

**From:** David Wilkinson [<mailto:DWilkinson@myadvantage.com.au>]

**Sent:** Wednesday, 14 March 2018 4:22 PM

**To:** Chambers - Catanzariti VP; Leigh Svendsen; Rachel Liebhaber; Andrew McCarthy; Michelle Anthony; [geoffl@acs.asn.au](mailto:geoffl@acs.asn.au); [kyle.scott@ablawyers.com.au](mailto:kyle.scott@ablawyers.com.au); [nigel.ward@ablawyers.com.au](mailto:nigel.ward@ablawyers.com.au); [David.Reid@acsa.asn.au](mailto:David.Reid@acsa.asn.au); [annamaria.wade@acsa.asn.au](mailto:annamaria.wade@acsa.asn.au); [stephen.smith@aigroup.com.au](mailto:stephen.smith@aigroup.com.au); Ruchi Bhatt; Joanna Bandara; [markh@lasa.asn.au](mailto:markh@lasa.asn.au); [jenna.field@nswact.lasa.asn.au](mailto:jenna.field@nswact.lasa.asn.au); Katrina Murphy; LucyF; [lhepworth@ramsayhealth.com.au](mailto:lhepworth@ramsayhealth.com.au); Matthew Swain; Jim Pryce; Timothy McCarthy

**Subject:** AM2016/31 Australian Dental Assoc. (ADA Inc) submission in Reply to HSU's submission of 12 February 2018

Attn – Alyce Lia,  
Associate to VP Catanzariti

Hi Alyce,

Please find attached the Australian Dental Association's submission opposing a variation to the Health Professionals and Support Services Award sought by the Health Services Union on 12 February 2018 and comments following the Hearing before the Full Bench on 11 and 12 December 2017.

Thank you for your attention in this matter, all the appropriate parties have been Cc'ed into this email.

Regards,

*David*

**David Wilkinson**

General Manager - Industrial Relations ADA HR Advisory Service  
Australian Dental Association

T | 1300 232 462 M | 0439 191 764 F | 02 8448 3299 E | [hrhotline@ada.org.au](mailto:hrhotline@ada.org.au)



## **4 Yearly Review of Modern Awards before the Fair Work Commission**

**Matter No. AM2016/31 formally AM2014/204**

**Response submissions to the applications to vary the *Health Professionals and Support Services Award (HPSS Award) 2010 as Directed by Vice President Catanzariti in Sydney on 21 December 2017***

Please find attached Submissions on behalf of the Australian Dental Association (ADA) prepared by Wentworth Advantage Pty Ltd in response to the applications to vary the Health Professionals and Support Services Award 2010 (HPSS Award) lodged on -

**12 March 2018**

**Lodged by:** Australian Dental Association Inc.

**Address for Service:**  
c/o Wentworth Advantage Pty Ltd  
Suite 7, Level 3, North Tower, Chatswood Central  
1-5 Railway Street CHATSWOOD NSW 2067

**Telephone:** 0439 191 764

**Fax:** (02) 8448 3299

**Email:** DWilkinson@myadvantage.com.au

## Fair Work Commission

### AM2016/31 formally AM2014/204

#### 4 Yearly Review of modern awards – application to vary the *Health Professionals and Support Services Award 2010*

#### Reply Submissions on behalf of the Australian Dental Association by Wentworth Advantage Pty Ltd

### Introduction

1. These submissions are made by Wentworth Advantage Pty Limited on behalf of the Australian Dental Association Incorporated (**ADA Inc** or **the ADA**) in relation to variations to the *Health Professional and Support Services Award 2010 (HPSS Award)* by the Health Services Union (**HSU**) in accordance with directions issued by Vice President Catanzariti on 21 December 2017.
2. The proposed variations are sought by the HSU in the context of the 4 Yearly Review of modern awards (**Review**) by the Fair Work Commission (**Commission**) pursuant to section 156 of the *Fair Work Act 2009 (FW Act)*. The variations sought by the HSU are set out in the submissions of the HSU filed with the Commission on 12 February 2018 (**HSU's February 2018 Submissions**).
3. The HPSS Award the subject of these submissions was made by the Australian Industrial Relations Commission (**AIRC**) as the result of a request (**Request**) made by the then Minister, Julia Gillard, under section 576C(1) of the *Workplace Relations Act 1996 (Cth) (WR Act)*.
4. Again as stated in the ADA Inc's 9 June 2017 submission (**ADA's June 2017 Submissions**) it is noted that the Health Services Union (**HSU**) has sought variations to the HPSS Award as part of the Review in relation to:
  - (a) the coverage of the HPSS Award and, in particular, clarity as to whether the list of health professionals contained in Schedule C to the HPSS Award is indicative or exhaustive;
  - (b) the span of hours for dayworkers under the HPSS Award;
  - (c) weekend penalties for shiftworkers under the HPSS Award;
  - (d) shift work arrangements under the HPSS Award; and
  - (e) other agreed matters or matters in relation to which ADA Inc does not wish to be necessarily heard at this point in time, yet the ADA reserves the right to do so if it were to choose to in the future.
5. In considering all of these points ADA Inc relies on its comprehensive previous submissions to the HPSS Award Review with particular reference to the 9 June 2017 submission.

6. It is noted that, in connection with the Review, a plain-English version of the HPSS Award (**Plain HPSS Award**) which has become the latest Exposure Draft (**ED**) issued by the Fair Work Commission (FWC) is dated 10 November 2017 to analysis the HSU's proposed variations are made by reference to the ED . In these submissions, where appropriate, ADA Inc makes reference to both the HPSS Award and the latest ED.
7. Again ADA Inc opposes the variations and claims sought by the HSU set out below in the format of the HSU's submissions dated 12 February 2018 and the ADA provides its reasons for doing so in it's submissions. These submissions are structured as follows based upon those referred to by the HSU in the following terms:
  - (a) The span of hours issues (clause 8.2, Exposure Draft [**ED**]).
  - (b) The list of common health professionals (Schedule B, ED).
  - (c) The payment of weekend penalty rates to shift workers (clause 18, ED).
  - (d) The substitution of public holidays by agreement (clause 23.3, ED).
  - (e) Overtime rates for casuals (clause 19.2(d) ED).

