

**4 YEARLY REVIEW OF MODERN AWARDS – HEALTH PROFESSIONALS AND
SUPPORT SERVICES AWARD 2010**

OUTLINE OF SUBMISSIONS OF HEALTH SERVICES UNION

1. These submissions are made by the Health Services Union (**HSU**) pursuant to the decision of the Full Bench in [2019] FWCFB 8538, dated 19 December 2019 (**the Full Bench decision**), and the directions issued as a consequence of that decision.
2. In the Full Bench decision, the Commission:
 - a. determined that the List in Schedule C of the *Health Professionals and Support Services Award 2010* (**HPSS Award**) is indicative;
 - b. issued directions for the filing of submissions and evidence in relation to which Health Professional occupations should not be covered by the HPSS Award.
3. The HSU submits that the resolution of the question whether particular Health Professional occupations should not be covered by the HPSS Award requires the Commission to consider:
 - a. whether subsection 143(7) operates to prevent the particular class of employees from being covered; and
 - b. whether it is consistent with the modern awards objective in s.134, and therefore appropriate, for the employees to be covered.
4. The HSU relies upon:

- a. Witness Statement of Gregory Roche dated 9 April 2020 (**Roche**);
- b. Witness Statement of Anastasia Staikopoulos dated 9 April 2020 (**Staikopoulos**);
- c. Witness Statement of Craig Whitehead dated 9 April 2020 (**Whitehead**);
- d. Witness Statement of Anthony Varos dated 9 April 2020 (**Varos**);
- e. Further witness Statement of Alexander Leszczynski dated 10 April 2020;
- f. The HSU Reply Submission dated 15 November 2019;
- g. The submission of the Australian Dental and Oral Health Therapists' Association dated 28 February 2020, which *maintains full support of the inclusion of "Oral Health Therapist" in the List of Common Health Professions*¹;
- h. HSU Tender Bundle of Pre-Modern Awards.

Relevant Professions

5. The health professions which are the subject of arguments that they should not be covered by the HPSS Award are the following:
 - a. Medical Practitioners;
 - b. Optometrists;
 - c. Dentists;
 - d. Dental Prosthetists;
 - e. Dental Hygienists;
 - f. Oral Health Therapists.

6. Those professions are dealt with in turn below.

¹ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-sub-adohta-280220.pdf>

Medical Practitioners

7. The Health Services Union does not oppose medical practitioners being excluded from the scope of the HPSS Award. Having regard to the existence of the *Medical Practitioners Award 2020*, it is appropriate for that instrument to regulate the terms and conditions of employed doctors.

Optometrists

8. The HSU contends that optometrists should be included within the coverage of the HPSS Award.
9. The principal argument of Optometry Australia in opposition to award coverage is that optometrists do not have a history of award coverage.
10. That argument is based on the terms of the award modernisation request, and upon s143(7) of the *Fair Work Act 2009* (**the FW Act**), which substantially replicates the terms of a passage in the request.

Section 143(7) of the Fair Work Act 2009

11. Subsection 143(7) of the Fair Work Act 2009, provides as follows:

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

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

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

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

12. Consideration of the application of subsection 143(7)(a) requires three issues to be addressed:
 - a. first, identification of the relevant *class of employees* (in this case, optometrists);

- b. second, a determination whether the relevant class of employees has traditionally not been covered by awards (whether state awards or Federal Awards); and
 - c. third, consideration of whether that traditional lack of coverage is *because of the nature or seniority* of their role.
13. The HSU accepts that optometrists have not traditionally been covered by awards. However, the Commission would not answer the third question in the affirmative. There is no material before the Commission which would satisfy the Commission that the historical absence of award coverage of *employed* optometrists has been *because of* the seniority or nature of *their roles*, as opposed to being the consequence of their relatively modest numbers and the fact that the majority of practising optometrists are (and have been) self-employed and accordingly no occasion arose for coverage of those professionals. Pre-modern awards covered a wide range of health professionals, including professionals offering primary health care, such as medical practitioners, nurses, dentists (as set out below, principally in public settings) and other allied health professionals. That coverage of other comparable health professionals suggest that it was the setting in which optometry roles were most commonly performed, rather than the nature or seniority of the roles that determined coverage.
14. Nothing in subsection 143(7)(b) provides an impediment to coverage of optometrists by the HPSS Award. Contrary to Optometry Australia's (**OA's**) Submission dated 28 February 2020 (at [19]), the work performed by Optometrists is of a similar nature to health professional work that has traditionally been regulated by the pre-modern awards.
15. Putting to one side the occupations the subject of the current controversy, all of the professions regulated by the Australian Health Practitioner Regulation Agency, are covered by a modern award to some extent. The qualifications required for professional practice as an optometrist² are consistent with those of

² Referred to at [10] to [11] of the Statement of Lyn Brodie dated 28 February 2020

other health professionals. The classification descriptions in Schedule B2 of the HPSS Award are capable of application to employed optometrists in either public or private practice.

