

AM2016/31

4 Yearly Review of Modern Awards

Health Professionals and Support Services Award 2010

SUBMISSIONS

OPTOMETRY AUSTRALIA

Dated 28 February 2020

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**4 YEARLY REVIEW OF MODERN AWARDS
HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010
AM2016/31
SUBMISSIONS IN ACCORDANCE WITH THE DIRECTIONS ISSUED 19 DECEMBER 2019**

1. This submission is filed on behalf of Optometry Australia (**OA**) in accordance with the directions issued by Vice President Catanzariti on 19 December 2019 (**Directions**).
2. OA is the peak professional body representing more than 80% of registered Optometrists (both employers and employees) in Australia¹ and as such identifies itself as an interested party.

Background

3. The decision of the Full Bench on 19 December 2019 (**Decision**) confirming its provisional view that Schedule C—List of Common Health Professionals in the *Health Professionals and Support Services Award 2010 (HPSS Award)* is indicative and not exhaustive² creates uncertainty for the members of OA who have traditionally been award-free³.
4. Prior to the Decision, it was widely understood by the industry that Optometrists were (and had always been) award-free. This understanding was first challenged early last year when OA discovered the following statement on the Fair Work Ombudsman’s (**FWO**) website (**FWO Statement**):

*The Health Professionals and Support Services Award covers optometry practices. Optometry practices provide optical services, such as eye testing, and dispense prescription eyewear. The award covers an optometrist, optical dispenser (or optician) and administrative/sales staff working in the practice. An optometrist falls under the Health Professional employee’s stream, while the Support Services stream covers the remaining employees. The relevant classification would depend on the skills, duties and qualifications of each employee.*⁴

5. The FWO Statement was controversial to OA as it reasonably understood that the HPSS Award was not intended to cover employees such as Optometrists who, because of the nature or

¹ Statement of Lyn Brodie on 28 February 2020 [3-6].

² [Decision \[2019\] FWCFB 8538](#)

³ Statement of Lyn Brodie on 28 February 2020 [16].

⁴ Statement of Lyn Brodie on 28 February 2020 [18].

seniority of their role, had traditionally been award-free.⁵ This understanding was reinforced by the fact that Optometrists were not covered under any pre-modern award and were omitted by the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in making the HPSS Award despite the Health Services Union (**HSU**) proposing coverage for Optometrists.⁶

6. On 26 March 2019, Lyn Brodie Chief Executive Officer of OA, Luke Arundel Chief Clinical Officer of OA and Emma Dalley, Principal Lawyer of Industry Legal Group Pty Ltd (**ILG**) met with Cletus Brown Director Knowledge, Operations Group of the FWO to discuss the FWO's interpretation of award coverage for Optometrists. During this meeting, the representatives for OA and ILG raised that Optometrists were not expressly included in Schedule C of the HPSS Award. However, the FWO maintained its view that Optometrists were covered by the HPSS Award by virtue of being health professionals.⁷

7. Following this meeting, OA discovered that the FWO had added the following statement on their website:

*The extent of the coverage of the Health Professionals and Support Services Award is currently the subject of proceedings in the Fair Work Commission (4 Yearly Review Decision [2018] FWCFB 7350). **The outcome of these proceedings may impact on the FWO's advice on coverage for professionals such as optometrists.** The FWO will be reviewing its advice at the conclusion of these proceedings. In the interim, you may wish to seek your own legal advice on this issue.*⁸

8. The FWO Statement caused OA members to be confused and concerned about the consequences for themselves and the profession.⁹

9. OA acknowledges that the FWO's interpretation is not binding however the above background is provided for context to establish that if Optometrists aren't expressly excluded from the HPSS Award, it will likely be interpreted that Optometrists are covered by the HPSS Award which was not the aim of the award modernisation process.

⁵ Statement of Lyn Brodie on 28 February 2020 [19].

⁶ [HSU Supplementary Submissions 14 January 2009](#).

⁷ Statement of Lyn Brodie on 28 February 2020 [20].

⁸ Statement of Lyn Brodie on 28 February 2020 [21].

⁹ Statement of Lyn Brodie on 28 February 2020 [22].

Award modernisation and the Fair Work Act

10. The award modernisation request made by the Minister for Employment and Workplace Relations pursuant to section 576C(1) of the *Workplace Relations Act 1996* set out:

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

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

(b) result in high-income employees being covered by modern awards;

(c) disadvantage employees;

(d) increase costs for employers;

(e) result in the modification of enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards operate. However section 576V of the Act provides that a modern award is to be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.¹⁰

11. Section 143(7) of the *Fair Work Act 2009* (Cth) (**Act**) states:

(7) A modern award must not be expressed to cover classes of employees:

(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Outline of submissions

12. OA submits that Optometrists should not be covered by the HPSS Award as it would be inconsistent with section 143(7) of the Act.