### **Statutory framework and the Commission's approach to the Review**

8. Again before addressing the variations to the HPSS Award sought by the HSU as part of the Review, it is appropriate to summarise the statutory framework in which the Review is conducted and to address the principles to be applied by the Commission in the conduct of the Review.
9. The Commission is required to ensure that modern awards, together with the National Employment Standards (**NES**), are the mechanism through which a fair and relevant minimum safety net of terms and conditions of employment is provided under the FW Act. This is known as the modern awards objective which is set out in section 134(1) of the FW Act. The modern awards objective sets out specific matters that the Commission is required to consider in ensuring that it is achieved. Section 134 of the FW Act relevantly provides:

**134. The modern awards objective**

*What is the modern awards objective?*

- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
  - (a) *relative living standards and the needs of the low paid; and*
  - (b) *the need to encourage collective bargaining; and*

- (c) *the need to promote social inclusion through increased workforce participation; and*
- (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (da) *the need to provide additional remuneration for:*
  - (i) *employees working overtime; or*
  - (ii) *employees working unsocial, irregular or unpredictable hours; or*
  - (iii) *employees working on weekends or public holidays; or*
  - (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
- (h) *the likely impact on any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

*This is the **modern awards objective**.*

*When does the modern awards objective apply?*

- (2) *The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:*
  - (a) *the FWC's functions or powers under this Part; and*
  - (b) *the FWC's functions or powers under Part 6-2, so far as they relate to modern award minimum wages.*

**Note:** *The FWC must also take into account the objects of this Act, and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).*

10. The FW Act limits the terms that a modern award may include as follows:

**138. Achieving the modern awards objective**

*A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.*

11. To assist in ensuring the modern awards objective is achieved, the Commission is required to conduct the Review. The Commission's task in conducting the Review is set out in section 156(2) of the FW Act, which relevantly provides:

- (2) *In a 4 yearly review of modern awards, the FWC:*
- (a) must review all modern awards; and
  - (b) may make:
    - (i) one or more determinations varying modern awards; and
    - (ii) one or more modern awards; and
    - (iii) one or more determinations revoking modern awards.
  - (c) must not review, or make a determination to vary, a default fund term of a modern award.

12. At the commencement of the Review, a Full Bench of the Commission dealt with various preliminary jurisdictional issues in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Jurisdictional Issues Decision**).

13. In the Preliminary Jurisdictional Issues Decision, the Full Bench confirmed that in conducting the Review, the Commission will have regard to the historical context of each modern award and previous decisions relevant to any contested issue. The Full Bench also confirmed that previous decisions of a Full Bench of the Commission or the AIRC should, absent reasons not to, generally be followed.

14. In the Preliminary Jurisdictional Issues Decision, the Full Bench emphasised the need for a party to mount a merit based argument in support of a claim to vary a modern award, stating:

*...where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation... ( at Para [23] of [2014] FWCFB 1788)*

15. In discussing how the Commission would address the modern awards objective under section 134 of the FW Act as part of the review, in the Preliminary Jurisdictional Issues Decision, the Full Bench stated:

**[31]** *The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' taking into account the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in Nestle Australia Ltd v Federal Commissioner of Taxation:*

*"To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant."*

*[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.*

*[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*

*[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.*

(footnotes omitted).

16. In addressing whether variations to a modern award were 'necessary' under section 157(1) of the FW Act as part of the Review, in the Preliminary Jurisdictional Issues Decision, the Full Bench stated:

*[39] We are satisfied that s.138 is relevant to the Review. We also accept that the observations of Tracey J in SDA v NRA (No.2), as to the distinction between that which is "necessary" and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.*

17. In summary, in the Preliminary Jurisdictional Issues Decision, the Full Bench confirmed that in conducting the Review:
- (a) the history of the making of a modern award was relevant;
  - (b) previous decisions of a Full Bench of the Commission or the AIRC should generally be followed unless there are sound reasons not to;
  - (c) significant changes to modern awards should be supported by reference to the statutory framework and probative evidence;
  - (d) all of the factors relevant to the modern awards objective must be considered and no one factor takes primacy; and
  - (e) variations to modern awards must be 'necessary' to meet the modern awards objective, not just desirable.

## HSU's claim to vary the span of ordinary hours under the HPSS Award

18. Again the HSU has sought that the Commission vary the span of ordinary hours under the HPSS Award for dayworkers so as to remove specific spans of hours that have been identified for particular types of professional health practices, and to impose a blanket span of hours for the entire professional health industry, based very closely on the provisions of the *Nurses Award 2010*. The effect of the HSU's proposed variation would be that dayworkers could only work their ordinary hours between 7:00 am and 7:00 pm, Monday to Friday and/or 7:00 am and 12pm Saturdays. This is shown in the HSU's newly offered Draft Determination on page 17 of their 12 February 2018 submission which comes up as follows –

**“[2] Delete Clause 8.2(b)-(e) and replace as follows:**

### **8.2 Span of hours – private practice**

*(a) In addition to the above, the ordinary hours of work for a worker in private practice are between:*

- (i) 7:00am – 7:00pm, Monday to Friday*
- (ii) (ii) 7:00am – 12:00pm, Saturday*

19. In support of the variations to the span of ordinary hours for dayworkers under the HPSS Award, the HSU submits that the Span of Hours provisions under the HPSS Award at Clause 11 on page 4 of it's 12 February 2018 submissions – where the HSU states , -

*“ 11. It is important at the outset of this section to note that the span of hours provisions in the HPSS Award do not operate to either:*

- a. limit the hours during which a business covered by the award is open*
- b. limit the hours during which an employee covered by the award may work in a business; or*
- c. limits the hours during which the ordinary hours of an employee may be rostered by the employer. .... “*

20. Precisely as with the current HPSS Award and the latest ED it is argued by the ADA it doesn't necessarily limit the ability of private dental practices to operate and engage their employees but it is all relative as in the pre-modern AP779110CRV – the Dental (Private Sector Victoria) Award 1998 which is arguably generally seen as the basis of the Federal “Common rule” precursor award, permitted ordinary hours to be worked as follows:



- i) 7:00 am to 9:30 pm Monday to Friday; and
- ii) 8:30 am to 5:00 pm Saturday;

Which of course is in excess to the current HPSS Award span of hours for private dental practices. So as stated in the ADA submission of 9 June 2017 there has already been a compromise made by private dental practice employers to work with the current award over the past eight years. However, of course this will change significantly if the HSU's proposed new "Span of hours" referred to in paragraph 18 above were to be introduced.