16. The Commission would not credit the suggestion in [22(b)] of OA's submission that award regulation of optometrists could result in any significant disadvantage to that cohort. Nothing about the introduction of enforceable minimum standards (which exceed the National Minimum Wage and National Employment Standards, which are otherwise applicable to employed optometrists) has the legal consequence of undermining or negating any existing contractual entitlements. As a matter of logic it does not follow that the improvement of the relevant minimum standards would have the result of diminishing the bargaining power of employed optometrists.
17. So far as OA has provided evidence of the circumstances of optometrists³, it is notable that the *estimated* average full time equivalent salary for the employees (as opposed to the self-employed persons) who were respondents to the survey is well below the high income threshold (currently about \$148,000). The bulk of employed optometrists (according to the survey) earn below that threshold, with only about 15% earning above \$130,000. Nothing in that evidence provides support for a conclusion that coverage by the HPSS award would increase costs for employers.
18. In considering the position of optometrists it is relevant that the List of Common Health Professionals in Schedule C includes the allied health profession of Orthoptist, which is a specialist in non-surgical treatment of eye disorders. The work of optometrists is of a similar nature to the work of such health professionals, and to the work of the other primary care practitioners on the List in Schedule C. It is also similar to the work performed by other primary health care practitioners which are award covered. It is consistent with the modern awards objective in s.134 to ensure that the minimum safety net of terms and conditions applicable to similar health professionals applies to optometrists.

³ Annexure 1 to the Statement of Lyn Brodie dated 28 February 2020

Dentists

19. The HSU opposes dentists being excluded from the HPSS Award.
20. The HSU notes that the submissions of the Australian Dental Association (**ADA**) dated 28 February 2020 identify the submissions it has made previously. The HSU relies on its previous submission dated 14 November 2019 in response to the ADA's submissions, and makes some further observations below.
21. As to the operation of s.143(7) of the FW Act, the HSU relies on its analysis of that provision above.
22. So far as the historical award coverage of dentists is concerned, it is not correct to say that employed dentists have not traditionally been covered by awards. Rather, coverage was dealt with on a state by state basis at the time of modernisation.
23. In New South Wales, the *Health Employees Dental Officers (State) Award* (C4296) covered registered dentists employed in public hospitals, including the United Dental Hospital. The classifications under that Award went up to the Director of Dental Services at Westmead and Royal Newcastle Hospitals and the Deputy Director of Dental Services at Westmead Hospital. The *Health Professional and Medical Salaries (State) Award* (C6992) prescribed the salaries for those roles.
24. In Queensland, as at the time of modernisation, dentists in the public health system were covered by the *District Health Services Employees' Award – State 2003*. Their salaries, up to a top rate of \$113,787 as at 1 September 2009, were prescribed in Schedule B(ii) of that Award.
25. In Tasmania, persons registered as dentists under the Tasmanian *Dentists Act 1919* and employed by the state were covered by the *Dental Employees Award* (AN170024).

26. In Victoria, rates of pay for dentists in the Health and Community Services Sector were regulated by the *Health and Community Services Industry Sector – Minimum Wage Order – Victoria 1997* (AP784047) made by the Australian Industrial Relations Commission on 15 August 1997. The classifications covered by that order (at clause 6) include the Medical and Dental Officers' stream. That stream included classifications spanning between recent graduate roles (Officer Level 2 (Dental)) and the indicative role of *Senior Dentist in charge of a clinical unit or branch of a hospital Specialist Dentist*.
27. Additionally, the *Health Services Union of Australia (Aboriginal and Torres Strait Islander Health Services) Award 2002* (AP819920) covered registered dentists employed in Aboriginal and Torres Strait Islander community controlled health organisations, as did the *Aboriginal Community Controlled Health Services (Northern Territory) Award 2002* (AP817919) and the *Aboriginal Organisations Health and Related Services (Northern Territory) Award 2002* (AP818988) (at Levels 7 and above).
28. The Commission would not be satisfied that there was any absence of award coverage of dentists as a consequence of the *seniority* or *nature* of their *role*. Dental roles for both recent graduates and at very senior levels were award covered in a number of jurisdictions and areas of practice, as set out above. The absence of general coverage in private practice is just as likely to have arisen due to the fact that prior to the Modern Award being made (as is the case now) most practising dentists in the private sector were self-employed or engaged as independent contractors⁴ (and no occasion arose for award coverage of those professionals).
29. Accordingly, subsection 143(7) does not compel the exclusion of dentists from the HPSS Award. For dentists in employed roles, it is desirable and appropriate that they be covered by the award that otherwise covers health professionals. Absent such coverage, employed dentists will in any event be covered by the National Employment Standards and the National Minimum Wage. There is no

⁴ Statement of Eithne Mary Irving dated 14 October 2019 at [9].

basis in principle or logic for the application of differential and less favourable minimum terms and conditions to dentists.

