of whether it gets passed on or whether it gets absorbed. You just trend down to a number approaching zero, don't you? I mean even if it is passed on the amount of the increase could not possibly be big enough by itself and have any of the sort of effects you're talking about.

PN2296

MR SECK: Those are all unknowables to a certain extent. I accept that perhaps the numbers used by Dr Stanford indicate it's likely to be low. For the reasons that my learned friend Ms Campbell will indicate we would say that the assessment made by Dr Stanford probably understates the impact of any wage increase for various reasons, at least for a few reasons.

PN2297

Firstly, that I think he accepted that the (indistinct) figure for oncosts was perhaps understating what the oncosts were.

PN2298

JUSTICE HATCHER: Perhaps. They might be overstated as well.

PN2299

MR SECK: Secondly, I think he accepted that there might be other – he hadn't taken into account certain other people who might have their wages increased as a result of an increase directly to dental assistants. Thirdly, I think the assessment -  
- -

PN2300

JUSTICE HATCHER: Well, he did. He gave the direct cost, and then he had an estimate of doubling that for indirect second order effects.

PN2301

MR SECK: In a general sense. I accept that, he just doubled it, but perhaps it wasn't done in that precise way - - -

PN2302

JUSTICE HATCHER: With respect, it's incapable of being done on a precise way, because it depends upon the discretionary decisions of dentists' practices in response to the decision.

PN2303

MR SECK: I accept that.

PN2304

JUSTICE HATCHER: And some might do it and some might not do it.

PN2305

MR SECK: And the decide might be bigger or the decide might be smaller. I acknowledge that it's unknowable because it's based on an assessment of what a dental practice will do in response. My only point is that it may understate it, it may overstate it, depending how one looks at it, and he has a lower amount or a higher amount.

PN2306

We would say when one looks at the higher end of that amount that does get to the stage where it may impact upon prices at the margin, and where it's going to really hit home will be obviously those who are running businesses which are less profitable in areas where there's going to be greater reliance placed upon lower prices by patients to undertake voluntary or preventative dental care, and it's that cohort who might be impacted.

PN2307

Now, I can't value that in any material way, and your Honour the president might be right, that it might ultimately be negligible, but all I'm saying is that because it's unknowable it still needs to be taken into account in assessing the modern award objective, whilst acknowledging that it's not going to be massive. It's going to be at the lower end of the scale, and I don't put the submission any higher than that point.

PN2308

DEPUTY PRESIDENT SLEVIN: But there's another step there. So people don't go to the dentist and we rely on this report to say as a result of people not going to the dentist they're going to otherwise get sick.

PN2309

MR SECK: There's a greater likelihood of them becoming sick based on that report, because there is a direct linkage between general health and oral health.

PN2310

DEPUTY PRESIDENT SLEVIN: Mouth cancers listed, cancer of the oesophagus and the like.

PN2311

MR SECK: Yes, all those kind of things.

PN2312

DEPUTY PRESIDENT SLEVIN: And so people are not going to go to the dentist and they're going to get cancer, and then what's the next step?

PN2313

MR SECK: They will be not participating in the workforce. So there will be costs associated with paying unemployment and other social benefits. They will be relying upon the public health system for their care. There might be costs associated with medicines, which will be covered under the PBS or other publicly subsidised medication. They might have a lot - - -

PN2314

DEPUTY PRESIDENT SLEVIN: And those things are caught by performance and competitiveness of the national economy - - -

PN2315

MR SECK: The national economy in a general sense, yes, because it impacts upon the physical position of the government and having to pay for those services. It means that there are less people who are able to participate in the workforce that may have an impact. Now, all of these things are impossible to value, in my respectful submission, unless one did a very detailed analysis.

PN2316

My simple proposition is that it's something to be taken into account in the modern award objective without being able to place a value on that.

PN2317

DEPUTY PRESIDENT O'NEILL: Mr Seck, I appreciate that it's unknowable, but the evidence of the dentists was essentially that they were concerned that if they had to increase their prices that would have an impact on patients who would go less frequently or stop going there, but I don't recall any evidence that sought to identify based on previous price increases and the factors what the quantifiable shift had been in demand.

PN2318

MR SECK: I think some of them give general evidence, Deputy President, saying that they have noticed when they increased them beforehand there was decline, but that wasn't identified by reference to any quantity. So I accept that criticism that no one has actually done the analysis of working out what the decline was and whether or not that was in response to price increases, but in my respectful submission there is at least general evidence to address that point.

PN2319

JUSTICE HATCHER: The IBIS report shows that industry revenue, employment numbers and a number of businesses have all grown over the last five years, notwithstanding that we have been allegedly in a cost of living crisis.

PN2320

MR SECK: Conversely I think that the IBIS report at page 7 does note that there is a susceptibility to a potential dampening of demand given the current cost of living crisis if there is going to be an increase in fees. So I understand that's just a proposition made, which is at page 7 of the report, but that, in my respectful submission, is a logical proposition to make. There's going to be at least some members of the community who might be price sensitive, especially those who are looking at trying to cut other parts of spending, and dental costs or dental work might be considered discretionary for some people. I accept it's not going to be material for everyone, and I can't put the evidence any higher than that.

PN2321

VICE PRESIDENT ASBURY: Mr Seck, for my part at least you could mount an equally compelling argument that the people who can't afford to go to the dentist can't afford to go to the dentist regardless of what happens to wages. It's already an issue, and notwithstanding that the dental practices are increasing their profit, increasing their employment, and given that the proportion that's coming from private health cover it seems to be fairly minimal, and yet 11.1 billion was spent on dental services in the period of this report.

PN2322

People who can afford to go to the dentist are going to continue to go to the dentist, and people who can't afford to go to the dentist are going to continue not to go to the dentist regardless of what happens with what Professor Stanford's evidence shows, or what Professor Stanford said is a minimal impact in terms of wages.

PN2323

MR SECK: It can only be relevant to those where there are decisions made of the margin. I accept that. It's not going to be affecting everyone, or even a large cohort.

PN2324

VICE PRESIDENT ASBURY: I understand.

PN2325

MR SECK: But for those people, especially in lower socioeconomic areas where every dollar counts a slight increase in dental fees may be the difference between deciding to undertake that work or not. So we wouldn't say that it's going to be a

large number of people. We just don't know. But given the correlation between, we would say logically, dental practices in lower socioeconomic areas being likely to be less profitable, and therefore any increases in wages as a result of any determination being made, are likely to be passed on to consumers. That's likely to have a magnifying impact, but I can't really put it any higher than that. Unless the expert panel has any further questions those are my submissions.

PN2326

JUSTICE HATCHER: Thank you. Ms Campbell.

PN2327

MS CAMPBELL: Thank you, your Honour. In terms of how I will structure my submissions this morning similarly to Mr Seck I will spend some time speaking about the provisional determination, our proposed determination which has similarities to that of the ADA. And then I will focus my submissions on phasing in, without attempting to repeat anything that's already been said, but perhaps to highlight where there are differences or slight differences in approach.

PN2328

The Dental Service Business Council consists of various dental clinics that are the larger operators at the end of the scale. As has been revealed through the proceeding, they do not represent necessarily the majority of the industry. The industry is relatively diverse in that it geographically covers all of Australia, but is centred around population centres and consists of a number of smaller businesses than those that are involved in the Dental Service Businesses Council.

PN2329

As has been raised earlier, it's a relatively small percentage that operate at the bigger end of the scale. The IBIS report is a good snapshot of the industry for this sort of information. Interestingly, the IBIS report says that the average number of employees is three. However, that can somewhat be distorted in circumstances where a number of operators are acting as sole traders in businesses that, as those involved in the Dental Services Business Council do, offer the service of an operating practice whereby you can apply your trade, have the benefit of the employee dental assistants and other employees at a fee for service.

PN2330

It was elicited by Mr Lettau how some of these systems can work, and there is, again, variation in that. Sometimes, the dentist will be paid a fee for their service. Sometimes, the dentist will receive a fee direct from the patient, and a percentage of that will be taken back to the operating business, and I believe there was a third alternative involving what was more of a commissions-style structure. That simply just situates where in the landscape my clients sit, but also the diversity of the landscape that the Commissioner's considering when looking at dental assistants and their industry.

PN2331

Turning now briefly to the proposed classification, obviously, the Commission has asked some questions about the classifications. There are, I think, some small differences, but perhaps they are not important between our proposed classifications and that of the ADA. Looking at the provisional classification,

perhaps the best way to understand the case is to identify what it is that - what the sought changes are, really, to the provisional classification. There were concerns about what's been described as the jump from level 1 to level 5 after three months. This was also referred to, really, as the lack of a stepping stone from level 1 to level 5 for unqualified employees.

PN2332

Level 1, as we understand it, in the provisional views, would apply to all employees regardless of whether or not they have previously had obtained a Certificate III in Dental Assisting. We did not understand level 1 in the provisional view to be something that would not apply to certificate-qualified employees.

PN2333

JUSTICE HATCHER: Well, with respect, that's not correct because it reflects the existing position, the award, that level 1 only applies to unqualified employees. If it had been otherwise - - -

PN2334

MS CAMPBELL: What I was going to say is that is potentially unclear from the drafting in that it's - entry level is, how we understood it, less than three months' experience, but if it's the case that qualified employees would automatically go to level 6, but I submit that there are sort of two ways of reading. Obviously, you can take into account the context of the existing and applicable award to understand that. So the jump between unqualified at three months to then level 5 was something that was consistently of concern to the dentists in the evidence.

PN2335

A lot of the evidence that was before the expert panel did tend towards to apply to people who did have certificates. They seem to be quite high representation of the certificate in those that gave evidence, but as Mr Seck has said, there isn't really a strong register or understanding of the numbers of those that are qualified. There does seem to be, at least, a large significant portion of unqualified dental assistants.

PN2336

The DAPA survey of 500 did give us some indication that 75 per cent of respondents had a certification. However, that may be somewhat weighted towards those with certifications given that DAPA itself does offer the certification. So potentially those who were asked would be weighted towards certification. The other aspect - - -

PN2337

JUSTICE HATCHER: Well, we made a finding about this, didn't we?

PN2338

MS CAMPBELL: In the percentages, yes.

PN2339

JUSTICE HATCHER: Yes.

PN2340

MS CAMPBELL: Just to be clear to your Honour, I'm just reflecting that against those who have given evidence that we have not heard from an unqualified dental assistant. We have heard some evidence from dentists about dental assistants that did not have qualifications, but we've not directly heard from an unqualified assistant.

PN2341

DEPUTY PRESIDENT GRAYSON: I thought one of them at least was unqualified. That was my recollection.