21. This point was further alluded to in the verbal evidence given by the ADA's witness Dr Neil David Hewson in the Hearing before the Full Bench on Tuesday 12 December 2017 in Melbourne. The Transcript at PN 1920 – PN 1928 contains the following exchanges between Mr Gerard Boyce – Counsel for the ADA and Dr Hewson – Witness for the ADA.

***“RE-EXAMINATION BY MR BOYCE***

***[11.48 AM]***

*PN1920*

*MR BOYCE: Dr Hewson, you were asked about the award that applied previously. Do you know what award that was?---DR HEWSON : It was a Victorian award and, as my statement says, I was involved in the - you know, when the new awards came in and the ADA actually put up a new award just for dental practices and it was largely based on that Victorian one. I just can't recall what the name was.*

*PN1921*

*Would it be the Dental (Private Sector) Victoria Award 1998?---DR HEWSON That sounds familiar, yes.*

*PN1922*

*Do you recall that the span of hours in that award was actually more expansive or more generous than the span of hours in the modern award?---DR HEWSON : - I don't recall that.*

*PN1923*

*Right. You were also asked about Saturdays and you responded about cutting down on shifts or days worked in respect of Saturdays. What was the reason for that?--- DR HEWSON : Just whether it was worthwhile economically to do it.*

*PN1924*

*On the basis?--- DR HEWSON : Of the extra holiday.*

*PN1925*

*That was when the modern award was provided for extra weeks' shift work or annual leave?---Yes, I forget how many Saturdays, if it was an extra 10 Saturday mornings they were entitled to there.*

*PN1926*

*That provision was overturned by - - -?--- DR HEWSON : That's my - yes.*

*PN1927*

*- - - a Full Bench of the Commission?---Yes.*

*PN1928*

*So it is the case that in direct response to increased award entitlements, your direct response was to reconsider opening times and shifts for employees?*

PN1929

*MS DOUST: I object, that's leading.*

PN1930

*THE WITNESS – DR HEWSON : Yes, well, we did.*

\*\*\* NEIL DAVID HEWSON

RXN MR BOYCE

PN1931

*MR BOYCE: It has been answered.*

### **Further analysis of the HSU's submission on the Span of Hours issue**

22. In the HSU's submission of 12 February 2017 on page 5 at paragraph 15 the HSU gives a summary of the different spans of hours in the current HPSS Award ED and then goes on to cite particular case law to support it's argument from the HSU's paragraphs 18- 20. This is not correct in the ADA's view as the cited cases are not appropriate here. In the ADA's thinking these points made by the HSU actually support the AIRC's Full Bench decision in making the original HPSS Award back in 2009. There were certainly pertinent reasons why the Full Bench back then made decisions to "carve-out" specific spans of hours for the different types of employees in the various types of private health practices that are covered by the Award. These "carve-outs" were made by the AIRC Full Bench even though according to the HSU it was "*.... the same profession or classification working at the same time of day....*" – paragraph 20 of the HSU submission thus inferred an inconsistency. The ADA counters by saying that this is not correct as the "shift penalties" in the Award attached to the various spans of hours could be argued as being applicable to the different private health disciplines or industries that operate as a sub-sector of the health professions.
23. Thus a larger "comparative exercise" of the various shift penalties is now being undertaken in this 4 Yr Award Review process and the HSU has been found wanting as the HSU has not provided "*.....probative evidence properly directed to demonstrating the facts supporting the proposed variation.....*" according to Para [23] of [2014] FWCFB 1788 as has been previously stated at Clause 14 of this submission.
24. The above point of not providing " probative evidence" especially in the context of the span of hours issue is further exacerbated in the exchange between Mr Boyce on behalf of the ADA and Mr Alexander John Leszczynski – Senior Industrial Officer – Victorian No.3 Branch of the HSU during his cross-examination by Mr Boyce on Monday 11 December 2017 in the Melbourne HPSS Award Review Hearing. The Transcript is as follows-

PN1292

*MR BOYCE : In terms of the coverage of dentists specifically, what do you say dentists would fall into in terms of the classification structure in the award?---MR LESZCZYNSKI : Sorry, are you asking me do I think dentists would fall within the coverage of the modern*

*award?*

*PN1293*

*Sorry, yes, do you?---MR LESZCZNSKI : I don't see there's anything in the modern award or the Act that would exclude them from coverage.*

*PN1294*

*Have you ever raised an issue or had a dispute about the coverage of a dentist as an employee covered by the award?---MR LESZCZYNSKI : No, our branch of the union doesn't cover dentists.*

*PN1295*

*Your branch of the union, as far as your evidence is concerned, you've got no evidence in relation to dentists whatsoever?---MR LESZCZYNSKI : No.*

25. Considering the above exchange coupled with the fact that there was no other witnesses called by the HSU at the Hearings and that only the one witness statement being that of Mr Alex Leszczynski was ever submitted in this matter by the HSU back on 17 March 2017 - then it could be deduced that the HSU has no or limited experience in the private dental practice industry and thus could not shed any light on the span of hours issue pertaining to the private dental sector. Again no “probative evidence” has been forthcoming from the HSU.
26. The ADA contents that the HSU is merely attempting to rely upon the ADA’s three witness statements of particular individuals ( Ms Eithne Irving, Ms Emma McKenny and Dr Neil Hewson) submitted by the ADA on 9 June 2017 and/or via the cross-examination of these witnesses at the Hearing.
27. Again strong compelling evidence must be put in order to make significant changes to an Award during this 4 Yr Award Review process and that was alluded to by Vice President Catanzariti with his reference to the “Horticulture Award 2010” Full Bench Decision [2017] FWCFB 6037 at PN 1097 on the Monday 11 December 2017 HPSS Award Transcript.
28. The Horticulture Award has now been varied because strong consistent “probative evidence” has been provided by the parties in their seeking to vary that award – this is very different to what the HSU has done in these proceedings.
29. The private dental practice sector has specific factors that do not really lend it to be available for enterprise bargaining. The sector is generally made up of thousands of small unrelated private businesses and the proposition being put by the HSU that a single span of hours in the HPSS Award is preferable because it will then lead itself to encourage enterprise bargaining is a flawed concept. Private dental practices have to be flexible and adaptable in offering a large span of ordinary hours (for out of work hours care) to the community as they need to be able to juggle emergency requests in mini-operating theatre workplaces without having the pool of employee resources that exist in 24/7 hospital environments.