30. In the recent decision in relation to the *Miscellaneous Award* [2020] FWCFB 754, the Full Bench concluded that it was anomalous to have differential coverage of cleaners and security guards, depending on the industry in which they performed their work.

31. Referring to that differential outcome, the Full Bench said:

[46] We can identify no intelligible industrial rationale for this outcome. With respect to cleaners and security guards, who generally perform lower-skilled duties for low or modest pay, we see no reason why the identity of their employer should make a difference as to whether such employees have the benefit of award entitlements or not. Being award-free means, among other things, that such employees have a lesser entitlement to minimum wages (being only entitled to the National Minimum Wage), and have no entitlement to penalty rates for working unsociable hours or for overtime, in circumstances where the work performed is the same as that of award-covered employees.

[47] Neither the AIRC award modernisation Full Bench's statement of 25 September 2009 nor its decision of 4 December 2009 explain the rationale for clause 4.3. There is no suggestion that the outcome to which we have just referred was intended. Nor is there any indication that the Full Bench intended to make award-free employees who had previously been covered by an award.

32. A similar inequity would arise if health professionals such as dentists are exempted from award coverage, while their fellow health professionals, are afforded the higher minimum wages and more robust protections resulting from award coverage. In the current setting given the risk to health professionals arising from the Covid-19 pandemic, and the arrangements in respect of the pandemic which have now been incorporated in Schedule X of the HPSS Award, the importance of consistent treatment of all health professionals becomes even more evident.

Dental Prosthetists, Dental Hygienists and Oral Health Therapists

Overview

33. Because of the relationship between the above roles, and the roles within dental care which currently covered by the HPSS, they are dealt with together, below.
34. At the outset it is important to note that the HPSS Award already covers a number of roles involved in the provision of dental care.
35. Schedule B of the HPSS Award, which contains the Classification Definitions for Support Services Employees, includes amongst the indicative Technical and Clinical roles listed, those of Dental Assistant and Dental Technician.
36. The List of Common Health Professionals at Schedule C of the HPSS Award includes the profession of dental therapist.
37. At the Exposure Draft Stage⁵, and at the making of the Modern Award⁶, the profession of “dental hygienist” was included in the List at Schedule C.
38. “Dental hygienist” was later excised from the list in Schedule C by a decision⁷ and order⁸ of the Full Bench of the then Australian Industrial Relations Commission made on 24 December 2009 (that is, before the Modern Award came into operation), as a consequence of an application made by the Dental Hygienists Association of Australia Inc (DHAA) on 20 October 2009.
39. The reasons of the Full Bench in dealing with the application were as follows:

[4] We have no reason to believe that the DHAA does not represent a significant number of dental hygienist employees. Further, no other organisation or person has made any submission on the application.

[5] We grant the application. We shall make an appropriate order.

⁵ [2009] AIRCFB 50

⁶ [2009] AIRCFB 345

⁷ [2009] AIRCFB 948 - <http://www.airc.gov.au/awardmod/fullbench/variations/2009aircfb948.pdf>

⁸ PR991493 - <http://www.airc.gov.au/awardmod/fullbench/variations/PR991493.pdf>

40. There is nothing to prevent the Commission from reconsidering the role of dental hygienists in the present review. The purpose of the 4 yearly reviews is to ensure that the awards operate consistently with the modern awards objective to provide a fair and relevant minimum safety net of terms and conditions. Whilst the Commission should have regard to the decision of the Full Bench, as noted by the Full Bench in the *Aged Care Award Decision* [2019] FWCFB 5078 at [111] (relying on the decision in the *Penalty Rates Case* [2017] FWCFB 1001) it is necessary to consider the context in which that decision was made, including the fact that there was no contradictor, and the matter was not fully argued.
41. The HSU contends that the roles of Dental Prosthetist, Dental Hygienist and Oral Health Therapist should not be excluded from the scope of the HPSS Award. because:
- a. they have a history of award coverage albeit such history would not be regarded as entirely comprehensive (which history is detailed below);
 - b. to the extent that there has not been award coverage of those professions in the private sector, such history is not relevant to the consideration in s.143(7) of the FW Act, and in any event, the Commission would not consider the absence of private sector coverage was because of the seniority or nature of the roles;
 - c. in relation to dental prosthetists, the evidence is that the work they perform, involving the provision of dentures for patients, is substantially the same across both public, community and private sectors,⁹ additionally, the evidence from dental prosthetists is that they can work simultaneously across the public health, community health and private health sectors;¹⁰
 - d. they involve work which is similar in nature to work that is already covered by the Award, and which falls naturally within the classifications in the Award, namely:

⁹ Statement of Gregory Roche [12]-[20], Statement of Anastasia Staikopoulos [17] and AS-1, Statement of Craig Whitehead [9], Statement of Anthony Varos [10], [26].