PN2342

MS CAMPBELL: I think potentially - - -

PN2343

VICE PRESIDENT ASBURY: Ms Medwin, I think.

PN2344

MS CAMPBELL: Ms Medwin was qualified.

PN2345

MR SECK: Lily Robertson last year (indistinct).

PN2346

MS CAMPBELL: Lily Robertson was not qualified.

PN2347

DEPUTY PRESIDENT GRAYSON: Yes. That's correct.

PN2348

MS CAMPBELL: The other issue that we have sought to address in our proposal is the progression over time with increasing skills. Ultimately, the provisional view will, as we understand it, lead to a four-year progress period. We have sought to extend that period out so that continued progression can happen. Now, that has had some consequences in that some of the increases in the provisional view will be delayed, but we've sought to do it in a way that reflects, really, the two branches of qualifications and experience as well as experience and qualifications being combined.

PN2349

Just briefly going to the levels that have been proposed by the DSPC, we have not, as far as I can see, included an equivalent experience style construction. I don't know whether that was what was intended to the ADA. There are some risks around equivalence of experience to the certificates in circumstances where assessments would have to be done as to what that equivalent experience was. There are also examples of overseas qualified people who may have experience or overseas qualifications. We have intended to narrow the certification to the Australian Dental Assisting qualifications.

PN2350

JUSTICE HATCHER: Why's that?

PN2351

MS CAMPBELL: It would seem to us that the evidence has largely been about those qualifications. The overseas systems, we are not really aware of what they are. The regulatory landscape overseas we understand to be quite different in that in some countries, dental assistants operate under a registration system, but we have not provided a process for equivalent experience as meeting that of a certification.

PN2352

JUSTICE HATCHER: Well, wasn't there evidence about one dental assistant who was actually an overseas qualified dentist working as a - - -

PN2353

MS CAMPBELL: Dentist, yes.

PN2354

JUSTICE HATCHER: I mean, surely that would qualify you, wouldn't it?

PN2355

MS CAMPBELL: In our system, we haven't provided a process for that. Overseas qualifications are - there's a complicated process by which recognition can occur in Australia of overseas qualifications. So, for example, there may be transitional courses and things like that that are available. There just simply hasn't really been any evidence about overseas equivalents, and we haven't made provision for it in our proposed structure.

PN2356

So as you can see, what's sought to be done is to introduce a stepping stone after that three-month period. We've proposed that the stepping stone should increase at two years and submit that that reflects the development over time of skills. There was a lot of evidence about the importance of repetition, and as things being repeated, proficiency or quickness and, thereby, value increase. And again, as was discussed earlier, there's going to have to be, in a time-based system, a date picked, and there may be some arbitrariness to that date, and potentially, not every individual person's skills will develop at the same time.

PN2357

But a lot of the concerns about slow skill development may be able to be managed through performance, particularly in those first - we did hear about people who had had very long periods of experience, and maybe were not performing at the expected levels, or were slower than others who had shorter periods of experience. But particularly in those first few years, Ms Medwin gave evidence about what people were able to do, and how it was that they progressed, based on the repetition. Her experience for her was that having a certificate enabled her to gain those skills more quickly, or to exercise her skills more quickly, and we've sought to recognise that in our structure.

PN2358

JUSTICE HATCHER: Your structure allows an unqualified person eventually to proceed to level 7, is that right?

PN2359

MS CAMPBELL: Yes.

PN2360

JUSTICE HATCHER: So that presumably might be a cost element in excess of the provisional view.

PN2361

MS CAMPBELL: That is possible. We haven't sought to just minimise costs through this structure. We've sought to recognise what we see as reflective of the work value that is provided in the industry. It's not simply a cost exercise. I think probably where we have departed from perhaps the existing award is that we've given recognition of time in that regard. I don't believe that we have assessed level 4 quite as highly. That occurred to me in the exchange between the Bench and Mr Seck earlier. I think that may be at one level below where they would currently be on the current award, so perhaps that's the trade-off that our proposal represents.

PN2362

DEPUTY PRESIDENT O'NEILL: Do you mean Certificate IV or level 4, just so  
- - -

PN2363

MS CAMPBELL: I think Certificate IV. So we have tried to represent the graduation that has been in the evidence, around skills and time, and in order to do that, to show that a Certificate IV was really at a higher level than a Certificate III, we've separated that out. Obviously, there's been evidence that you need to have Certificate III to obtain a Certificate IV. The evidence around Certificate IV was that this was focused on specialised skills, in the sense of dental procedures, and it built on the existing skills of Certificate III. But in order to recognise that time and experience, I think that has been somewhat of a trade-off that your Honour Justice Hatcher has just identified, in the seven years.

PN2364

JUSTICE HATCHER: I thought there was evidence about one dental assistant who had been in the industry for a long period of time, but had never been able to perform adequately, to the extent that her (indistinct) dentist - - -

PN2365

MS CAMPBELL: Yes. But your Honour asked Dr Weerakoon about whether or not that was a representative issue or whether that was a performance issue.

PN2366

JUSTICE HATCHER: Yes.

PN2367

MS CAMPBELL: And there are going to be employees – as there are in every industry; this is not any comment on the dental assistants themselves that are not necessarily meeting job capabilities – experience, we accept, is not going to be a cure for all performance issues. Dr Weerakoon accepted, in the questions that you asked of her, that that was an individual performance issue. She then went on to

give another example of a person that she currently worked with, that had a few issues, but she said that she was prepared to take that person as they were and deal with it.

PN2368

I took that to mean from her that, you know, she has accepted this person has got a lot of experience, but they're not really performing. Now, if there was a different practice, or a different employer, whereby somebody has reached that high level, and they go, 'You know what, you're an experienced dental assistant, you're at level 7', but they think that performance is not there, there's a separate process to manage that. And work value and performance are two separate issues. You really have to consider work value in the way that that's been described. It's the nature of the work and the skills, as opposed to how that work and skills are being performed.

PN2369

So I would urge you not to be distracted by performance. The same can be said at the other end of the scale; there may be a brilliant dental assistant, and we've heard about these dental assistants as well, who started at a very early age, may not have become qualified, but they just got it, and they just were able to do the work at a very high level of proficiency from day 1. Again, that could be a matter of performance. There are going to be high performers in the 22,000 or so population. They can also distort the work value proposition. It's a question of those factors in 157(2)(a), rather than a question of what an individual does once they are performing the skills or the work.

PN2370

JUSTICE HATCHER: Well, I take your point about the difference between performance and work value, but that sort of evidence raises the questions of the extent to which length of service is a reliable proxy for work value.

PN2371

MS CAMPBELL: Yes. And I think one of the difficulties that has emerged in this case is that it's a very varied and disparate industry. There is some consistency in the work that dental assistants do. However, there are also differences in terms of the actual tasks, and if we were looking at an indicative task model, in my submission, there just has not been – and this could be a question for another day, potentially, but in the evidence available now, there is not enough information before you to graduate the levels based on task or role types. It really has been a case that's focused on experience and qualifications.

PN2372

That is not to say that, as was indicated earlier, that that couldn't be revisited. But in the exercise of the powers that you've actually got today, you've got to be satisfied on the work value propositions, and you've also got to be satisfied on the modern award objectives. So there may be different ways of doing things that are also better, but in my submission, you have to confine yourselves to the way that the case has sort of fallen out and been approached, because I could not stand here today and say to you, as in many other awards – Security Services Industry, for example – everybody at level 1 does this, and then everybody at level 2 does this, and maybe they do some more tasks, or they do it in this way. That's not the way

that I see the evidence as having fallen out. Perhaps if I might move on to the levels from phasing – into phasing in.

PN2373

DEPUTY PRESIDENT SLEVIN: Before you do, Ms Campbell, paragraphs 32 and 34 of your written submission, I'm just wondering what's happening with people with more than three months' experience. They seem to be contemplated by both level 2 and level 3.

PN2374

MS CAMPBELL: That may be a typographical issue. Just let me find the - - -

PN2375

DEPUTY PRESIDENT O'NEILL: I thought it depended upon what tasks or responsibilities they had, perhaps, after three months. Is that correct?

PN2376

MS CAMPBELL: So level 2, my understanding is a new entrant with three months of experience.

PN2377

DEPUTY PRESIDENT SLEVIN: So that's where you go after level 1.

PN2378

MS CAMPBELL: Yes, and then - - -

PN2379

DEPUTY PRESIDENT SLEVIN: You'll definitely go to level 2. It seems you may go to level 3 at three months. It's not clear what the (indistinct) is between those two.

PN2380

MS CAMPBELL: I see. So what we had tried to articulate here is that there are some dental assistants who work in more specialised practices that are operating at higher – that are operating at more complexity in the dental procedures. So these are specialist practices that focus on things like oral surgery. What we were trying to do was to reflect the value that those dental assistants bring in those practices. They tend to be somewhat higher-earning circumstances, so we were attempting to provide a pathway for those dental assistants. They obviously also exercise similar invisible skills, but this was a procedure-specific – sorry, a process-specific submission.

PN2381

DEPUTY PRESIDENT SLEVIN: So if you were going to define it, perhaps on page 9, which is still in paragraph 34, the sentence:

PN2382

*A dental assistant at this level –*

PN2383

being level 3 –

PN2384

*will be comfortable with more advanced procedures and all consumables.*

PN2385

Is that the discrimen between 2 and 3?

PN2386

MS CAMPBELL: Yes. Mr Seck just pointed out to me as well that we were also seeking to discriminate between level 2 having more direct supervision than a level 3 person. So if you go to paragraph 32, there's limited responsibility, accountability and discretion.

PN2387

Moving on to phasing in, as your Honour Justice Hatcher raised – I think it was on Day 1 – there's really sort of two issues with phasing in, and perhaps to date it's been treated as really one issue, but the first issue is the date of any increase. Now I understand that what's been proposed by the ACTU is a January 1 increase. There are concerns that were represented in the evidence about the impact of a change to the levels. Largely, those concerns, in my submission – I believe it was question 8 that went to the Expert Panel. That was the question to you about the implementation.

PN2388

There are implementation concerns associated with any change. Regardless of the provisional view, if there's a change to the existing award, what we have heard is that it's a very disaggregated sector where many employers are themselves either employees of the business or working in the business in a professional capacity. There seems to be, in the case of many of the smaller dental practices, little by way of HR support or payroll. They are really operating as small businesses or even down to very small businesses. For that reason, we have sought in our submission to push back the start date of any change.

PN2389

I appreciate that some of this is going to be dependent on how quickly a decision can be issued, but until that occurs, there will be just a degree of uncertainty, and whatever change there's going to be, other than just a decision not to make a change, which I don't think anybody is advocating for, is going to have a cost in terms of – need time in terms of the assessment for how it should be implemented.