30. The ADA mentions the point here that the HPSS Award should not be drafted in an attempt to allow for an increase in the possibility of enterprise bargaining in order to overcome potential award restrictions in private dental practices, which is what the HSU is trying to achieve it seems.
31. Further even when there may be a chance of enterprise bargaining in the larger dental practice groups the HSU has skewed the ADA's evidence and it's witnesses. This is seen in the following reproduction of the Hearing Transcript of Tuesday 12 December 2017 where Ms L Doust – Counsel for the HSU was cross examining Ms Emma Jane McKenny – Executive Manager of People and Culture for Pacific Smiles Group. This was then followed by a Re-Examination by Mr Boyce on behalf of the ADA. As set out –

32. **CROSS-EXAMINATION BY MS DOUST, CONTINUING** [11.35 AM]

*PN1854*

*MS DOUST: Ms McKenny, just returning to the questions I was asking you before the break, I was asking you about how Pacific Smiles manages its workforce under the award and about whether or not that award presented you with any inconvenience in the way in which Pacific Smiles does its business. Do you recall those questions?—MS MCKENNY -Yes.*

*PN1855*

*Can I just ask you this: has Pacific Smiles engaged its workforce in any enterprise bargaining?---MS MCKENNY -No. We have a small cohort of employees, so circa 60 employees, that are covered under the DEP Enterprise Agreement. The rest of our employee workforce, so circa 900 employees, would be covered by the HPSS Award, and then approximately 100 to 120 would be covered by an individual agreement.*

*PN1856*

*But so far as the 900-odd employees who are under the award, you have never tried to engage them in enterprise bargaining about their terms and conditions of employment; is that correct?—MS MCKENNY -To the best of my knowledge, that's correct.*

*PN1857*

*Is that the case because there's nothing in the award that presents Pacific Smiles with any problem that it needs to negotiate to get around?—MS MCKENNY -There is a number of obstacles in the award that we do find currently, but we've, at this stage, elected not to undertake in any EBA negotiations with our workforce.*

*PN1858*

*Thank you. Nothing further.*

*\*\*\* EMMA JANE MCKENNY*

*XXN MS DOUST*

*PN1859*

*VICE PRESIDENT CATANZARITI: Anything arising, Mr Boyce, any re-examination?*

*PN1860*

*MR BOYCE: Just one question.*

**RE-EXAMINATION BY MR BOYCE**

**[11.37 AM]**

*PN1861*

*MR BOYCE: Ms McKenny, has the union ever approached you to negotiate an enterprise agreement on behalf of members?—MS MCKENNY : --No, they haven't, not to my knowledge.*

*PN1862*

*Thank you, your Honour*

33. Again in this exchange the ADA submits there is no original “probative evidence” initially researched and gathered by the HSU merely an attempt to glean something from the ADA’s evidence which it seems in these circumstances had not been reflected upon correctly by the HSU in the first place. The HSU therefore merely reinterprets the points it has made in Clauses 22-24 of it’s latest submission again without “probative evidence”.
34. The ADA contends further that the HSU had not challenged any of the evidence provided by the ADA to do with the “Span of Hours” issues confronting private dental practices in any meaningful way - especially the need for practices to remain open past normal business hours and therefore in doing so enabling the practice to engage it’s employees at approximately the same hourly cost in order to offer valuable dental treatment to fulfil to the community’s demand for these services.
35. In the HSU submission of 12 February 2017 we are referred to the provisions of the “*General Retail Industry Award 2010*” at paragraphs 42-45. This Award in fact allows for the variation in ordinary hours of work dependent upon the type of retail business the employer operates with other general Award terms coming into play in the application of weekly rosters. This in a way is similar to the span of hours “carve-outs” in the current HPSS Award but without the need for the specialised hours to undertake emergency treatment that dental practices often require. The ADA believes that the way this point has been argued by the HSU in these paragraphs does not assist it’s case. The points to do with this and the discussions on the General Retail Industry and other pertinent Awards are referred to in Paragraphs PN 1033 and PN 1054 of the Transcript of Monday 11 December 2017.
36. The HSU in further highlighting the evidence at the Hearing on Tues 12 December 2017 given by Ms Eithne Irving – Deputy CEO of ADA Inc – where she made reference in the HSU’s submissions at Clause 25 and 26 that according to the ADA survey the profit of a small private dental practice could be around \$350,000 a year. That is not that much considering the study undertaken by the dentist proprietor and the risk of running a small specialist health practitioner business with the costing of up to \$1 million in setting up the premise and borrowing to finance the equipment to run a sterile mini operating theatre, to lead-line the room for X-rays etc and hook up the appropriate plumbing etc. Further the HSU has played down another important part of the evidence given by Ms Irving – that being that there has been around a 35% drop in practice profits since 2013 which is to be published shortly in the latest ADA survey data. See the Transcript PN 1693 – PN 1698.
37. In light of all of the above, the ADA submits limiting the span of ordinary hours under the HPSS Award for private dental practice dayworkers would have a negative impact on business, increasing employment costs and regulatory burden with the potential for a negative impact on productivity. The ADA submits that these factors weigh heavily

against the Commission exercising its modern award powers to vary the span of ordinary hours in the HPSS Award for dayworkers as doing so is not necessary to ensure the modern awards objective is achieved.

38. The ADA goes further to say that it does not oppose the submissions on the span of hours issues proposed by the Chiropractors Association of Australia (CAA) dated 9 March 2018 nor does it in any way oppose the submissions by the Medical Imaging Employment Relations Group (MIERG) amended and Resubmitted dated 21 February 2018 - where the proposal of having the Span of Hours at the new Clause 8.2 of the HPSS Award ED is stated as being -

*“ 8.2 The ordinary hours of work of a day worker will be between 7.00 a.m. and 9.00 p.m. Monday to Sunday inclusive. “*

This correctly would then be appropriate for all private health practices including medical, dental, pathology, all medical imaging, chiropractic and also physiotherapy practices, because that is the demand for these health services from the Australian community.