¹⁰ See, eg, Statement of Craig Whitehead, [1]-[3].

- i. the work of both oral health therapist and dental hygienists is similar to the work of the dental therapist (which role is already included in the Modern Award), and is also regulated by the Australian Health Practitioner Regulation Agency;
- ii. the work of dental prosthetists is regulated by the Australian Health Practitioner Regulation Agency, and like the other professionals, dental prosthetists are required to undertake continuing professional development in their field in order to maintain accreditation;¹¹
- iii. the work of dental prosthetists is similar to, and has a long connection with the work of dental technicians (which role is already included in the Modern Award). The professional role of “dental prosthetist” was established in about the early 1990s, and was formerly described as “Advanced Dental Technician”;
- iv. the work of dental prosthetists is also similar to the work of orthotists and prosthetists (which are listed in Schedule C) which involves designing and fashioning prosthetics;
- e. it is undesirable for some dental health roles to be covered and others not covered, as the roles may interact in workplaces and in teams comprised of other award covered roles. Where enterprise bargaining occurs in dental workplaces or in workplaces which include dental roles, it is undesirable that professional roles likely to be the subject of bargaining are not covered;
- f. it is appropriate that each of the roles be covered by the Award having regard to the considerations in s.134 of the FW Act.

42. Those considerations are discussed below.

Pre-Modern Award Coverage

New South Wales

¹¹ Statement of Anthony Varos, [14], Statement of Craig Whitehead, [14].

43. Dental therapists in the New South Wales health system were covered in New South Wales by the *Dental Therapists (State) Award* from about 2000, and from 2005, by the *Public Hospital Dental Therapists (State) Award (C4280)*. In that award, the term is defined as follows:

"Dental Therapist" means a person appointed as such and who possesses an approved certificate of proficiency in theory and technique in preventative and operative dental care of children.

(emphasis added)

44. Dental hygienists employed in the New South Wales health system were covered by the *Public Hospitals (Dental Staff) Award (C4281)*. That award was initially published on 8 December 2000 and was ultimately rescinded on 29 March 2012.
45. The *Public Hospital Dental Therapists (State) Award (C4280)* was rescinded and replaced by the *Health Employees Oral Health Therapists (State) Award* made by the New South Wales Industrial Relations Commission on 23 September 2008 (C3073).
46. The latter award covered three professions registered by the New South Wales Dental Board, namely:
- a. *"Dental Therapist"*, which was defined in clause 2 of the Award as: a person appointed as such and who possesses an approved qualification of proficiency in theory and technique in preventative and operative dental care of children. A dental therapist must hold the relevant registration from the NSW Dental Board;
 - b. *"Dental Hygienist"*, which was defined in clause 2 of the Award as: a person appointed as such and who possesses an approved qualification of proficiency in theory and technique in dental hygiene. A dental hygienist must hold the relevant registration from the NSW Dental Board; and
 - c. *"Oral Health Therapist"*, which was defined in clause 2 of the Award as: a person appointed as such and who holds the relevant registration from

the NSW Dental Board as an oral health therapist or both the registrations of dental therapist and dental hygienist.

47. Under the Transitional Arrangements at clause 4 of that award, dental therapists and dental hygienists were incorporated into the oral health therapist classification scale, effectively as a sub-category of oral health therapist, but could not progress beyond Level 2 in the classifications if they did not attain the full scope of practice, or weren't already a Community Dental Health Programs Officer. Oral Health Therapists had the capacity, subject to the nature of their qualification, to commence at a higher rate than the other two professions, and had the capacity to advance further along the scale. The transition arrangements, which are set out following, suggest a future preference for those with the Oral Health Therapist scope of practice.

4. Transition Arrangements

Single registered therapists and hygienists will have limited transition to the new oral health therapists scale, until the full oral health therapist qualifications are obtained. This is due to the broader scope of work of the oral health therapist over the existing classifications.

The transition will be:

Existing Grade 1 dental therapists and dental hygienists move to the new oral health therapist scale based on years of service to a maximum of Level 2 Year 2. Incremental progression beyond this can only occur with registration for the full scope of work of the oral health therapist.

Existing Grade 2 and Grade 3 Therapists move to the new oral health therapist scale based on years of service to a maximum of Level 2 Year 4.

Existing Community Dental Health Programs Officers move to Level 3 of the new oral health therapist scale based on years of service.