PN2390

One of the things that seems very apparent with dental assistants is that, unlike some other professions that are more highly regulated, or have registration processes, or have required qualification processes, there's going to have to be some information sought. Now it may be that that's not particularly difficult to do if you have a small number of employees or a small number of dental assistant employees, but the smaller employers are going to have sort of less resources, I suppose, to put towards questions around 'When did you start, what are your experiences, what years have you worked, and what are your qualifications?' The larger employers will have more resources to do that, but they also have more employees, so what would be sought would be a reasonable amount of time in

order to change systems and review systems to implement any potential change. So that's what I wanted to submit about - - -

PN2391

JUSTICE HATCHER: That's less likely to be an issue if we simply go with the provisional view, which effectively maintains the existing structure but changes pay rates only.

PN2392

MS CAMPBELL: I suppose even in that situation, some changes would have to be made, whether that's done to systems or whether that's done through book-keepers, because the industry will have to understand what the changes are, but you're right in that time and experience and qualifications do – it will require some additional information, which the provisional view, my understanding would be that information would already be obtained and they can say, you know, 'You are a level, we are going to move you to this level.'

PN2393

In terms of phasing in and the impact on business, I think there's been collapsing of the factors in the modern award objectives. You're allowed to take into account the impacted business, but you're also allowed to take into account the impact on the economy. We had the report of Dr Stanford yesterday, which I will take you through, but even if you were not satisfied that there is any impact on the economy whatsoever, an impact on business alone is something that you can take into account. It's not necessary to show that an award increase will affect the national economy, will affect the employee, or will affect the entire industry either to say that it should or shouldn't be made, and, equally, you don't have to be satisfied that there'll be no change to the economy. These are broad and flexible factors. These are just simply things that you can take into account.

PN2394

The questions that were asked of Dr Stanford were really directed towards higher level economic impacts, so that is on the economy as a whole, the industry and the services as a whole, and on the employment of the dental employees themselves. He ultimately came up with a low case and a high case. I put some propositions to him that he accepted about the high case. It was necessary for him, because of the lack of data about dental assistants and how they are paid, to make some assumptions, and he made those assumptions. He accepted that he did not take into account some of the oncosts that will come from this. Dr Stanford's assessment - - -

PN2395

JUSTICE HATCHER: I think his evidence was that 15 per cent was an overall estimate and wasn't calculated by reference to any particular category of oncosts, except I think that he said it was obviously more than enough to cover superannuation.

PN2396

MS CAMPBELL: Yes. And we would agree. It was more than enough to cover superannuation if there were some other costs that were not included. We are not necessarily saying that the sky is, you know, going to fall in because those things

were not included, and your Honours are entitled to take into account those costs that will come on from – oncosts from the increase.

PN2397

Perhaps the best way to put it is that some of those issues are going to play out at a business to business level. Some of the businesses in the industry are profitable, some of the businesses in the industry have lower profit margins. Profit in this case, and Dr Stanford also represented this more at the macro level, it's complicated to work out what profit was because profit may be – he termed it neatly when it was sort of dentist compensation. If the dentist is the owner of the business and the profit represents their income, he said that it would have no impact from an economic perspective whether or not that was determined as their income or their profit, but when we're thinking about profits in this case, it's a somewhat unique industry to simply – in a lot of cases, profits can be akin to wages of the dentist, and that was how Dr Stanford certainly made his assessment. That also plays out, though, at the more micro and business level in some cases, particular for the smaller business practices.

PN2398

At the smaller level, it was very clear that dentists are operating in a high cost environment for the businesses. We heard about a \$68,000 dental chair, I think it was a \$110,000 X-ray machine, so to the extent that those businesses have profits, a lot of them can be seen really as contingencies. Dr Weerakoon spoke about how she wanted to have a buffer should she need to pay staff in circumstances where they were unable to work, like COVID-19.

PN2399

So these are factors that you can take – sorry, this evidence are matters you can make inferences about when you're considering business, even if Dr Stanford's evidence was that it will not play out at an economic level, despite him having accepted that there may be some additional things that he could have taken into account in those estimations.

PN2400

There's also the issue of payroll tax. That is something that is affecting a lot of businesses at the moment. The New South Wales submission from the DSVC is there. There are both payroll tax historical liabilities and payroll tax ongoing issues. This is an industry that is facing a number of increasing costs in different areas. I wanted to spend some time taking you to the fixed fee arrangements. The evidence – so Dr Benedetto gave some relatively high level evidence about the nature of the fixed fee arrangements and how they work. These are the fixed fee arrangements that concern private health providers whereby, a preferred provider will complete a restricted list of – or a list of procedures for those health fund members.

PN2401

The IBIS report probably gives the most information about these and how they work. There are some risks associated with them in that part of the costs or where costs are going to increase, those costs will be absorbed. These are yearly negotiated arrangements, 1 April is the negotiation times. And there will be – Dr Benedetto's experience is that they are – are a negotiation probably overstates

the situation. It's a price-offered situation. And there's just no way of knowing whether or not these additional costs will be factored into those.

PN2402

I put to Dr Stanford that one way of funding any losses created by an increase of wages in these situations is that you could task costs onto different consumers. He didn't accept that that is what businesses would do. Again, it may just be a situation where there's no way of knowing. I also suggested to him that these costs could be covered – or asked him whether it was possible that these costs could be covered by price increases going onto consumers. His answer was that in a competitive environment, that that was unlikely.

PN2403

We had an interesting exchange about automation and it seems that the conclusion of that was automation is also unlikely. And automation being a cost saving possibility.

PN2404

VICE PRESIDENT ASBURY: If the nature of the arrangements, the market means they can't pass it on, that substantially invalidates Mr Seck's argument about effects on the national economy and health, doesn't it?

PN2405

MS CAMPBELL: I think there's a difference to be set about the fixed fee private health arrangements. Not everybody who acts, so some – it's a disparate market of consumers. There are those who have private health. There are those who have private health and will pay on top of that private – and only use the private health. There are those who have private health and will pay on top of the private health. There are some purely private consumers, so for example, they don't have private health and they just pay purely out of pocket.

PN2406

There are also parts of the market that are only Government funded, so that – and then there are some (indistinct) split. So children, for example, we hope one in two will receive public dental care, but that means that the other part will not. And so it's a complicated, I suppose, set of funding sources.

PN2407

VICE PRESIDENT ASBURY: Yes, but all of that suggests that if you look at it on an industry basis, the cost of this will not entirely be passed on. Some of it might be.

PN2408

MS CAMPBELL: That's it, yes.

PN2409

VICE PRESIDENT ASBURY: But it might vary from practice to practice. But in (indistinct) there will not be 100 per cent passed onto costs.

PN2410

MS CAMPBELL: Is your Honour asking about the overall increases will not be passed onto consumers? That seems to be - - -

PN2411

VICE PRESIDENT ASBURY: The proposition I'm putting to you.

PN2412

MS CAMPBELL: Yes.

PN2413

VICE PRESIDENT ASBURY: Is that when one looks at the aggregate effect with the – of the increases across the industry.

PN2414

MS CAMPBELL: Yes.

PN2415

VICE PRESIDENT ASBURY: That they are – the evidence suggests that there will not be a pass-on off 100 per cent of the cost – you know, it'll be a – something less – some lower proportion of that. So that for example, when Mr Stanford says, estimates that the direct cost is 1 per cent of employment costs and a small amount of total costs, the actual pass on (indistinct) will be something even less than that because of the various factors you've raised.

PN2416

Won't be zero, but it'll be something less than that.

PN2417

MS CAMPBELL: Yes. That seems to be what Dr Stanford was saying. I took his evidence to be that these costs won't be passed on. They'll be absorbed in profit. My submission to you is that that's an impact on business. So whether or not it's a – you know, I suppose you've got to make a value judgment and impacts will come out in different ways.

PN2418

VICE PRESIDENT ASBURY: I mean I think in terms of one section – sorry, section 134(1)(f), it's obviously going to increase employment costs.

PN2419

MS CAMPBELL: Yes.

PN2420

VICE PRESIDENT ASBURY: There might be an issue of quantification, but there's no way that that's not going to happen.

PN2421

MS CAMPBELL: Yes. But you know, it's interesting that it's sort of apparent in the nature of Dr Stanford's report is – there are going to be multiple individual decisions made at a practice basis. Some people may choose to pass it on. Some people may not. Some people may – it's going to be ultimately at the end of the day, a business decision. Some people may choose to not increase non-award employees or – sorry – award employees that are paid at higher rates.

PN2422

There are many individual business ways that this could fall out and the diversity of the industry and the fact that we are by and large talking about small businesses even in the larger businesses it was clear from Dr Benedetto's evidence that at least at National Dental Care, they were not operating from a standardised pay scale or a standardised HR process. Individuals were paid based on their individual location. Some were award reliant and some were not. So there's going to be multiple ways that the decision will impact. It may not – it may be different in any business. It may be inconsistent and it – I think if anything that is what the evidence showed.

PN2423

A further possibility in the sense of Mr Seck's address to you on the effect of the national economy, we also heard a lot about voucher schemes and – so the voucher schemes are the state government systems and then there are also some Commonwealth Government systems. Public dental care is delivered through a mixed system of private providers and also some public providers as well. There's possibilities that if the public funding is not sufficient to cover costs, a business decision might be made to either withdraws from that or to shoulder the cost and impact it elsewhere into your business. This is just simply another way that there will be impacts at a business level.

PN2424

As was raised earlier, there's been no indication of – as there have been in some of the other hearings and in some of the other industries – increases in State or Commonwealth funding. There's just simply no evidence on that one way or the other.

PN2425

Dr Stanford indicated that over time from an economic perspective, there may be an expectation that there be market increases. There's no really any evidence other than that. Other than of that general economic sort. Dr Benedetto talked about in the case of the private health arrangements, I think he said, I – they don't keep up with CPI.

PN2426

So it doesn't seem to be that they themselves would increase.

PN2427

VICE PRESIDENT ASBURY: So, if you just go back to fix the arrangements, you said – made a reference to a 1 April renegotiation date. So - - -

PN2428

MS CAMPBELL: So Dr Benedetto says that they are renegotiated around the time that private health premiums are – sorry, that private health rebate is set by the Government and that's the date for that. So that's how I've come to that date.

PN2429

VICE PRESIDENT ASBURY: So, if they renegotiated when would that adjustment take effect? I mean, I'm just trying to work out how this plays out in connection with operative date.

PN2430

MS CAMPBELL: I mean, speaking from the Bar table, the long – I don't imagine that a decision before 1 April could change the – I suspect that probably could change the outcome of those negotiations from this point. But I can't really say more than that.