#### **Summary and conclusion on the Span of Hours issue**

39. ADA Inc submits that there is nothing confusing about the span of hours provisions for dayworkers under the HPSS Award which would warrant the Commission varying the HPSS Award so as to achieve the modern awards objective.
40. Further, on a proper analysis of the factors the Commission is required to consider in exercising its modern award powers to achieve the modern awards objective, ADA Inc submits that there is no basis for the Commission to change the span of ordinary hours under the HPSS Award for dayworkers, and in particular, that there is no basis for the Commission to change the span of hours for private dental practices under the HPSS Award, so as to ensure that the modern awards objective is achieved. ADA Inc submits that a proper analysis of the factors the Commission is required to consider in exercising its modern award powers to achieve the modern awards objective supports the maintenance of differing spans of ordinary hours for employees including using specific “carve-outs” where needed for those working in specialised industry sectors of the health care environment .
41. In summary, ADA Inc submits that there is nothing confusing about the span of ordinary hours provisions of the HPSS Award for dayworkers and it is not necessary to vary the span of ordinary hours for dayworkers under the HPSS Award in the manner sought by the HSU in order to achieve the modern awards objective.

#### **HSU’s claim that the list of common health professionals is indicative**

42. The HSU has claimed that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) is an indicative rather than an exhaustive list, having the potential to

significantly expand the coverage of the HPSS Award to health professionals who, in ADA Inc's submission, have never before been covered by modern awards or awards generally.

43. The ADA will not go back into the full detail it had lodged with the FWC on 9 June 2017 yet it will rely on these previous submissions and states categorically that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) is an "exhaustive" list and that the HSU's claim that the list of health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) is indicative should be rejected by the Commission. ADA Inc makes this submission on the basis of:

- (a) the proper construction of the HPSS Award applying uncontroversial rules of interpretation; and
- (b) the history of the making of the HPSS Award,

both of which were addressed in detail in the ADA's 9 June 2017 submission and will again be referred to in the following.

44. Again going back to the earlier HSU submissions the ADA further submits that the HSU's submissions that treating the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) as exhaustive because it:

- (a) would lead to confusion, uncertainty and inconsistency;
- (b) would result in the HPSS Award being 'stuck' with the health professional nomenclature of a particular point in time, and would quickly become out of date;
- (c) would result in the removal from award coverage of health professionals who have hitherto been regarded as covered by the HPSS Award;
- (d) would contradict the principle of protecting the relative living standards and needs of the low paid;
- (e) would be inconsistent with the modern awards objectives in that it could potentially exclude from coverage emerging health professions; and
- (f) would mean that *'future employers and professional groups will retain the capacity to persuade the Commission why a particular professional group should fall outside coverage'* and *'the starting point ... should be that all professions are covered'*,

all these should be rejected by the Commission for the reasons the ADA has already stated in its 9 June 2017 submission.

45. Finally, the ADA submits that the HSU's submissions fail to have proper regard to considering the impact the proposed variations to the HPSS Award would have on business, including on productivity, employment costs and the regulatory burden, as part of the Commission achieving the modern awards objective, a matter which is also addressed previously.

**(a) The proper construction of the HPSS Award**

46. The ADA submits that there is nothing ambiguous about the language used in Schedule B of the HPSS Award (Schedule A to the Plain HPSS Award ED) that would mean the list of health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) could be regarded as anything other than exhaustive. ADA Inc makes that submission on the basis of well-established and uncontroversial rules relating to the construction of industrial instruments.

47. Again when interpreting a specific clause contained in an industrial instrument, regard must be had to the ordinary and natural meaning of that clause and the terms of the industrial instrument must be read in the context of the clause and in the context of the entire instrument. The position was stated in *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 where the Court stated:

*The context of an expression may thus be much more than the words that are its immediate neighbours. Context may be extended to the entire document of which it is a part, or to other documents with which there is an association. Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used.*

48. Schedule B to the HPSS Award (Schedule A to the Plain HPSS Award ED ) is divided into 2 parts. Those provide for classification definitions for:

- (a) Support Services employees (set out in paragraph B.1 of the HPSS Award and paragraph A.1 of the Plain HPSS Award); and
- (b) Health Professional employees (set out in paragraph B.2 of the HPSS Award and paragraph A.2 of the Plain HPSS Award).



**(b) The history of the making of the HPSS Award**

49. As noted above, the HPSS Award was made by the AIRC as the result of the Request. The Request set out the matters the AIRC was required to consider when making a modern award such as the HPSS Award. Relevantly, the Request stated:

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;*

...

50. Initially, the AIRC held a number of consultation sessions following which, interested parties were invited to share an exposure draft of their proposed modern award or modern awards.

51. On 31 October 2008, the HSU filed with the AIRC a draft award which the HSU proposed be made. This draft award was titled the *Health and Medical Services Industry Award 2010 (2008 HSU Award)*. The coverage clause of the 2008 HSU Award relevantly provided:

4.1 *This industry award applies throughout Australia to employers engaged in or about or in connection with the health and medical services industry in relation to employees to the exclusion of any other modern award. However this award does not apply to an employee excluded from award coverage by the Act.*

...

4.3 *This Award **shall apply to all persons employed in the Classifications listed in Schedule A to this Award.***

(emphasis added).

52. Schedule A to the 2008 HSU Award relevantly provided:

*A modern health industry award contains three function-based classification streams. **The streams cover all the types of workers required to deliver health services to patients in the modern multi-disciplinary health services environment.***

Those classifications are:

1. *The Support Stream – workers who perform administrative functions, or whose roles are ancillary to workers in the clinical and management streams;*
2. *The Clinical Stream – clinicians and other professionals who deliver health and scientific services to patients and clinicians in the course of the provision of patient care;*
3. *The Management Stream – comprised of specialist managers or senior staff who oversee the performance of administrative functions or the delivery of patient care services.*

*The levels within each stream ascend by reference to autonomy of role, complexity of tasks and qualifications and skills required of the employee. Rates of pay progress commensurate with the described role levels. The indicative tasks associated with each level are described within the classification system below. Indicative tasks assist to place an employee's role in a particular level within a stream.*

(emphasis added).

53. ADA Inc notes that the classification structure contained within the 2008 HSU Award made no specific reference to any specific occupations or roles relevant to the private dental industry in Australia.
54. In connection with the filing of the 2008 HSU Award, the HSU also filed with the AIRC submissions dated 31 October 2008, a copy of which are included as annexure “B” (**HSU’s October 2008 Submissions**). In relation to the classification structure contained within the draft award, the HSU made the following submission:
  38. *The HSU has prepared a draft award to cover the health and medical services industry. The award which is one which has national scope, and has been prepared having regard to the prevailing conditions for employees in all the classifications in the health industry.*
  39. **The HSU has prepared a classification structure to cover the entire health and medical services industry.** *The classification structure contains three streams or functional groups:*
    - a. *The Support Stream – workers who perform administrative functions, or whose roles are ancillary to workers in the clinical and management streams;*
    - b. *The Clinical Stream – clinicians and other professionals who deliver health and scientific services to patients and clinicians in the course of the provision of patient care;*
    - c. *The Management Stream – comprised of specialist managers or senior staff who oversee the performance of administrative functions or the delivery of patient care services.*
  40. *The classification structure proposed by the HSU is at an early stage. The HSU welcomes feedback from other industry participants as to the structure.*

(emphasis added).