¹⁰ [Request under Section 576C\(1\) – Award Modernisation Consolidated Version](#)

The HPSS Award must not be expressed to cover Optometrists who, because of the nature and seniority of their role, have traditionally not been covered by awards

13. OA submits that Optometrists in the private sector have traditionally been award-free due to the nature and seniority of their role.
14. The pre-modern awards that applied to employees within the optometry industry related to less senior employees who performed work of a different nature. For example:
 - a. “optical instrument repairer”, ‘qualified optical mechanic”, “optical worker” and “process worker”;¹¹
 - b. “optical shop associate”;¹²
 - c. “optical mechanic” and “optical employee”;¹³
 - d. “optical worker” and “clerical employee”;¹⁴ and
 - e. “mechanical optician” and “optical employee”.¹⁵
15. There is no relevant coverage for Optometrists in pre-modern awards because of the nature and seniority of their role.
16. In their submissions to the AIRC in relation to the award modernisation process, the NSW Government acknowledged that Optometrists are an occupation within NSW that has traditionally been considered award-free.¹⁶ Optometrists were listed alongside other occupations such as Managers and Legal Professionals who have traditionally been considered award-free because of the nature and seniority of their role.
17. OA accepts that section 143(7) of the Act “*does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those*

¹¹ Optical Employees Award (SA) [AN150100](#)

¹² Shop Distributive and Allied Employees’ Association/Paris Miki Pty Ltd Optical Shop Associates Award 2001 [AT811334](#)

¹³ Optical Mechanics’ Award, 1971 (WA) [AN160237](#)

¹⁴ Optical Industries Award (Tas) [AN170074](#)

¹⁵ Optical Manufacturing Industry Employees’ Award - State 2003 (Qld) [AN140198](#)

¹⁶ [NSW Government Submissions 16 October 2009](#)

industries or occupations is of a similar nature to work that has historically been regulated by awards". However, Optometry is not a new industry or occupation and as such the express exclusion of Optometry from the HPSS Award does not attempt to preclude the extension of modern award coverage as intended.

18. Optometrists are regulated by the Australian Health Practitioner Regulation Agency and generally must be registered with the Optometry Board of Australia¹⁷. As such there is certainty as to the role title and scope of Optometrists.

The HPSS Award must not be expressed to cover Optometrists who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

19. The work performed by Optometrists is not of a similar nature to the work that has traditionally been regulated by the pre-modern awards.¹⁸
20. OA further submits that Optometrists were omitted from the HPSS Award because they were not of a similar nature to the occupations listed in Schedule C of the HPSS Award which may have traditionally been regulated by pre-modern awards.

Other matters

21. The HSU's Rules do not cover Optometrists.¹⁹
22. If Optometrists are not expressly excluded from the HPSS Award, coverage under the HPSS Award may have the following consequences which were not intended:
 - a. many high-income employees will become covered by the HPSS Award;
 - b. employee members (especially Graduate Optometrists) may be significantly disadvantaged:
 - i. instead of acting as a safety net, the minimum rate of pay under the HPSS Award if adopted may significantly decrease the salaries currently being offered

¹⁷ Statement of Lyn Brodie on 28 February 2020 [8].

¹⁸ Statement of Lyn Brodie on 28 February 2020 [7-15].

¹⁹ Health Services Union Rules incorporating alterations of 23 May 2018 ([R2018/48](#))

and paid which is particularly concerning for a profession where the highest pay rates for employee members are already not considered commensurate with the complexity and responsibility borne by practitioners;²⁰

ii. employee members who have traditionally possessed significant bargaining power in relation to their terms of engagement may have such terms varied or changed to their detriment in line with consultation provisions in the HPSS Award; and

c. increased compliance costs for employer members.

23. According to an OA member survey conducted in 2018 with 406 Optometrists responding:

a. 87% of the respondents worked in private practice with the majority being self-employed or owning their own business. 10% worked as locums/contractors. The remaining respondents included members who worked for non-optometry owned practices, not for profit organisations, research institutes and universities.

b. the majority of respondents reported their equivalent full-time earnings per annum (excluding superannuation) was \$130,000 or over. The midpoint salary was \$108,351 per annum. The estimated average salary for the employee respondents was \$105,988 and for the employer respondents was \$110,294.

c. respondents worked on average 35.9 hours per week in optometry-related work. The average number of hours worked per week reported by employee respondents was 32.8 hours, while employer respondents was 38.4 hours. The vast majority worked between 36-40 hours each week. Of the respondents who worked fewer than 35 hours per week, the vast majority commented that the reason for this was a personal decision.²¹

24. According to data published by the Department of Health in the Optometry Factsheet 2016:

a. the average weekly hours for Optometrists were 35.1;

²⁰ Statement of Lyn Brodie on 28 February 2020 [24].

²¹ Statement of Lyn Brodie on 28 February 2020 [13] and Annexure 3.

- b. 47.3% of Optometrists worked in a group private practice; and
 - c. 30.8% of Optometrists worked in sole private practice.²²
25. According to an OA Graduate member survey conducted in 2019, over 55% of Graduates reported their equivalent full-time earnings per annum (excluding superannuation) was \$80,000 or over. Over 25% reported earning more than \$90,000.²³ This is significantly more than the current minimum rates under the HPSS Award for Graduates. For example, a Graduate with a Masters degree entry would receive approximately just over \$50,000 per annum under the HPSS Award.
26. The minimum rates of pay under the HPSS Award are significantly less than members are currently receiving. As such, the HPSS Award is not required to provide a fair and relevant minimum safety net of terms and conditions relating to wages.



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On behalf of Optometry Australia

Dated 28 February 2020

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²² Statement of Lyn Brodie on 28 February 2020 [14] and Annexure 4.

²³ Statement of Lyn Brodie on 28 February 2020 [15] and Annexure 5.