PN2431

VICE PRESIDENT ASBURY: Well, I mean, that's why I'm just trying to work out how this plays out. So you and the ADA have proposed a first operative date of 1 July 2026, as against, for example, the Union's immediate phasing in and DAPA says the same thing, or alternatively, 1 December. But does any of this make any difference in terms of - - -

PN2432

MS CAMPBELL: I suspect even the 1 July date will mean that there's just some costs carrying. Unlike some of the other decisions where sort of five-year phasing in has been sought, we've sought overall end-to-end complete phase in by three years to reflect those increases. Apparently there's some evidence about the timing issue from the last proceeding that, if it would assist, we can direct you to, but the - - -

PN2433

JUSTICE HATCHER: All right. Well, you just send us an aid about that, if you wish.

PN2434

MS CAMPBELL: Thank you. I think I've overdone my allocated anyway. So I better sit down unless there's anything I can assist you with further.

PN2435

JUSTICE HATCHER: All right. Thank you. I'm just wondering if the convenient course is now that we take an early lunch and resume at 1 o'clock.

PN2436

MR SECK: That would be convenient for us. I may need to get some instructions on reply anyway.

PN2437

JUSTICE HATCHER: Yes, all right.

PN2438

MR SECK: Can I just raise one issue? The words 'or equivalent experience' which is referred to in the ADA's proposed classifications for level 6, I'm now instructed, is a typographical error. So if the expert panel can cross out the words 'or equivalent experience', that reflects the ADA's proposed classification scale accurately.

PN2439

JUSTICE HATCHER: Yes, thank you.

PN2440

MR SECK: May it please.

PN2441

JUSTICE HATCHER: All right. We'll adjourn now and resume at 1 o'clock.

**LUNCHEON ADJOURNMENT**

**[12.09 PM]**

**RESUMED**

**[1.02 PM]**

PN2442

JUSTICE HATCHER: Mr Lettau.

PN2443

MR LETTAU: Thank you, your Honour. I'll address the panel by reference to the same two key issues that my learned friends have done so far, that is, the evidentiary issues regarding the provisional view on the classification structures proposed, and then I'll address the issue of costs of phasing in. I'll address the provisional view at a higher level, and DAPA will spend a little bit more time on that, and I'll go into a little bit more detail on costs, and DAPA will do the opposite.

PN2444

So starting with the proposed classification structures, the union maintains its support of the expert panel's provisional view, and we rely on our written reply submissions in particular on the way we view the provisional view. Just firstly on the principles that were expressed as sitting behind the provisional view, at paragraph 288 of the decision, there were three principles, so I'll paraphrase them. The first one is that the simplest way to correct the gender-based undervaluation is to reclassify dental assistants within the existing support services structure.

PN2445

We agree with that approach. We support that approach. We think it's preferable, for a number of reasons, one of which is, the structure remains clear and easy to use, not, to quote Mr Figliomeni, 'convoluted', as he described in evidence some of the other proposals put, at PN1730. I think even here today, we all had a little bit of difficulty wrapping our heads around the ADA's and the DSBC's proposals, so one can understand Mr Figliomeni's point of view on that issue. But a more fundamental issue with the proposals of the employers is that they don't, in our view, implement the decision's findings about work value.

PN2446

And the reason is, employee wages under some of the proposals and at some levels are either worse off at some levels than the current award rates, or they're no better than the current award rates. The union also recognises that the panel has foreshadowed potential further review of the support services classification structure, and in that sense, the unions support that approach and oppose the more substantial alterations to the dental services classifications under the award.

PN2447

Our view, in substance, is that, in substance, many of the submissions made by the ADA and the Dental Services Business Council in support of the proposed classification structures really take issue with the fundamentals of the support services classification structure in general and the current principles that underpin them, so principles around entry level, where you land if you're qualified, and those sorts of things, rather than the provisional view, which, I think it can be said fairly, simply remains within the existing framework and tries to adjust things within that framework, without making any heavy-handed adjustments.

PN2448

We would say, in relation to submissions made about the support services structure, that they may or may not have merit. We don't express a view on that at this point, but our submission is that now, particularly at this stage of the proceedings, is not the time to be making these more fundamental changes to the support services structure. So back to the provisional view, the provisional view is to uplift the existing dental assistant classification between existing levels, except for the entry level. We accept that this gives the appearance of a steeper step after entry level; you move from level 1 to level 5, instead of level 1 to level 2.

PN2449

But our submission is, the proper way to be looking at that steepness is from the position of the wages that are free from gender-based undervaluation, not from the position of wages that are affected by undervaluation. So in that sense, the steepness can really be viewed, in one sense, as superficial, in that it's only caused by the fact that we've raised three levels while keeping the entry level pegged at the base rate, a move which the expert panel considered necessary to correct undervaluation.

PN2450

So our view is that there is no necessity to correct the so-called steepness at exists, and the unions do not - we don't advocate for a stepping stone, but we would point out the following: if a stepping stone level is to be considered by the expert panel, our submission is that it does not require such a big departure from the provisional view and the assisting dental assistants classifications under the support services structure as some of the other proposals involve. For example, an intermediary level could be added between entry level and level 5, and would make two submissions on any consideration of such a intermediary level.

PN2451

The first is to be free of undervaluation, the unions submit progression to any intermediary level after three months would have to be at a level higher than level 2, obviously, and it really should be, in our view, no lower than C10, and that only leaves one option which is level 4. Second point - - -

PN2452

JUSTICE HATCHER: I mean, if it was level 4, it doesn't really resolve the big leap issue because there's still a big leap anyway. So - - -

PN2453

MR LETTAU: It's true. So a less big leap.

PN2454

JUSTICE HATCHER: Slightly less.

PN2455

MR LETTAU: But it's a leap. The second point we would make on that is it should be an entry-level qualification that applies for a maximum between the first six to 12 months, so 12 months being the maximum. When I say it's the first six to 12 months, I mean up to six or 12 months. Our view is that the - our submission is that the evidence does not support the proposition of the employees remaining on an intermediary level for any longer than 12 months, and we'd point to a view things in the evidence about that.

PN2456

The first thing to say, generally, is that there was a wide range of evidence before the panel at the primary hearing with dental assistants at all levels. So dental assistants with 12 months' experience and no qualifications, six years, 13 years, 50 years, all variations of qualified and unqualified. The evidence of Ms Lily Robertson is particularly relevant on the issue of unqualified progression. She was unqualified and had 12 months' experience at the time she gave her evidence before the panel. So we would say her evidence could be relied upon for a stepping stone for up to 12 months.

PN2457

The evidence of Ms Medwin that we've also filed, the second statement of Ms Medwin in this proceeding, also goes to the question of - I guess, the issue of time to competency, how long it takes to - until it's appropriate to be lifted up to a non-intermediary level, and her evidence is it's around the 12-month mark. Yes, the 12-month mark. So that's our views on any consideration of a stepping stone level.

PN2458

Turning now to the issue of Certificate IIIs and the issue of, you know, the qualifications versus experience and how that should be valued, two points. First, for qualified dental assistants, the provisional view - as we've already pointed out, the provisional view doesn't depart from the existing principal under the support service structure that a Certificate III is recognised as a valid entry point into the structure the you've qualified. You enter at a higher level. And we don't see any justification for that to be departed from either in the evidence or in submissions.

PN2459

The second point we would make is the way we read the decision of the expert panel is that the question of value of Certificate III was resolved within the decision. It was expressed at paragraph 278 of the decision - I'll just read it out - where the expert panel found that the evidence indicates that as a matter of practice, basic duties of dental assistants may equally be performed by qualified and unqualified dental assistants, but more complex and advanced duties are generally - are always undertaken by dental assistants with qualifications. So there's a basis there in the primary decision for that approach. We don't understand that that was a provisional view, and in our view, there is, at least, a degree of an attempt to take issue with a non-provisional finding there about figure 3s by the employer parties.

PN2460

Ms Medwin's second statement dated 15 October is also very probative in relation to Certificate IIIs. She is a good example of an employee who started immediately with a Certificate III, and her evidence shows how she could quickly learn on the job how - she developed competencies much quicker than other employees, and that the Certificate III remained a foundational part of her competency and the growth in her competency over time, and we would say that her evidence was not disturbed in any meaningful way during cross-examination.

PN2461

A couple of final points about experience versus qualifications, just to point out, one is that to some extent, the debate is a bit of a moot point because the provisional view includes recognition of Certificate III including equivalent experience. So, you know, if you're an employer that values experience over qualifications, the provisional view recognises and allows flexibility to recognise employees' experience even if they're unqualified. So that's all we would say there.

PN2462

JUSTICE HATCHER: I'm just wondering whether we should - if we stayed with that approach, whether we should say something a bit more about what equivalent experience to a Certificate III might be because there was - I think there was some criticism which I suppose has some force that it's a bit vague, and employees might not understand what their obligations are in respect of that element.

PN2463

MR LETTAU: I think the most I can say is that to the extent some of the employees have pegged equivalency to years, length of service, we wouldn't support the number of years they've put forward. We would say less.

PN2464

JUSTICE HATCHER: Yes. I wasn't talking about years in that scenario. I was talking about some greater - - -

PN2465

MR LETTAU: Some descriptive, discursive approach. I haven't got instructions on that, but I could take them.

PN2466

DEPUTY PRESIDENT SLEVIN: What do you say about years, though?

PN2467

MR LETTAU: Well, we say that the employer's years approach, it's too long. So less is all I can really say at this point.

PN2468

DEPUTY PRESIDENT SLEVIN: Do you have some numbers? The DAPA gave us some numbers in terms of the years.

PN2469

MR LETTAU: I need to take the question on notice, and I can come back with some numbers. I should also add that we think DAPA's approach as well as 2IC employer's years are too long, we take issue with that approach, too, but I don't have the specific instructions on years or a discursive approach right now.

PN2470

JUSTICE HATCHER: And just for completeness, another alternative may be to combine the two concepts so to say that there might be equivalent experience or X number of years.

PN2471

MR LETTAU: I will take that question on notice. So that's all I have to say at this stage on the provisional view. Moving on to costs and phasing in, these issues concern relevantly the evidence of the impact on business of the proposed increase to the minimum wage for dental assistants, and in substance, that's really the main issue there, I'd say, and this includes under different phasing scenarios that have been proposed by different parties.

PN2472

The issue between the parties is that employer's interests say that the wage increases are simply unaffordable to dental practices because of low profit margins. I'm paraphrasing, but I'm trying to capture what we understand the substance of their argument to be, that insurers and governments who fund and took care are not responsive to dentists' needs about - or dentists' increase in costs. This all comes from the (indistinct).