55. It is apparent that from as early as October 2008, the HSU sought to have a modern award covering **all** health professionals in Australia.

56. On 14 January 2009, the HSU filed further submissions with the AIRC, a copy of which are included as annexure “C” (HSU’s January 2009 Submissions). The HSU’s January 2009 Submissions included a draft application clause and classification structure for a proposed modern award to be known as the *Modern Health Industry Hybrid Award* (Proposed Hybrid Award). The application clause of the Proposed Hybrid Award relevantly provided:

**4. APPLICATION**

- 4.1 *This award applies throughout Australia to employers of employees within the Health Industry and prevails over any other modern award.*
- 4.2 *This award also applies to employers of employees in occupations in the following streams of this award:*
- a. *Health Professional*
  - b. *Medical and Dental Officers*
  - c. *Nursing*

57. The introduction to the classification structure of the Proposed Hybrid Award relevantly provided:

*A modern health industry award contains the following functional, occupational or profession based classification streams. **The streams cover all the types of workers required to deliver health services to patients in the modern multi-disciplinary health services environment.***

*Those classifications are:*

1. *The Support Stream – workers who perform maintenance, grounds keeping, security, transport, domestic, laundry/linen, stores, food service functions or other functions of a similar type however named;*
2. *The Care Stream – multi skilled workers who provide personal care assistance to patients and/or provide assistance to clinicians in the course of care or treatment;*
3. *The Technical Stream – workers who undertake work requiring a specialist technical skill and who possess a certificate or advanced qualification or are in the process of acquiring such qualifications. This stream includes lab assistants, pharmacy technicians, sterilising technicians, theatre technicians, dental technicians, orthotic technicians, prosthetic technicians, ECG technicians, anaesthetic or instrument technicians, perfusionists, phlebotomists and others;*
4. *The Administration and Management Stream – clerical and administrative employees, specialist managers or senior staff who oversee the performance of administrative functions or the delivery of patient care services.*
5. *The Dental and Medical Officers Stream – doctors of medicine and dentists registered and performing work within those fields of expertise;*
6. *The Health Professionals Stream - clinicians and other professionals who deliver health and scientific services to patients directly or indirectly;*

7. *The Nursing Stream – workers who have successfully completed a course of training in nursing leading to enrolment or registration with a relevant statutory body;*

*The levels within each stream ascend by reference to autonomy of role, complexity of tasks and qualifications and skills required of the employee. Rates of pay progress commensurate with the described role levels. The indicative tasks associated with each level are described within the classification system below. Indicative tasks assist to place an employee’s role in a particular level within a stream.*

(emphasis added).

58. In the Proposed Hybrid Award, the HSU, for the first time, included details of specific occupations or roles relevant to the private dental industry in Australia. Relevantly, the Proposed Hybrid Award included the following occupations or roles:
- (a) Dental Secretary (Health 1);
  - (b) Receptionist (Health 1);
  - (c) Dental Assistant (untrained) (Health 2);
  - (d) Dental Laboratory Assistant (Health 4);
  - (e) Dental Technician (Health 6);
  - (f) Dental Officer (Health 10);
  - (g) Senior Dentist / Senior Dental Officer (Health 11) [these terms appear to be used interchangeably]; and
  - (h) Dental Specialist (Health 11).
59. The terms of the Proposed Hybrid Award confirm that as at January 2009, the HSU continued to seek a modern award that covered all health professionals in Australia.
60. On 23 January 2009, the AIRC released an exposure draft of a modern award to be known as the *Health Professional and Support Services Industry and Occupational Award 2010*, copy of which is included as annexure “D” (**First Exposure Draft**). The coverage clause of the First Exposure Draft relevantly provided:

**4. Coverage**

**4.1 This industry and occupational award covers:**

- (a) *employers throughout Australia in the health industry and their employees in the classifications listed in clauses 14—Minimum weekly wages for support service employees*

*and 15—Minimum weekly wages for health professional employees to the exclusion of any other modern award.*

*(b) employers engaging a health professional employee falling within the classification listed in clause 15.*

*4.2 This award does not cover an employee excluded from award coverage by the Act.*

61. Clause 13, Classifications, of the First Exposure Draft provided:

*All employees covered by this award must be classified according to the structure and definitions set out in Schedule A—Classification Definitions. Employers must advise their employees in writing of their classification upon commencement and of any subsequent changes to their classification.*

62. Clause A.1 of Schedule A to the First Exposure Draft included the classification definitions for both support services employees and health professionals, as was ultimately the case when the AIRC made the HPSS Award.

63. The introductory paragraph of paragraph A.2 of the First Exposure Draft (which includes the classification definitions for health professionals and is the equivalent to what is contained in paragraph B.2 of Schedule B to the HPSS Award and paragraph A.2 of Schedule A to the Plain HPSS Award) provides:

*A list of common health professionals **which are covered** by the definitions is contained in [Schedule B](#).*

(emphasis added).

64. Schedule B to the First Exposure Draft (which is the equivalent to what is contained in Schedule C to the HPSS Award and Schedule B to the Plain HPSS Award) provided as follows:

***Schedule B—List of Common Health Professionals***

*Acupuncturist*

*Aromatherapist*

*Art Therapist*

*Audiologist*

*Biomedical Technologist*

*Cardiac Technologist Health Information Manager*

*Child Psychotherapist*

*Chiropractor*

*Client Advisor/Rehabilitation Consultant*

*Clinical Perfusionist*

*Community Development Worker*

*Counsellor*

**Dental Technician**

**Dental Therapist**

**Dental Hygienist**

*Dietician*

*Exercise Physiologist*

*Genetics Counsellor*

*Homeopathist*

*Masseur, Remedial*

*Medical Imaging Technologist (MIT)*

*Medical Laboratory Technician*

*Medical Librarian*

*Medical Photographer/Illustrator*

*Medical Record Administrator*

*Medical Technician/Renal Dialysis Technician*

*Musculoskeletal Therapist*

*Music Therapist*

*Myotherapist*

*Naturopathist*

*Nuclear Medicine Technologist (NMT)*

*Occupational Therapist*

*Orthoptist*

*Osteopath*

*Pastoral Carer*

*Pharmacist*

*Physiotherapist*

*Play Therapist*

*Podiatrist*

*Prosthetist/Orthotist*

*Psychologist*

*Radiation Therapy Technologist (RTT)*

*Recreation Therapist*

*Reflexologist*

*Research Technologist*

*Scientist*

*Social Worker*

*Speech Pathologist*

*Welfare Worker*

*Youth Worker*

(emphasis added).