New positions of Level 3 or Level 4 will be advertised based upon the broader scope of work of the oral health therapist. If these are unable to be filled by suitably qualified applicants, consideration will be given to re-advertising the position(s) with single registration criteria.

48. The classification scale for oral health therapists was relatively truncated, with only four levels, with internal progression by years of service to a maximum of fourth year at the first two levels and second year at the third and fourth levels.
49. Clause 6 of the award provided that the rates of pay applicable to the oral health therapist roles were to be in accordance with the rates of pay set out in the *Health Professional and Medical Salaries (State) Award*. The rate applicable at the bottom of the scale (Level 1, first year) as at 1 July 2008 was \$47,886, the rate at the top of the scale (Level 4, second year) was \$82,998.
50. Dental technicians in the New South Wales health service were covered by the *Health Employees Dental Technicians (State) Award (C0836)*. That award was in place from no later than 16 July 1999. Advancement from the Grade 1 to Grade 2 classification required:
 - a. at least three years experience as a registered dental technician; and
 - b. successful completion of the first year of the Dental Prosthetics course at TAFE (or equivalent).
51. The *Health Employees Dental Technicians (State) Award* was replaced and rescinded by the *Health Employees (Dental Prosthetists and Dental Technicians (State) Award (C7074)* on 23 September 2008.
52. The classifications of that award appear at Clause 3. The classification scale provided for 6 levels for Dental Technicians between trainee roles and Level 4 (Senior Dental Technician) and Level 5 (Specialised Dental Technician) roles. There were three dental prosthetist roles: Dental Prosthetist Level 1, Senior Dental Prosthetist Level 2 and Specialised Dental Prosthetist Level 3.
53. The classification of *Dental Prosthetist Level 1* is a dental prosthetist with:
 - a. at least six years experience as a registered dental technician (cl 3.2(a)(i); and

- b. has successfully completed the qualifications of the Diploma of Dental Technology and the Advanced Diploma of Dental Prosthetics (cl 3.2(a)(ii)).

- 54. Those requirements are the same as those for the *Dental Technician Level 3*, which was also required:
 - a. to have at least six years experience as a registered dental technician (cl 3.1(d)(i));
 - b. to have completed qualifications equivalent to the Advanced Diploma of Dental Prosthetics (cl 3.1(d)(ii)); and
 - c. was required, in order to have achieved the level of *Dental Technician Level 1*, to have attained the Diploma of Dental Technology.

- 55. The relationship between the dental technician and dental prosthetists reflected in the New South Wales award is consistent with the evidence of the dental prosthetists whose evidence has been filed by the HSU. Each of Gregory Roche, Anastasia Staikopoulos, Craig Whitehead and Anthony Varos, qualified and worked as a dental technician as their first step towards the attainment of dental prosthetist qualifications. In Mr Varos' case, his role as an 'Advanced Dental Technician', was renamed "dental prosthetist" in 1990¹².

- 56. As with the awards covering dental therapists, dental hygienists and oral health therapists, the *Health Employees (Dental Prosthetists and Dental Technicians (State) Award* provided that salaries were to be in accordance with the rates in the *Health Professional and Medical Salaries (State) Award*.

- 57. As at 1 July 2008, the *Health Professional and Medical Salaries (State) Award* provided for:
 - a. dental technicians to receive a minimum salary as a trainee of \$30,279, a Level 1 starting salary of \$46,846, and a maximum salary of \$76,886;

¹² Varos [5]

- b. dental prosthetists to start at a salary of \$58,968 (equivalent to the start of Level 3 in the dental technician scale and to progress to a maximum salary of \$76,886 (the same as the top of the dental technician scale);
- c. rates for dental technicians at Levels 3 to 5 (with two increments at each level) identical to those for dental prosthetists at Levels 1 to 3;
- d. dental therapists or dental hygienists to attain a maximum salary (top of the Level 2 classification) of \$69,378;
- e. oral health therapists to attain a maximum salary (top of Level 4) of \$82,998;
- f. rates applicable to the classifications of Grade 2 Scientific Officer; a Grade 2 Biomedical Engineer; a first year Dental Officer, a Level 4 Dental Technician, a Level 2/Level 3 Dental Prosthetist, a 10th Year Environmental Health Officer, a Graduate Health Education Officer, some hospital scientist classifications, Grade 2 Librarians, a 2nd year Resident Medical Officer, the most senior Nurse Counsellor and a Grade 3 Medical Records Manager about equivalent to maximum salary for a single-registered dental therapist or dental hygienist;
- g. rates applicable to, inter alia, Aboriginal Health Co-Ordinators, Senior Aboriginal Health Education Officers, Grade 4 and above Scientific Officers, Grade 3 Biomedical Engineers and 3rd year Dental Officers equivalent to the top rate applicable to Oral Health Therapists.