PN2473

And so practices will either reduce stuff, if the wages go up, or they'll pass on the costs to consumers directly, and then there's a line of argument that then keeps taking the logic that if consumers can't afford it, they'll forego their dental costs, and eventually the government will pay. They won't summarise it all in full. All we would say in response to that is that those submissions were put at a very high level of generality, and we do not - or our submission is that they were not supported by any specific probative evidence at all.

PN2474

Our view is that the dentist sector is characterised by substantial profits, in fact, as supported by the evidence and an ability to absorb the minimum wage rates and that the proposed increases are not sufficiently large to have a meaningful impact on business and the national economy, particularly if phased in. But even if it's (indistinct) without phasing in, and much of the employer evidence is not sufficiently probative on the questions of costs of phasing in for the expert panel to draw any reliable conclusions regarding broader costs impacts and (indistinct) phasing in. In some, the picture's much more optimistic from our point of view and we think that's supported by the evidence.

PN2475

I'll take the expert panel through three parts on costs. The first is in relation to Dr Stanford's expert evidence. I'll then address the lay evidence of the employers. And then make a few general - raise a few general issues of conclusions in relation to costs. So beginning with Dr Stanford's report, who was

asked to give an opinion on the impacts of the proposed changes on employment costs and growth and the national economy.

PN2476

The key finding we say should be made from his evidence following:

PN2477

*Wage adjustments are expected to lead to a direct one-time increase in total compensation paid in the dental services industry estimated at 0.54 per cent to 1.08 per cent and an increase in the industry's total operating costs of about 0.28 per cent to 0.56 per cent.*

PN2478

And that's at paragraph 55. And the high figure (indistinct) of these ranges, as the expert panel already knows, represents a generous allowance for indirect wage effects from the decision. I.e. for example, the non-reliant – non-award reliant dental assistance or other auxiliary workers. And that allowance is made by doubling the impact on award-relying employees.

PN2479

*Employment costs of such a small magnitude would not have any measurable impact on employment in the industry and the impact on total costs, even if fully passed through to consumers, would be so small in the order of one-half of 1 per centage point that no significant adjustment in the industry pricing or consumer behaviour could be expected.*

PN2480

Paragraph 52.

PN2481

*Be phased in over a one or two year period. It would be too small to accurately measure. And in the case of a three-year phase in, the cost increments would be even smaller, so much so that it's not meaningful to simulate that scenario.*

PN2482

So that was the conclusion of Dr Stanford at paragraph 54. The employers both tested Dr Stanford's evidence in cross-examination. For many of the points raised, Stanford made appropriate concessions some of which he'd in fact already made in the report, where he was asked to speculate outside the scope of his expertise. He politely declined to do so except for – except for where it came from his Mum's wisdom about debt repair.

PN2483

Propositions put to Dr Stanford during cross-examination even when taken at their highest do not in our submission disturb the substantive conclusions that Dr Stanford drew in his report. And as Dr Stanford pointed out in cross-examination, there is,

PN2484

*Ample cushion in the modelling to take into account potential indirect effects of wage increases.*

PN2485

For example, the flow on effects I just described above. And he – ample cushioning (indistinct) that's a – it's a pretty big buffer. He doubles everything. So he assumes that effectively assumes that 65 per cent – I think that I'm getting that about right. It's from the Cortis report. About 65 per cent of employees' dental assistants who are award reliant which is doubling what in fact is the data does indicate.

PN2486

Neither of the employer parties invited any of their witnesses to comment on Dr Stanford's report at all. And we would say on the evidence filed in relation to this week's hearing on costs, the Stanford report is the only reliable evidence the Commission has to draw conclusions about economic impact of proposed changes.

PN2487

Moving onto the employer's laying costs evidence that they filed in support of their positions, the employer part is relied on I think nine witness statements, from memory, or thereabouts. Six practice-owner dentists who were lay witnesses. Three dentists who were some form of – had some form of consultancy role as well.

PN2488

It should be said that where a party wishes to assert the particular change to the rates of pay, cannot be afforded or must be phased in as employers do say, that the submission – that submission should be accompanied by probative evidence, properly directed to demonstrating the facts asserted and we say very little weight should be given to the vast majority of the lay evidence on the economic impact of any wage increases and for the following reasons: (1) evidence was provided at high levels of generality from the lay witnesses, there was very limited reliance on empirical data. Where data was produced, for example in the form of financial statements and the like, it was at times, if you looked (indistinct) reconcile with the evidence provided by the witnesses about what they said was the costs impacts on the practices, that's one example.

PN2489

This was raised earlier with Ms Boroky. Almost none of the witnesses when asked, stated that they'd actually completed any calculations to assess what the cost impacts would actually be in numerical terms which is fairly straightforward calculation to do as I attempted to demonstrate in a very back of the envelope way with Dr Rakkas. Much of the evidence was characterised by a formulaic statement in each of the witness statements about how profit margins and the proposed increases could not be afforded.

PN2490

And when pressed on this cross-examination, most witnesses accepted one or more of the following propositions: either that they did not know what percentage the increase was that was being proposed, and Dr Bailey's an example of that –

they had not based the profitability evidence in their statements on a review of their financial documents, but on for example, and I'm quoting 'general information', that was Dr Boroky, or a number of witnesses said, 'on general impressions', or that they did not consider the financial statements at all relevant to the issue of the possibility of their practices - Dr Figliomeni gave evidence to that effect, as did Dr Littleton.

PN2491

Where witnesses stated they had done calculations or financial analysis, the calculations and analysis was not attached to the statement. So it could not be interrogated in any way. Dr Kim's an example of that. And finally, in cross-examination, some witnesses, such as Dr Weerakoon and Dr Rakkas did not directly claim that the wage increases could not be – would be unaffordable and I think an interrogation of their financial statements would indicate (indistinct).

PN2492

VICE PRESIDENT ASBURY: Can you remind me, did Dr Weerakoon's business pay award wages? I thought - - -

PN2493

MR LETTAU: Twenty per cent above award wages.

PN2494

VICE PRESIDENT ASBURY: Yes. So I - - -

PN2495

MR LETTAU: Yes. Probably for that reason. So there would be affordable – so the take away from us is that if that evidence – even if it were taken at its highest, our submission is firstly, it can't really be taken at its highest for the reason we've just given you, but even if it were taken at its highest, while it may speak to the specific witness's businesses and that sort of thing, it's not a sufficient basis, probative basis for the Commission to be drawing broader conclusions about the ability of dentist practices to absorb cost impacts or the need for phasing in.

PN2496

So filings and general observations or issues and conclusions to draw on and – and costs. Firstly, on the issue of above award rates, most employer evidence, lay evidence, given indicated that they paid some level of above award rates which would for obvious reasons tender the impact of any minimum wage increases. Dr Benedetto said, who's from the national dental care, which represents, I think, 100 practices, or solicitors or around that many – he said that 'A lot of their dental assistants were paid above award rates that's at PN1400 to PN1402.

PN2497

And he estimated at about 50 per cent of their 1300 auxiliary staff (indistinct) 650 is not insubstantial proportion to the actual dentists and dental assistants. Other witnesses who indicated they pay above award rates are actually listed in attachment 7 of Dr Stanford's supplementary report. (Indistinct) so that can function as an aide memoire, as the – which witnesses say in their witness statements that they pay above award.

PN2498

Mr Littleton significantly said that he pays four out of five of his DA's above award. Up to 60 per cent above award. PN1798, PN1803, but the vast majority pay above award.

PN2499

The second, I guess, cautionary point to make is about the supply of financial statements and other financial documents provided by employees, and the caution comes from this topic of services and facilities agreements and how that affects what you can actually read into his reports.

### **CONFIDENTIAL TRANSCRIPT PN 2500**

PN2501

Dr Kim who does valuations of practices, he accepted at PN384 that where practices operated with services and facilities agreements, dental practices, financial records in most cases would not reflect the full patient billing passing through the practice. He said this is very relevant when talking about analysing practice financials for sale, and in these circumstances, he said, and I quote, 'We do tend to adjust financial statements, sometimes relatively heavily', and that's at PN384.

PN2502

We counted five witnesses who stated that their practices have at least one services and facility agreement, and they were Anthony Benedetto. He said the majority of the NDC network operates with services and facilities agreements. So it's a very vast network, PN1452, Dr Rakkas at PN1511. Ms Boroky at PN235, Dr Weerakoon at PN447 and Dr Figliomeni at PN1680. They're the examples we could find.

PN2503

JUSTICE HATCHER: Okay. Just going back a bit, where did you say that aide-memoire was about - - -

PN2504

MR LETTAU: I'm just sort of referring to it as an aide-memoire. It's not technically. At attachment 7 to Dr Stanford's supplementary report. It's a second or third letter of instruction from us extracting - - -

PN2505

JUSTICE HATCHER: It's in the instructor attachment 7.

PN2506

MR LETTAU: Yes.

PN2507

JUSTICE HATCHER: I thought they're lettered, aren't they?

PN2508

MR LETTAU: It's a letter, yes.

PN2509

JUSTICE HATCHER: No. They're lettered. I can't find an attachment 7.

PN2510

MR LETTAU: There's one annexure to the statement which is JS1, and then that annexure has various attachments. I don't know if they're bookmarked and PDF'd, but I can probably find the page number.

PN2511

JUSTICE HATCHER: Anyway, sorry. You go on.

PN2512

MR LETTAU: And so the takeaway there is treat all of those financial reports and balance sheets and so on as - - -

PN2513

JUSTICE HATCHER: Yes. I've got it. Thank you.

PN2514

MR LETTAU: With caution, especially where there are service and facilities agreements because they're most likely suppressing the true income generation of those businesses. Third point, patient impact and price sensitivity. There was some evidence about that from the lay evidence. When these witnesses were cross-examined about the basis of their price sensitive evidence, it was quite clear that it was mostly based on general impressions and past experience.

PN2515

There was no, as was discussed a little bit earlier, during one of my friends - learned friend's submissions, no one referred to any specific past examples where that had to - they didn't experience measurable impacts on patients. Most of the evidence, we would submit, came down to what you might call a commonsense observation when prices go up, demand comes down. It didn't seem to go much higher than that. Dr Benedetto, I think, was the only witness who when asked said that he had based his evidence on things he had read, but he wasn't able to recall any of the specific things he'd read when he was asked to, and that was at PN1440.

PN2516

The IBISWorld report paints a fairly starkly different picture to that evidence about patient impact. I'll give a few examples. At pages 7 and 8 of the report under the current performance section, it says that the private health insurance is actually bolstering dental demand at the time - now. So general treatment, extras coverage increase to 55.1 per cent of the population as at March 2025 and that 59.1 million dental services were claimed in the year 2023 to 2024 which was a record high.