65. On 13 February 2009, the HSU filed further submissions with the AIRC in relation to the classification structure contained within the Proposed Hybrid Award, the HSU made the following submission:

12. *The making of one health modern award along the lines of what we have proposed, will ensure that:*
  - a. *every worker knows the relativity of their classification compared to other classifications;*
  - b. *classifications are not duplicated in multiple awards;*
  - c. ***all health workers are covered by a modern award;***
  - d. *similar classifications are streamed;*
  - e. *employers and workers have just one document for all minimum wages and conditions for health workers regardless of where they work.*

(emphasis added).

66. The HSU's February 2009 Submissions confirm that in preparing the Proposed Hybrid Award in January 2009, the HSU's intention was to propose a modern award that covered **all** health professionals in Australia.

67. On 19 February 2009, Australian Federation of Employers & Industries (**AFEI**) filed submissions with the AIRC. In relation to the proposed award for health professionals and support services staff, AFEI stated that typically award-free health professionals in many states ie physiotherapists and dentists should not be covered by the new federal awards as this would go against the initial Minister's Request in the making of Modern Awards.

***The impact on business, including on productivity, employment costs and the regulatory burden***

68. ADA Inc submits that it is uncontroversial that there are certain classes of health professionals who fall outside of the coverage of the HPSS Award. Dentists is one, dental hygienists is another. In the HSU's March 2017 Submissions, the HSU hypothesises about a number of allegedly emerging health professions which may fall outside the coverage of the HPSS Award.
69. There is little or no evidence before the Commission as to the impact on business, including on productivity, employment costs and the regulatory burden, if the Commission extends the coverage of the HPSS Award to include all health professionals as sought by the HSU. This is because it is not clear which health professionals would be covered by the HPSS Award in these circumstances. As was acknowledged in paragraph 7 of the HSU's March 2017 Submissions, the term 'health professional employee' is not defined in the HPSS Award. However, it could not be seriously contested that the introduction of modern award coverage for a class of employees not historically covered by a modern award would increase the regulatory burden on employers. Depending on the historical arrangements an employer has in place with its employees, the introduction of modern award coverage could result in increased employment costs and could have a negative impact on productivity. It is submitted that the Commission must consider these matters as a part of it exercising its modern award powers so as to achieve the modern awards objective.
70. ADA Inc submits that these matters support a construction of the HPSS Award that the list of health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is an exhaustive list. Such a construction is the only construction that allows the Commission to ensure that it has achieved the modern awards objective by setting a fair and relevant safety net of minimum terms and conditions for particular types of health professionals.
71. In circumstances where there would be an inevitable increase in the regulatory burden on employers, which may result in increased employment costs and, depending on the nature of the industry in which the employer operates, impacts on productivity if the terms of the HPSS Award did not appropriately reflect the needs of that industry to provide a fair and relevant minimum safety net of terms and conditions, ADA Inc submits that the Commission should not exercise its modern award powers to extend the coverage of the HPSS Award to all health professionals. In the circumstances, ADA Inc submits this factor weighs heavily in support of the Commission finding it is not



necessary for the list of health professionals in Schedule C of the HPSS Award (Schedule B to the Plain HPSS Award ED) to be indicative for the modern awards objective to be achieved.

**List of Common Health Professionals matters from the HPSS Award Hearings and the HSU's 12 February 2018 submissions**

72. The ADA relies on the comments of Mr Boyce and the ADA's own witnesses in the Hearings in Melbourne on both 11 and 12 December 2017. The ADA has stated that it believes that the list is exhaustive and concurs with the discussions on the use of the word "Common" set out by Mr Boyce and also by Ms K Murphy of the Dental Hygienist Association of Australia (DHAA). The ADA believes strongly that as stated by MR Boyce in the Transcript at PN 996 – PN 997 on Monday 11 December 2017- where the point is made that it is in fact a "substantial change" to the HPSS Award in considering the List to be "indicative". This is shown below -

**PN996**

*MR BOYCE: It's case in this matter is one of opposition to the HSU claims, the first one being this issue of coverage, exhaustive versus indicative, and there's, I suppose, two views on the impact of that. One is that there's no change so that certain individuals were always covered and it would have a retrospective effect going back to when the relevant award was made. The other is that it is a substantial change and seeks to expand the coverage. My submission is that - and it appears as though the way the HSU has gone about it is to effectively say it's an ambiguity or uncertainty issue that needs to be resolved, therefore, it's a clarification issue, meaning that the coverage issue has always applied to health professionals across the board from the beginning of the time the award was made by the Australian Industrial Relations Commission which would be concerning, in my submission, particularly for dentists who my client represents being covered all the way back because obviously they have always assumed they are award-free. And that assumption or that position, in my submission, is soundly based having regard to the history of the award and the various contests that were made in respect of the award right back to 2008 in terms of the award modernisation process.*

**PN997**

*The Full Bench is obviously aware that during that process the Commission had a very difficult task and also made awards not necessarily supported in terms of every single clause in those awards by reasons or even by reference or mention of those particular types of variations. But one then looks at the underlying submissions that were made in terms of the contest between the parties before the Commission and the ultimate result and needs to determine whether a particular issue was accepted or rejected. Now, this claim as to coverage is something that the HSU has been pursuing since 2008. There is no disputes or evidence before the Commission that there is any issue as to this coverage. They purely rely upon it as an issue of ambiguity or uncertainty. But when one has regard to the nature of the contest going back to 2008, clearly this is an exhaustive list, not an indicative list, and I would just take you to - - -*

**PN998**

*VICE PRESIDENT CATANZARITI: So what would you suggest? That every time there is a new title, that the HSU then seeks to vary the classification structure by way of application to vary?*

**PN999**

*MR BOYCE: Yes, well, there's two ways they could go about it and they haven't done either. One is that they have an indicative list but have a set of exclusions. Or the other is they have an exhaustive list and every time there is a change in terms of professional qualifications or skills or a new classification emerges or a new profession emerges or professions get merged between*

existing health professionals, then they come along to the Commission and they say: "Here's the evidence. This classification or this health professional used to be subject to these various qualifications. They have now merged into something else or changed into something else or something new has come along completely and we therefore seek to include them as to the list of common health professionals." But to simply have general, "Any health professional is covered by this award", in my submission, creates problems both going forward, but also creates significant problems looking back.