58. Even allowing for the passage of time since the publication of the above rates rates, nothing about the entry level rates for the roles referred to above, nor the maximum rates for those roles, nor the roles paid equivalent rates, marks the roles as ones that are particularly senior. In the public sector, neither the seniority of the roles nor the nature of their work made it inappropriate for them to be award covered. There is no basis for thinking those two considerations were the reason for the relative absence of coverage in the private sector.

59. So far as dental technicians were concerned, there does not appear to be any basis in New South Wales for suggesting that their seniority in private settings was fundamentally greater than in public sector roles. Dental technicians employed outside the New South Wales Health service in dental workrooms

were covered by the *Dental Technicians (State) Award* (AN120180). That award was made no later than 4 June 1993. A variation to that award effective 1 December 2009 provided for weekly rates for third year dental technicians of \$729.00, considerably less than their colleagues in the public sector.

Victoria

60. In Victoria, the common rule *Dental (Private Sector Victoria) Award 1998* (AP779110CRV) contained a classification of Dental Hygienist/Dental Therapist at clause 17.2. No distinction was made in the wage rates between those two descriptions, and the wage rate applicable to the role increased with each additional year of experience subsequent to qualification.
61. Under that award, “Dental Hygienist” was defined to mean: *an employee who has a Bachelor of Oral Health or equivalent as approved by the Dental Practice Board of Victoria (Dental Hygienist) (cl. 17.3.8(a)) and registered as such with the Dental Practice Board of Victoria or its successor (cl. 17.3.8(b)).*
62. Rates of pay for allied health professionals in dentistry in the Health and Community Services Sector were regulated by the *Health and Community Services Industry Sector – Minimum Wage Order – Victoria 1997* (AP784047) made by the Australian Industrial Relations Commission on 15 August 1997. That order covered “Health Professionals” as defined. The classification of “Health Professional Level 2” covered *a qualified professional with a three year degree or recognised equivalent or registered with a professional body and whose qualification is a pre-requisite for the performance of their duties.*

Queensland

63. In Queensland, dental technicians employed in the private sector were covered by the *Dental Technicians Award* (Qld).

64. As at the time of award modernisation, the *District Health Services Employees' Award – State 2003 (Qld)* covered the following classes of employee engaged in the District Health Services:
- a. oral health therapist (in the professional stream);
 - b. dental prosthetist (in the technical stream);
 - c. dental technician (in the technical stream);
 - d. dental therapist (in the technical stream);
 - e. dental assistant (in the operational stream).
65. That award referred to “Oral Health Teams”, comprised of dentists and up to three “dental auxiliaries” (by inference, the classifications referred to above).
66. Wages for all the above roles were determined by reference to a set of classification levels in each stream, determined by generic descriptors in the Schedule C to the Award. The professional and technical streams started at the same rates, and each had 6 levels, but the top technical stream Level 6 rate was equivalent to the bottom of the professional Level 5 rate.
67. The presence of dental prosthetists in the technical stream in the award is consistent with its historical connection with the role of dental technician apparent in the New South Wales awards above.

Other States and Territories

68. In Tasmania, the *Dentists Award (AN170025)* covered, in respect of all employers, the classifications of:
- a. *Registered Dental Mechanic*, defined to mean any person registered under Section 48 of the *Dentists Act 1919* who makes any article to be fitted to the human mouth; and
 - b. *Dental Technician*, defined to mean any person other than a Registered Dental Mechanic who makes any article to be fitted to the human mouth and who has served an apprenticeship under the provisions of The Dental Assistants' Association of Australia (Tasmanian Branch).

69. The former classification is the equivalent of a dental prosthetist.
70. Clause 8, Wage Rates of that award records the relativities of the two classifications. The dental technician scale has rates at relativities between about 105% and about 111% of the base rate; the registered dental mechanic scale has rates at relativities between about 118% and about 124% of the base rate.
71. In Tasmania the *Hospitals Award* (AN170046) also covered, by reference to generic descriptors, positions in the “Professional Employees Stream” (clause 7). The descriptions are capable of application to dentists, dental hygienists, oral health therapists and dental prosthetists.
72. In Western Australia, the *Dental Technicians and Attendant/Receptionists Award* 1982 covered Dental Technicians, Senior Dental Technicians and Advanced Dental Technicians. The latter was defined as follows:
- an adult employee who has at least four years' experience as a Dental Technician other than as an apprentice and has qualified at an approved trade school, and who is engaged in all aspects of Crown and Bridge work (including Ceramics) or Cast Metal Dentures or Maxillo facial work on Orthodontice.*
73. Dental Technicians, and Advanced Dental Technicians employed at the Perth Dental Hospital were covered by the *Hospital Employees (Perth Dental Hospital) Award 1971* (AN160160), which later became the *Health Employees (Dental Health Services) Award 2003*, and applied to Metropolitan Health Services.
74. Belying its name, the *Hospital Salaried Officers (Dental Therapists) Award 1980* covered employed dental therapists and their employers who were in private practice in Western Australia.
75. In South Australia, Dental Technicians were covered by the *Dental Technicians and Attendants Award* (AN150045).