PN2517

It also states in the major markets section at page 18 that the core paying market in dental services which is the ages 35 to 75 is the cohort with the greatest financial means and accounts for 44 per cent of dentist industry revenue. It states

at page 15, 'According to ABS data, three-quarters of people in this age cohort who needed to see a dentist in 2023 to 2024 did see a dentist'.

PN2518

There was a point made by my learned friend about those on the margins. We're not aware of any specific evidence about how those on the margins deal with dentist - decisions about going to the dentist, but the IBIS report does provide some more information about the government support programs that are available. That's at page 32, where it says \$1.3 billion in funding is provided through the Child Dental Benefits Schedule, for example. It also states that 107.8 million in funding is provided under the Federation Funding Agreement. There's other examples in there. I won't go through all of them.

PN2519

Another conclusion, we would say, that can be drawn from some of the evidence and from the IBIS report and Dr Stanford's report is about the capacity to pay. All the indications in the evidence, we say, contrary to what the employers say is that there are strong signs that there is a capacity to pay any pay increases. I've already given the example of Dr Weerakoon and Dr Rakkas, but if the expert panel looks at the IBIS report, it indicates high profit margins at 25.8 per cent total profit, around 3.8 billion. These figures have already been cited. So I won't go over the page numbers.

PN2520

Medium term growth forecast. So that's said to be about 2.5 per cent over 2026 to 31. The industry's expected to grow to 16.9 billion. That's in the executive summary at page 4. The fact which was pointed out by my learned friend that 96 per cent of practices earn less than \$2 million per year, we would submit, tells us nothing about their ability to pay increases at all, and we'd also make a submission in reply to some submissions that were made of a general nature about the comparative ability - I'll rephrase that - the comparative variability of profit margins based on practice size or location. None of those submissions as far as we're aware is based on any specific evidence before the expert panel.

PN2521

One point on the issue of phasing in, and this is actually a response to the Dental Services Business Council's written reply subs, they point out the consent position that was reached in the ATSIWA Award in regard to phasing in over a three-year period and use this as an example for what might be done in the dental assistants and HPSS award. They quote, 'The primary reason for this appeared to be that the Commonwealth funds, the Aboriginal Healthcare Scheme and that any increases in its funding would take time to come into effect', and that's paragraphs 9 to 11 of the key paragraphs of the submissions.

PN2522

I think the point being there is that there's some lag, perhaps, in insurers and in governments to catch up to any wage increases in the dental services industry, but in response to what the Dental Services Business Council say there, the way they summarise why the three-year phasing occurred is not accurate. The primary differences to point out is that under the ATSIWA Award, the increases for dental assistants were much higher.

PN2523

Ten-point-seven per cent to 34 per cent. So a lot higher. And the reasons the unions supported a phased-in approach in that instance was the first three of them - the first one was the nature of the ACCO sector. It's not for profit. It's servicing First Nations people specifically; (2), it has a very high reliance on Commonwealth and state territory funding. It's not comparable in any way to the general private dental services sector, and (3), it was to do with the large size of the proposed increase. And I'll point out another point about phasing in. The approach that is being taken is the following.

PN2524

The operative date would be 1 January 2026, and then there'd be three years, 10 per cent each year. So if you're going to make a comparison to the ATSI (indistinct) award here, and you implement it from - 10 per cent from 1 January 2026, the scenario that Dental Services Business Council is actually proposing is immediate implementation, with no delay, because you have 10 per cent - - -

PN2525

JUSTICE HATCHER: And of course, with the ATSI Health Workers Award, we made work value findings which go way beyond this case, including the required exercise of cultural skills and other things.

PN2526

MR LETTAU: Yes, and partly reflected in higher increases, too. The final point is the question, who pays for all of this? We, the unions, we acknowledge that any increases in minimum rates of pay to correct gender-based undervaluation must ultimately be borne by somebody. And today, as we've pointed out in our submissions last year, that cost is entirely borne by dental assistants, through their suppressed wage, which are undervalued. And not just today, but for as long as they've been undervalued, they've been bearing that cost, and I think that is a conclusion that could be drawn from the findings of the decision.

PN2527

Now, in the present context, based on the evidence about the cost of wage adjustments, we see there's a few channels through which it can be absorbed. It can be absorbed by individual dentists, as sole traders, for example. It can be absorbed by the dental practices, through profits. It can be absorbed by consumers, through price changes; by insurers, through adjustments to fee schedules and the like; and by government. Much of the lay evidence, and even the submissions as well, when discussing the different ways that increases could be absorbed, talk about them as if one of those actors is going to absorb the whole increase, and the impact that that whole impact will have on one actor.

PN2528

So for example, if the insurers and the governments don't pay for it, then it's going to get passed on to the practice, and the practice is going to have to pay for it. If the practice can't pay for it, it's going to get thrown to the consumer, and so on and so on; it's going to get passed on down the chain of absorption (indistinct). That approach is obviously unrealistic. In practice, the impact on any wage increases will be distributed across all of these different absorptive cushions.

PN2529

And when viewed in aggregate, as Dr Stanford's evidence does, there is sufficient capacity within the sector as a whole to absorb the increases in the minimum wage rates, without a material impact or disruption; indeed, in some scenarios, so immaterial that Dr Stanford said it would have no measurable impact. That is the reason why the unions maintain the position that the changes are moderate enough to be capable of being accommodated in full, and without delay. Those are our submissions, unless there are further questions.

PN2530

JUSTICE HATCHER: Thank you. Ms Schreier-Joffe.

PN2531

MS SCHREIER-JOFFE: (Indistinct) the Full Bench, I have a draft of my outline of submissions to hand up, as a summary. I would also like to correct a typographical error in my outline of submissions filed in these proceedings most recently, which I think was last Friday or the Friday before. The one that you would have, the date – my apologies; the copy I have is not dated, but the outline of submissions we'll be working off (indistinct) before I just handed up these ones. It's 15 October. My apologies.

PN2532

JUSTICE HATCHER: So what's 15 October?

PN2533

MS SCHREIER-JOFFE: Yes, the outline of submissions on 15 October, filed in these proceedings. There is a typographical error that I would like to correct, and it is directly relevant to what we say the classification structure should be. I take your Honours to it when I come to it. I'm going to try my very best not to repeat what's already been said in relation to some of the aspects of the matters discussed, but my submissions will focus primarily on the provisional view of the classification structure in the draft determination, and, to a lesser extent, on the ability of the proposed increases to be absorbed, and the phasing in of those increases.

PN2534

In that regard, essentially, there is a tension between what I will call the employee interests, being the unions and DAPA's view, and that of the employer interests, and I am combining the ADA and the Business Council, the Dental Services Business Council, for ease of reference. DAPA is supportive, having previously proposed a separate and distinct classification structure. That proposal was rejected in favour of the draft classification structure. It is important to understand that, in proposing our original separate classification structure, we sought to take it outside of the current classification structure, and that approach was entirely rejected.

PN2535

We are accepting of that position, and we understand the position reached and the reasons for it, as expounded by the original decision. What we submit is that the employer interests are trying to do exactly that; create an entirely new structure and shoehorn it into the current classification structure, and we say that's an

entirely inappropriate approach. If there is to be a new classification structure, it needs to be revisited, and as my friends already pointed out, this is something on the agenda of the Commission for a future date. We say that is the appropriate time to look at those issues.

PN2536

In relation to the approach adopted by the employer interests, however, they seem to equate work value with time in the job, experience in the job. We say that is an approach that the evidence does not support. The evidence is clearly – and there is substantial evidence to this extent, that you can have the skills to provide a valuable contribution as early as three to six months, certainly by a point of 12 months. And what the Commission here is endeavouring to do, and the expert panel is endeavouring to do, is to recognise work value, the undervaluation of that work value as a result of gender, and rectify that.

PN2537

It is not rectified, we would submit, by a pure mechanistic approach of years of experience. And certainly, the evidence provided by Ms Shakespeare, Ms Hayes, and many of the dentists themselves indicate that there are dental assistants who are competent, who can give the appropriate level of support as early as 12 months' experience, and some before. And we say that goes directly to the issue of value, and should not be tied to an extensive level of years of experience, in the way that is now submitted by the employer interests.

PN2538

JUSTICE HATCHER: Ms Schreier-Joffe, just so I understand where you're going with this, I'm looking at paragraph 2.15 of the outline. It's got your proposal, and someone has drawn a line through it. What does that - - -

PN2539

MS SCHREIER-JOFFE: Bear with me.

PN2540

JUSTICE HATCHER: Is that just - - -

PN2541

MS SCHREIER-JOFFE: Yes. 2.5 of my - - -

PN2542

JUSTICE HATCHER: 2.15, on page 7.

PN2543

DEPUTY PRESIDENT SLEVIN: Of the document you handed up.

PN2544

MS SCHREIER-JOFFE: Sorry, my apologies. I'll take your Honours then to 2.15.

PN2545

VICE PRESIDENT ASBURY: Page 7?

PN2546

MS SCHREIER-JOFFE: My apologies.

PN2547

VICE PRESIDENT ASBURY: Well, I might just show you my copy.

PN2548

MS SCHREIER-JOFFE: Yes, no, no. I have it. 2.15. Which I – which has been deleted.

PN2549

VICE PRESIDENT ASBURY: So that's got a line through it. So what - - -

PN2550

MS SCHREIER-JOFFE: Yes.

PN2551

VICE PRESIDENT ASBURY: So?

PN2552

MS SCHREIER-JOFFE: So that has a line through it because it was an incorrectly transferred the – and my point which I wanted to make was in commencing that the appropriate classification structure is in our submissions on the 15 October, at 2.7 - - -

PN2553

VICE PRESIDENT ASBURY: All right. So what's the difference?

PN2554

MS SCHREIER-JOFFE: - - - my apologies for that.

PN2555

VICE PRESIDENT ASBURY: Just so we're clear about where we're going with this? So it's the 15 October? Just give me a second.

PN2556

JUSTICE HATCHER: Sorry, you said 2.7?

PN2557

MS SCHREIER-JOFFE: It was 2.7 on page 5.

PN2558

VICE PRESIDENT ASBURY: Right. Okay.

PN2559

MS SCHREIER-JOFFE: My apologies. And there is a correction in this document. You will see at Point (c) it says, 'And three years' experience'. That is an error, actually deleted. So - - -

PN2560

VICE PRESIDENT ASBURY: Sorry. So in the - - -

PN2561

MS SCHREIER-JOFFE: In 2.7.

PN2562

VICE PRESIDENT ASBURY: Yes.