PN1000

VICE PRESIDENT CATANZARITI: It would only create stuff looking back if the amendments were made retrospectively and that would be whilst possible in some modern awards we have, but (indistinct) retrospectively we have looked at them more carefully in the review, on this case, it would actually be quite unlikely because that would open people for whatever reason have been award-free for a number of years suddenly being told that they are exposed under the award in a backwards - with backpay claims and other things may flow.

PN1001

MR BOYCE: Yes, well, that would be a substantive variation.

PN1002

VICE PRESIDENT CATANZARITI: That would be, indeed, substantive. ....

73. The HSU's submission of the 12 February 2018 discusses this at their Clauses 56 – 60 on page 12. Where in particular at Clause 59 the HSU states –

*"Cl. 59 - Evidence provided at hearing from the parties provided no logical reason why the Schedule should be treated as an exhaustive list of health professionals."*

74. The ADA believes this comment is incorrect as various logical reasons were presented for why the list is exhaustive especially in the evidence given by Ms Eithne Irving – where she stated to Mr Boyce in Re-Examination at Transcript PN 1761 – PN 1766 on Tues 12 December the following –

#### RE-EXAMINATION BY MR BOYCE

[10.30 AM]

PN1761

MR BOYCE: Ms Irving, you were asked questions about the dental therapists and the change in 2010. Prior to 2010, what were the numbers of classification title changes that occurred and when did they occur?--- MS IRVING : I just want to make sure I understand your question. There's only - the change - the introduction of oral health therapy has been the only change in dental practice in over 50 years. Is that what you're asking me?

PN1762

Yes, thank you. So, effectively, it's about half a century since any changes have essentially occurred?---MS IRVING : -Pretty much, yes, and I think now that these titles are protected under the national law, it's actually going to be quite difficult to change them. The Australian health ministers have made it very clear they are not interested in introducing any new categories and so they are making it more difficult to include more people in the national scheme.

PN1763

In terms of protection, what do you mean by that?---MS IRVING : Well, the national law is a protection of title piece of legislation, so it protects those titles. So, I can't call myself a dental therapist, I can't call myself a dentist, I can't call myself a medical practitioner because those titles are restricted and protected under that legislation.

\*\*\* EITHNE MARY IRVING

RXN MR BOYCE

75. With this exchange the ADA contends that there is definitely logic to consider it is “exhaustive” as specific role/ job titles especially in private dental practice are registered and legislation protects them .
76. Again this is an example of the HSU not providing adequate “probative evidence” in order for the Full Bench to be able to justify a “substantial variation” to the HPSS Award as per it’s Decision of [2014] FWCFB 1788.

### **Summary and conclusion**

77. ADA Inc submits that upon a proper construction of the HPSS Award, it is clear that the list of health professionals in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) is an exhaustive list. The history of the making of the HPSS Award, including the proceedings before the AIRC and its decisions, support such a construction.
78. Further, on a proper analysis of the factors the Commission is required to consider in exercising its modern award powers to achieve the modern awards objective, there is no basis for a claim to be made that it is ‘necessary’ for the list of health professionals in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) to be an indicative list such that other health professionals will fall within the coverage of the HPSS Award so as to ensure that the modern awards objective is achieved.
79. In summary, ADA Inc submits that the list of health professional in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award ED) is an exhaustive list and it is not necessary to vary the HPSS Award so that it covers all health professionals so as to achieve the modern awards objective.

### **HSU’s claim to vary the weekend penalties under the HPSS Award for shiftworkers**

80. ADA Inc now opposes the HSU’s proposed variation to the HPSS Award for Weekend penalties as detailed in paragraphs 62 to 65 of the HSU’s 12 February 2018 Submissions.

### **HSU’s claim to vary the shiftwork penalties under the HPSS Award for shiftworkers**

81. As detailed in paragraphs 18 to 41 above, ADA Inc’s primary submission is that the span of ordinary hours for dayworkers under the HPSS Award for dayworkers should not be varied.
82. Should the Commission disagree with ADA Inc, and find that the span of ordinary hours provisions of the HPSS Award for dayworkers should be varied in the manner sought by the HSU such that private dental practices:
  - (a) would no longer be able to roster ordinary hours for a day worker between 6:00 pm and 9:00 pm, Monday to Friday; and

(b) would no longer be able to roster ordinary hours for a day worker on a Saturday,

ADA Inc agrees there would be a need to ensure that an employer remained able to engage an employee as a shiftworker to perform work during the employer's hours of business (should they extend past 6:00 pm Monday to Friday or include weekends).

83. While ADA Inc submits there is no need to change the shift work provisions of the HPSS Award given that they are already drafted to accommodate the span of hours sought by the HSU as part of the Review, as the variation sought by the HSU would result in the reduction of the penalty rates payable to employees in certain circumstances, particularly for an employee working an 'afternoon shift' as proposed by the HSU, ADA Inc would not object to the HPSS Award being varied in the manner sought by the HSU as detailed in paragraphs 65 of the HSU's 12 February 2018 Submissions.

#### **HSU's claim to vary the public holiday provisions of the HPSS Award**

84. ADA Inc neither supports, nor opposes, the HSU's proposed variation to the HPSS Award relating to public holidays as a result of clause 32.1 of the HPSS Award allegedly being inconsistent with the requirements of the NES as detailed in paragraphs 66 to 68 of the HSU's 12 February 2018 Submissions. At this stage the ADA does not wish to be heard on this aspect of the HSU's proposed variations to the HPSS Award.

#### **HSU's Comments on Overtime for Casuals – Clause 19.2 (d)**

85. The ADA does not agree with the HSU's interpretation of "Overtime for Casuals" – with in the current HPSS Award as it has been stated in Clauses 74 -79 of the HSU's 12 February 2018 submission. Considering this the ADA reserves it's right to respond to this if needs be at a future date.

**David Wilkinson**

General Manager – Industrial Relations

**Wentworth Advantage Pty Limited**

on behalf of the **Australian Dental Association Inc.**

**Dated: 12 March 2018**