Oral Health Therapists

76. The role of oral health therapist is one of relatively recent provenance, as the DHAA Submission accepts¹³. The profession requires the completion of a three year degree. The role was incorporated in the NSW Awards in about 2008, at which time it was also recognised by the New South Wales Dental Board¹⁴. The process of award modernisation was already in contemplation at that time.
77. DHAA accepts in its Submission (at [37]), that apart from in New South Wales, none of the state dental boards were registering oral health therapists as oral health therapists (as opposed to registration as dental therapists and dental hygienists) prior to 2010.
78. The profession of oral health therapists is one which has had dramatically increasing numbers in the past decade or so. Its increase in numbers has occurred at the expense of dental therapists. The terms of the New South Wales Award indicates the profession is one which incorporates, and was envisaged to replace the dental therapist role. The work of the role is similar to the work of the dental therapist, which is already covered by the Award.
79. The Commission would give little weight to the relative absence of reference to oral health therapists in pre-modern awards. That absence was more likely due to the modest numbers in the profession and the fact that it was not a recognised and registrable profession in the respective states and territories apart from New South Wales prior to 2010, than the nature of the work, or the seniority of the role.
80. The Commission would not accede to the application to exclude oral health therapists from the Award.

Dental Hygienist

¹³ DHAA Submission dated 28 February 2020 [35]

¹⁴ DHAA Submission [36]

81. As set out above, dental hygienists were the subject of award regulation prior to modernisation, albeit not in the private sector.
82. The Commission would give little weight to that fact. For the reasons set out above, a historical absence of award coverage in a particular sector does not prevent modern award coverage.
83. It is apparent from both the New South Wales Awards and the Victorian awards that dental hygienists were considered to be at a level equivalent to that of dental therapists. In New South Wales, the maximum salary available in the classification was lower than the maximum available to dental technicians, dental prosthetists and oral health therapists. The role of dental hygienist is one that would be regarded as especially senior, when regard is had to the skills, qualifications, level of responsibility, and remuneration.
84. The absence of award coverage of dental hygienists in the private sector was more likely due to the limited numbers in the profession, and their patterns of working (in private practice or as independent contractors) than the nature of the work itself, or the seniority of the role.
85. The Commission would not consider it appropriate for dental hygienists to be excluded from Award coverage.

Dental Prosthetists

86. The role of dental prosthetist is one which has emerged from the role of dental technician, and is closely connected with that role. Dental prosthetists either perform their own dental technician work of making the dental prosthetic, or work closely with a dental technician. At least in Queensland, the role of dental prosthetist was regarded as a technical role, rather than a health professional role.
87. The Australian Dental Prosthetists Association does not claim that dental prosthetists have *no* history of award coverage. Rather, they assert there is no history of coverage in the private sector. That assertion is not entirely correct.

Dental prosthetists were covered in Tasmania in the private sector, and, as set out above, in the public sector across several states.

88. The role of dental prosthetist is not of such seniority as to explain its absence from private sector awards. In the New South Wales public sector award, dental prosthetist roles are equivalent to those of senior dental technicians, and a range of mid-level professional roles. In Queensland, the roles are in streams with other health professionals. The profession is not singled out for advancement through the classifications by reason.
89. As set out above, the relative absence of coverage in one sector (that is, the private sector) does not provide a proper basis for excluding a profession from award coverage. The question posed by s.143(7) of the FW Act is whether a *class of employees* has traditionally been covered, not whether a class of employers has been covered. There is no basis in logic or principle why a role which is award covered in a public sector setting should not be award covered in the private sector. The observations above about the Full Bench decision in respect of the *Miscellaneous Award* apply with even greater force to the profession of dental prosthetist.
90. The evidence of the HSU witnesses shows that when they were working in the private sector, the dental prosthetists were more likely to have to undertake their own dental technician work, that is, work at a lower level of skill and requiring less qualification.
91. The absence of dental prosthetists from private sector awards is more likely a consequence of their limited professional numbers¹⁵, and the fact that many of their number in private practice work as independent contractors¹⁶, and thus would not fall within the scope of awards, rather than a product of the seniority or nature of their work. There is nothing intrinsic to the tasks and duties of the dental prosthetist which has been identified which was relied on to deny the

¹⁵ The ADA and ADPA submission notes there were some 1234 registered practicing dental prosthetists in Australia in 2019.