PN2563

MS SCHREIER-JOFFE: At paragraph (c), or subparagraph (c).

PN2564

VICE PRESIDENT ASBURY: Yes.

PN2565

MS SCHREIER-JOFFE: It says, 'Level 5 dental assistants, unqualified 12.' And I says 12 months and three years. It's got the extra - - -

PN2566

VICE PRESIDENT ASBURY: I see that means between – between 12 months, it's been three - - -

PN2567

MS SCHREIER-JOFFE: Yes, there should – it should just stop at 'unqualified'. There should be no time period is what I - - -

PN2568

VICE PRESIDENT ASBURY: No, but I thought it - - -

PN2569

MS SCHREIER-JOFFE: Level 5.

PN2570

VICE PRESIDENT ASBURY: I thought Level 3, you've got – you've got – you need to have 12 months (indistinct) to get into Level 5. Is that right?

PN2571

MS SCHREIER-JOFFE: Yes. So our suggest – so just – I might take it a step back. What we are proposing is to adopt the provisional determinations (indistinct) the classification but with a stepping stone – one stepping stone to take into account the gap – the one stepping stone is the Level 3 which takes into account experience from three months to 12 months. So in other words, the first three months is entry level. It is the current award provisions, the stepping stone and I know my learned friend discussed me and that he talked about it at Level 4. We're proposing at Level 3.

PN2572

VICE PRESIDENT ASBURY: And it's three to 12 months?

PN2573

MS SCHREIER-JOFFE: Three to 12 months.

PN2574

VICE PRESIDENT ASBURY: Level 5 is 12 months to three years.

PN2575

MS SCHREIER-JOFFE: Well - - -

PN2576

VICE PRESIDENT ASBURY: Because then you've got the unqualified as – after three years going to Level 6. I'm not – I don't – I'm not understanding what you're correcting here.

PN2577

MS SCHREIER-JOFFE: So I'm just saying that after 12 months, they were down to Level 5.

PN2578

VICE PRESIDENT ASBURY: Yes.

PN2579

MS SCHREIER-JOFFE: And the Level 6 and Level 7, we have – I have made an addition to the provisional table and that - and that is really just to assess – assist in this idea of what is equivalent experience. So this has been debated this morning in terms of submissions. How do you measure – what is meant by equivalent experience. Our submission is arguably, you put on a period of time. That that's the proposal in relation to that issue.

PN2580

And I think the suggestion was it might be a combination of both.

PN2581

VICE PRESIDENT ASBURY: Just so we're not confused, can you send us a document (indistinct) which actually sets out what you're now proposing?

PN2582

MS SCHREIER-JOFFE: Certainly.

PN2583

VICE PRESIDENT ASBURY: I think I've lost scope of this a bit.

PN2584

MS SCHREIER-JOFFE: In relation to this issue though, it is our submission that essentially the provisional views should be adopted given the rejection of a completely separate classification structure, which we accept, with the slight modification to take into account, the jump between a dental assistant, who has no experience, no qualifications at three months and at Level 5 under the current proposal, we're suggesting that they step at Level 3.

PN2585

And I will clarify the further clarification which you've asked for in relation to - -  
-

PN2586

VICE PRESIDENT ASBURY: Level 6. Or seven.

PN2587

MS SCHREIER-JOFFE: Level 6 and 7. We say this addresses both the issue of experience and has been raised by some of the witnesses for the employer groups. But more accurately reflects the value and the work value provided by dental assistants, and as very clearly espoused by the evidence, in fact, by all of the dental assistants that gave evidence in these proceedings, that they were providing value, certainly at the point of a 12 month experience.

PN2588

That question was specifically put to all of the dentists who gave evidence too and to a fault, every single one of them had said that the dental assistants were entirely valuable, that their practices would not be able to run without them.

PN2589

I do admit that there was, and I apologise. I do not recall which person who said, you know, a (indistinct) – yes, a (indistinct) – would be enough. Unfortunately, we may disagree with that terminology, but at the end of the day, if we're judging work value, it seems uncontroversial to me based on the evidence, that is before the Commission that at the 12 month mark, there is sufficient value provided by dental assistants to support the provisional views that is founded by the draft classification structure.

PN2590

I want to move on to the issue of the costs and I won't go on in too much detail because my friend did a sterling job in relation to this. But I do echo that the evidence provided in these proceedings, overwhelmingly in my submission supports the proposition that the increases and the modest increases that are posed by the provisional views, can be supported by the dentist practices themselves. The industry at large and that is born out by the evidence and our cross-examination. It seemed entirely clear that all of the dentists that gave evidence were at least making some profit. Some more than others.

PN2591

So the suggestion that increases cannot be born at least to some extent by the dentists and absorbed, we would say this is not born out by the evidence. And I won't go through all of the (indistinct) compelling evidence in relation to (indistinct) covered by my friend.

PN2592

In relation to the issue of phasing in, I think it's important to understand that we are talking about the lowest paid members of the profession and when I use the word profession, I meant the whole industry at large. One of the – in fact the first point under the award objectives, the Fair Work objectives in relation to this issue, is to ensure the needs of the low paid.

PN2593

Dental assistants have been recognised as low paid workers and as such, arguments made by Mr Seck in relation to the objectors of the – of the award process, to take into account costs to business and industry, of course, on objectives that need to be considered but in the scheme of these proceedings where there is direct evidence about the value that these individuals bring to the workplace, the findings of the Commission already that they have been

undervalued, and the fact that they are low paid workers, those issues should far outweigh, in my submission, any consideration about whether business or industry at large can possibly afford the increases. I can't put it any higher than that.

PN2594

JUSTICE HATCHER: Well, I mean, nobody is saying the increases shouldn't be paid. It's simply a question – or that they can't be paid at all. It's simply a question of timing, to ease the business into - - -

PN2595

MS SCHREIER-JOFFE: And that's my point, which I'm about to make. In terms of phasing in, we say, on that basis, the increases should be immediate. We say 1 January is when they should take effect. If there is going to be a phasing in – and we've put this in our submissions; it should be phased in over a period of three tranches, the first being 1 January, the next being in July, and the following, the year after. But we say that the preferable position is that it's to be an immediate phasing in. In relation to some of the comments about impact on the general health of the public should costs go up and people not visit the dentist, the corollary is also true.

PN2596

There is ample evidence on the record that the lack of career progression and the lack of adequate pay is leading to a significant attrition of dental assistants in the profession. In fact, some of the dentists gave evidence that they can't find dental assistants. And the very fact that, if you do not have dental assistants, who are essential to the practices, will affect the capacity of those dentists to provide healthcare to the public. It's the countervailing argument made by the employer interests.

PN2597

In relation to the timing, again, this issue of rectifying the pay of low-paid workers in this industry will, we say, have an immediate effect on their ability to stay in the industry, which, again, argues for an immediate, if not fast implementation of any changes. So we would be opposed to any extensive or delayed phasing in of these increases. There was some comment made about the impact of increases to payroll tax. I do want to note that, as has already been pointed out, the majority of dental services are provided by small dental practices, small employers. Most of those will not be impacted by the payroll tax in any event.

PN2598

JUSTICE HATCHER: Because they're below the threshold?

PN2599

MS SCHREIER-JOFFE: That's right. And the larger organisations, such as the Dental - - -

PN2600

JUSTICE HATCHER: DSBC.

PN2601

MS SCHREIER-JOFFE: Dental Care – will be more than able to afford the increase to payroll tax, as has been clearly expounded in the evidence, and Mr Mann's affidavit sets this out in quite extensive detail. The large organisations have enormous funds, are funded by private equity, and are more than capable of bearing the increases costs; the modest, we would say, increased costs that would be appropriate in these circumstances. We say submit, in relation to these issues, and as my learned friend has already made the submission, at the moment, the burden is entirely falling on the lowest paid workers in the industry.

PN2602

This should be rectified immediately and not delayed so that the bigger organisations and the dentists themselves can, to some extent, protect their profits at the expense of individuals who have barely enough to live, and in some circumstances, are struggling to do so. And that evidence is given by Ms Hayes and others in relation to these proceedings. The last point I want to address is the reference to the impact this might have on fixed fees, and there was some discussion about when fixed fees get negotiated and the like.

PN2603

My understanding from the evidence given is that the individual dentists, other than Mr Benedetto, who was providing evidence on behalf of the dental care group, those dentists all said that they do not participate in fixed fees. So it is my understanding, on the evidence before the Commission, that the only evidence about fixed fees was given by Mr Benedetto, and his evidence clearly stated that the fixed fee arrangements were beneficial to that organisation, because of the volume of work, or volume of clients that they saw. And in those circumstances, we say that that issue is not relevant, and shouldn't be relevant to determining a phasing in, or the phasing in of these issues.

PN2604

And lastly, there was a comment made about the timing to implement these changes, and what I understood from my friend's submission is that there needed to be time given to smaller businesses to implement changes. If the changes are as proposed by the provisional classification structure, and possibly amended slightly, in the way that I have described, there should not be any significant changes that need to be implemented. It seemed to me, when the dentists were asked how many – the length of service of their dental assistants, they knew that from the witness box.

PN2605

They also seemed to know whether they were qualified or not qualified. These are the very things that I understood my friend is concerned about getting, in terms of implementation. We say that they are not matters that would take very long to implement or apply. And in those circumstances, we say there should be no impediment to any phasing in of any increases that are proposed by the expert panel. Those are my submissions.

PN2606

JUSTICE HATCHER: Thank you.

PN2607

DEPUTY PRESIDENT GRAYSON: Ms Schreier-Joffe, just when you put in your note, as to what your position is – I think it's in relation to 2.7 of the reply submissions, and particularly to level 6 and level 7 – I'm keen to understand whether your position is that the years that you've got in your current proposal are in addition to the language proposed by the panel, which is equivalent qualification or experience. So if that could be clear in whatever you file, that is, whether it's in addition to or substitution for that language.

PN2608

MS SCHREIER-JOFFE: It's in addition to.

PN2609

DEPUTY PRESIDENT GRAYSON: Okay.

PN2610

MS SCHREIER-JOFFE: So it is in addition to.

PN2611

DEPUTY PRESIDENT GRAYSON: That certainly wasn't clear in your last communication.

PN2612

MS SCHREIER-JOFFE: I apologise.

PN2613

DEPUTY PRESIDENT GRAYSON: So if that can be clear in whatever communication you file next.

PN2614

MS SCHREIER-JOFFE: Yes. Thank you.

PN2615

DEPUTY PRESIDENT GRAYSON: Thank you, Ms Schreier-Joffe.

PN2616

JUSTICE HATCHER: Mr Seck.