¹⁶ ADA and ADPA submission [4]

profession award coverage pre-modernisation, nor that would amount to a proper basis for resisting modern award coverage now.

92. There is evidence that dental prosthetists are currently considered to be covered by the HPSS Award, despite not being specifically listed in the Schedule. The evidence of Alex Leszczynski is that the Form F17 completed by the Victorian Hospital Industry Association (**VHIA**) reveals that the VHIA considers that Dental Prosthetists covered by the Allied Health Professionals (Victorian Public Health Sector) Single Interest Enterprise Agreement 2016-2020 are aligned to Health Professional Level 1 or 2 of the HPSS Award for the purposes of the Better Off Overall Test.¹⁷

93. The evidence from dental prosthetists is that they consider themselves to be health professionals.¹⁸ As the evidence reveals, dental prosthetists have a unique role to play in improving the overall health of their patients:

*If someone doesn't have their teeth their ability to eat will be affected, their diet may be limited and/or poor, they will likely have low self-esteem, and their overall health may not be great. As a health practitioner we are necessary to improve the overall health of our patients. The work that we do making and fitting someone's dentures is something that no other health professional can do.*¹⁹

*When I attend to a patient, my aim is to improve their overall health. I am helping them to be able to eat, or to smile. Being able to smile again can vastly improve someone's quality of life and health outcomes.*²⁰

94. Additionally, in contrast to the claims of the ADPA and its witness, Jenine Bradburn,²¹ the evidence from the HSU's dental prosthetist witnesses is that they do wish to be covered by the HPSS Award and see value in the protections that award coverage provides.²²

¹⁷ Further Statement of Alex Leszczynski, [5] and AL-3, p344.

¹⁸ Statement of Gregory Roche [24], Statement of Anastasia Staikopoulos [22], Statement of Craig Whitehead, [23], Statement of Anthony Varos [30].

¹⁹ Statement of Anastasia Staikopoulos [22]

²⁰ Statement of Anthony Varos, [30].

²¹ ADPA Submission, [11], Statement of Jenine Anne Bradburn, [20].

²² Statement of Gregory Roche [27]-[28], Statement of Anastasia Staikopoulos [24]-[26], Statement of Craig Whitehead [24].

95. There is evidence before the Full Bench from dental prosthetists working across both public and private sectors who were previously members of the ADPA, but left as they found the ADPA did not represent their interests as employees or provide them with support.²³ The evidence of the HSU's dental prosthetist witnesses shows that they consider the ADPA to represent the interests of self-employed dental prosthetists, but not employees:

*I felt like there wasn't a lot of support or benefit from being a member of the Association once I started working as an employee in the community health sector.*²⁴

*[T]he ADPA is not there to represent the industrial interests of employees, they don't have the interests of employees at heart.*²⁵

Conclusion

96. For the reasons explored above, subsection 143(7) does not compel the exclusion of oral health therapists, dental hygienists or dental prosthetists from the HPSS Award.
97. As set out above, the work of oral health therapists, dental hygienists and dental prosthetists is similar to work that is covered by both the HPSS award and other awards. It is appropriate that employees in those roles be award covered, and that they be covered by the award that otherwise covers health professionals.
98. Absent such coverage, those employees will in any event be covered by the National Employment Standards and the National Minimum Wage. There is no basis in principle or logic for the application of differential and less favourable minimum terms and conditions to those employees than to their fellow health professionals, who are covered by the HPSS award.

²³ Statement of Gregory Roche [23] and [28], Statement of Anastasia Staikopoulos [23], Statement of Craig Whitehead [21]-[22], Statement of Anthony Varos [27]-[29].

²⁴ Statement of Anastasia Staikopoulos [23].

²⁵ Statement of Gregory Roche [28].

99. The exclusion of oral health therapists, dental hygienists or dental prosthetists from the HPSS Award would give rise to the sort of anomalies discussed by the Full Bench in the decision in relation to the *Miscellaneous Award* [2020] FWCFB 754, which is discussed above.
100. It would be inequitable to exclude oral health therapists, dental hygienists and dental prosthetists, while their fellow health professionals, are afforded the higher minimum wages and more robust protections resulting from award coverage. In the current setting given the risk to health professionals arising from the Covid-19 pandemic, and the arrangements in respect of the pandemic which have now been incorporated in Schedule X of the HPSS Award, the importance of consistent treatment of all health professionals becomes more evident.
101. Having regard to the award coverage of other health professionals, the Commission would be satisfied that coverage of the above groups by the HPSS Award would be consistent with the modern awards objective, as it would ensure the application of a fair and relevant minimum safety net of terms and conditions to those employees.

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