PN2617

MR SECK: Just a few points in reply. On the proposal (indistinct) your Honour the President, about having qualifications or equivalent experience, or nominating a number of years, may I perhaps deal with the second option. And I'm not saying they're, obviously, mutually exclusive. We would say, if that option is to be considered, then I think there needs to be some consideration as to who would be the person who would judge the question of equivalent experience.

PN2618

And one issue to raise, or one indicator which might be useful is that the Health Professional and Support Services Award has something akin to this in relation to health professionals level 1. I don't know if the expert panel has a copy of the current 2020 award before them, but health professional level 1 - - -

PN2619

JUSTICE HATCHER: So what clause is this?

PN2620

MR SECK: It's A2, which I think might be in this schedule.

PN2621

JUSTICE HATCHER: Yes.

PN2622

MR SECK: And health professional level 1, paragraph B refers to entry levels for new graduates who meet the requirement to practice as a health professional, or such qualification as deemed acceptable by the employer. And then it says it also applies to – it is also the level for early stages of the career of a health professional. I raise that because that's an issue which occurred in one of the cases I appeared, before the Fair Work Ombudsman in the Federal Court, in *FWO v Foot & Thai Massage Pty Ltd*.

PN2623

JUSTICE HATCHER: So what is it? FW - - -

PN2624

MR SECK: *v Foot & Thai Massage Pty Ltd*.

PN2625

JUSTICE HATCHER: What's the citation?

PN2626

MR SECK: I'll find it for your Honour. It's (No 4), but I don't have it in front of me at the moment.

PN2627

JUSTICE HATCHER: Yes. All right.

PN2628

MR SECK: The context in which that arose was that there were massage therapists who had come from the Philippines. They didn't have qualifications which allowed them to practice as a health professional in Australia. They had practical experience, and also some Filipino qualifications, and Justice Katzman at first instance accepted that that is a subjective assessment which is made by the employer, that is, deemed acceptable by the employer.

PN2629

The matter has gone on appeal to the Full Federal Court, and one of the issues which has come up before the Full Federal Court for decision is where or not the work qualification is sufficiently broad to encompass years of experience, as opposed to a qualification from an institution. I only raise that by way of example, to say that I think the language which used needs to be given careful attention, especially whether or not it's equivalent experience which is deemed acceptable to the employer, or whether or not there needs to be a more basis for defining that criteria.

PN2630

Having years of experience as an objective criteria obviously avoids that issue. But if one is to use the word 'equivalent experience', then it might be useful to provide more guidance on that point. I expect that the Full Federal Court will hand down its decision probably in the next few months. The matter was heard in August of this year. Can I then deal with the question of profitability just very quickly. We accept all the businesses which – all the dentists who gave evidence in these proceedings operate profitable businesses. Profit just varies between those businesses, and the reasons why profit might be maintained differ.

PN2631

Now, that doesn't say anything about whether or not they can, quote unquote, absorb or afford those pay increases. Clearly, if one applied that arithmetic model and said pay increases were X amount of money, and look at the profit, the businesses can afford it, but it's really in the context of operating a commercial enterprise, and the reasons why profit might be earned and retained, and its operation as an ongoing business, which is the key issue. But we certainly don't argue with the fact that, if one simply looked at the profit levels, at least from the majority of the businesses, they can be absorbed. I would make one more point on this issue, that is, when one looks at the IBIS report, page 34, the fourth bullet point in the first column, the IBIS report says:

PN2632

*Profit margins have fluctuated in recent years, although they've trended downwards overall in the face of a higher cost base.*

PN2633

Some of the witnesses indicated their profits are going up. I think Dr Brophy said, over a number of years, her profit had come down, though she'd made efforts to bring it up. Some people they'd cut costs, to try to maintain profit. I think Dr Figliomeni said he – over the first six years of practice, because he was setting up his business, he didn't earn any profit. So that demonstrates there's going to be a variance across different businesses, for a variety of reasons, and looking at it at an aggregate level may not necessarily be a reliable or safe way of saying, 'This is going to be okay for the dental industry overall', because, as my learned friend Ms Campbell indicated, one of the considerations under the modern award objective is to take into account the impact on business, and we would read that as individual businesses, at a micro level, and not necessarily business as a whole, although that obviously is capable of being embraced by that expression.

PN2634

Can I then just deal with the issue of DAPA's position, that they say the evidence doesn't necessarily establish that there is a direct proportionate relationship between work value and experience. It's obviously not proportionate, but I think DAPA's evidence actually suggests quite the contrary, in circumstances where DAPA's initial proposal was to link quite directly experience and work value. And indeed, Ms Hayes' first statement has a whole section which indicates that there's a direct relationship, in her mind, between experience and work value.

PN2635

Now, we accept it's not a perfect relationship, and it's going to vary, for reasons that have been discussed and articulated in submissions. But we do think it's

probably slightly – the DAPA's position has shifted significantly from what they put initially and the evidence which they relied upon to support it, to the position it's now taking in these proceedings. Can I then talk about the start date for any variation. Given the time of year – we're in late October now; I don't know how realistic a 1 January 2026 operative date would be.

PN2636

But given the time of year, firstly, 1 January, any time period between a decision of this Commission and the communication of the outcome of any determination, and the ability for a large number of small businesses to know about or have communicated to them the changes, and then implement those changes during a very busy time of year, especially in circumstances where people are often going away on holiday, is obviously going to be logistically difficult to ensure everyone implements. So I'm not when the expert panel proposes to make a decision and a determination on the issue, but we would ask that the expert panel bear in mind those considerations in deciding when the operative date should be for any determination.

PN2637

And we would say 1 January is probably an inconvenient date for a lot of businesses, and may be impracticable for a lot of them to ensure compliance by that date. Ms Schreier-Joffe also referred to attrition of dental assistants if they're not paid properly. I wasn't sure whether or not that was related to work value or some other issue. Obviously, on the question of work value, attraction and retention is not a consideration which falls within section 134(2A).

PN2638

VICE PRESIDENT ASBURY: Was it raised relevant to phasing, Mr Seck?

PN2639

MR SECK: That's what I thought might be the alternative, in terms of phasing.

PN2640

VICE PRESIDENT ASBURY: My recollection is, it was.

PN2641

MR SECK: And if it's raised in relation to phasing, then, in my respectful submission, if there's going to be a desire to retain dental assistants, then, ordinarily, one would expect market mechanisms to take care of that. So if a dental business sees it as essential to retain those dental assistants, and it cannot operate without them – and there's certainly no contest from the Australian Dental Association that dental assistants have an essential and valuable role for every dental practice – then one would expect that the market would take care of that.

PN2642

It's obviously not the role of the Commission to seek to interpose itself, to seek to ensure that dental practices pay rates in order to attract and retain dental assistants. So in my respectful submission, that would be not only a relevant consideration, but a counterintuitive one, which wouldn't necessarily be one that justifies implementation on an earlier date. Unless the expert panel has any further questions, those are my submissions in reply.

PN2643

JUSTICE HATCHER: Anything from you, Ms Campbell?

PN2644

MS CAMPBELL: Just one issue, and that's on the matter of payroll tax. It was presented just then to the expert panel as though it's an issue relating to a cap for those that employ. It also applies to those that remunerate. So it will apply to those operators who have employees, but who also pay out based on either commissions or the service arrangements that we've been talking about. The threshold is that 1 million, I believe, in Victoria, and 1.2 million in New South Wales. Many will be below that, but some practices will be above that, given the disparate nature of the industry.

PN2645

JUSTICE HATCHER: I don't recall that that would result in any sole practitioner enterprise, about which witnesses gave evidence, being in excess of that threshold (indistinct).

PN2646

MS CAMPBELL: It would be unlikely.

PN2647

JUSTICE HATCHER: And even then, you only pay it above the margin. You don't pay it - - -

PN2648

MS CAMPBELL: I think in New South Wales, it's 5.45 per cent above.

PN2649

JUSTICE HATCHER: For the amount above the threshold. Yes. All right. So Ms Schreier-Joffe, you were going to send us just a document which sets out what the position currently is.

PN2650

MS SCHREIER-JOFFE: Yes. What our proposal is, yes.

PN2651

JUSTICE HATCHER: So was anybody else going to send us - - -

PN2652

MR SECK: Your Honour's associate might have a copy of our draft order for confidentiality, which has been agreed on this side of the table. So hopefully, subject to any changes, that can be made shortly.

PN2653

JUSTICE HATCHER: Perhaps you can discuss that before you leave the courtroom with the other parties, and then we'll be able to issue it this afternoon.

PN2654

MR SECK: We'll do that, your Honour. The second thing I'd promised, your Honour – and I don't know where it is, but I'll ensure (indistinct) send it, is that there's to be – sorry, two points. There was a document I said I'd prepare, which

in effect cross-referenced the propositions in my submissions to the evidence. If the expert panel would still find utility in that, I can provide that probably later today.

PN2655

JUSTICE HATCHER: Well, it's a matter for you. We don't require it, but if you want to provide it, you can.

PN2656

MR SECK: And your Honour Justice Hatcher asked me about the citation for the Fair Work Ombudsman v Foot & Thai decision.

PN2657

JUSTICE HATCHER: We've found it. Thank you.

PN2658

MS CAMPBELL: Good. Hopefully I found the right one.

PN2659

MR SECK: (No 4) 2021 FCA 1242. May it please your Honour.

PN2660

JUSTICE HATCHER: All right. We thank the parties for their submissions, and subject to receipt of the further note from DAPA – Mr Lettau.

PN2661

MR LETTAU: Sorry, your Honour. I had some questions on notice that I was going to address the Bench on very quickly.

PN2662

JUSTICE HATCHER: Sorry. All right. Yes.

PN2663

MR LETTAU: Sorry to drag it on. So just quickly, on the question of, 'or equivalent experience' – and we were asked (indistinct) was, a discursive and/or a fixed year. And my instructions are that we would support something similar to what's in the provisional view for the pathology collectors, where it's Certificate III or equivalent experience, and more than one year's experience, I think. We would say the same; in terms of the discursive side of things, my instructions are that the discursive side should aim at describing the sorts of competencies (indistinct) around the 18 to two-year mark. I know it's quite an open-ended proposition, but that's my instructions.

#### **CONFIDENTIAL TRANSCRIPT PN 2664**

PN2665

JUSTICE HATCHER: Yes. So maybe different definitions of what is a worker, for payroll tax purposes, as between different states and territories.

PN2666

MR LETTAU: Yes. I can't say anything further on that, but - - -

PN2667

JUSTICE HATCHER: All right. Definitely nothing – any further – no? All right. I thank the parties for their submissions. We reserve our decision. We'll now adjourn.

**ADJOURNED TO A DATE TO BE FIXED**

**[2.19 PM]**