

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

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

**Response to applications to vary the *Health Professionals and Support Services Award (HPSS Award) 2010***

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 -

**9 June 2017**

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

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## 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*

#### 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**) 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 23 November 2016.
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 17 March 2017 (**HSU's March 2017 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. The 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;

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- (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 heard.
5. It is noted that, in connection with the Review, a plain-English version of the HPSS Award (**Plain HPSS Award**) has been prepared and the HSU's proposed variations are made by reference to the Plain HPSS Award. In these submissions, where appropriate, ADA Inc makes reference to both the HPSS Award and the Plain HPSS Award.
6. ADA Inc opposes a number of the variations sought to the HPSS Award and provides its reasons for doing so in these submissions. These submissions are structured as follows:
- (a) about ADA Inc (paragraphs 7 and 8);
  - (b) the statutory framework under which the Review is conducted and the Commission's approach to the Review (paragraphs 9 to 18);
  - (c) the HSU's claim relating to whether the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is indicative or exhaustive (paragraphs 19 to 102);
  - (d) the variations sought by the HSU relating to the span of ordinary hours of work for dayworkers under the HPSS Award (paragraphs 103 to 144);
  - (e) the variations sought by the HSU relating to weekend penalties for shiftworkers under the HPSS Award (paragraph 145 );
  - (f) the variations sought by the HSU relating to shift work arrangements under the HPSS Award (paragraphs 146 to 148);
  - (g) the variations sought by the HSU relating to the public holiday provisions of the HPSS Award (paragraph 149); and
  - (h) the variations to the HPSS Award sought by the HSU which are agreed (paragraph 150).

#### **About ADA Inc**

7. ADA Inc is the peak professional body representing dentists in Australia. ADA Inc has 2 main objectives which are the promotion of the art and science of dentistry and to encourage the oral health of Australians. There are branches of ADA Inc in each of the States and Territories of Australia. Membership of ADA Inc is voluntary however, around 73% of all registered

dentists in Australia are members. The membership of ADA Inc is made up of dental students, employer dentists and employee dentists.

8. ADA Inc membership imposes an obligation for members to practice their profession in accordance with the high standards set down by ADA Inc.

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

9. 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.
10. 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 are 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).*

11. 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.*

12. To assist in ensuring the modern awards objective is achieved, the Commission is required to conduct the Review. The Commission's task is 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.*

13. 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**).
14. 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.
15. 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...*
16. 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).

17. 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.*

18. 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 that the list of common health professionals is indicative**

19. 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) 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.
20. ADA Inc submits that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) 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) 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 are addressed below.

21. ADA Inc also 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) as exhaustive:

- (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'*,

should be rejected by the Commission for the reasons set out below.

22. Finally, ADA Inc 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 below.

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

23. ADA Inc submits that there is nothing ambiguous about the language used in Schedule B of the HPSS Award (Schedule A to the Plain HPSS Award) that would mean the list of health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS



Award) 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.

24. 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.*

25. Schedule B to the HPSS Award (Schedule A to the Plain HPSS Award) 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).
26. There are material differences in the language used in paragraphs B.1 and B.2 of Schedule B to the HPSS Award. Paragraph B.1.1 of Schedule B to the HPSS Award (describing a Support Services employee – level 1) relevantly provides:

**Indicative roles at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Assistant gardener</i>	<i>Food and domestic services assistant</i>	<i>Animal house attendant</i>
<i>Car park attendant</i>		<i>CSSD attendant</i>
<i>Cleaner</i>		<i>Darkroom processor</i>
<i>General clerk</i>		<i>Dental assistant (unqualified)</i>
<i>Hospital orderly</i>		<i>Laboratory assistant</i>
<i>Incinerator operator</i>		<i>Medical imaging support</i>

**General and administrative services**

**Food services**

**Technical and clinical**

*Laundry hand*

*Orthotic technician*

*Seamsperson*

*Recording attendant (including EEG & ECG)*

*Social work/Welfare aide*

*Theatre attendant*

(emphasis added).

27. Paragraph B.1.2 of Schedule B to the HPSS Award (describing a Support Services employee – level 2) relevantly provides:

**In addition to level 1, other indicative roles at this level are:**

**General and administrative services**

**Food services**

**Technical and clinical**

*Driver (less than 3 tonne)*

*Diet cook (a person responsible for the conduct of a diet kitchen; an unqualified (non-trade) cook employed as a sole cook in a kitchen.*

*Instrument technician*

*Gardener (non-trade)*

*Personal care worker grade 1*

*General clerk/Typist (between 3 months and less than 1 years service)*

*Housekeeper*

*Maintenance/Handyperson (unqualified)*

*Storeperson*

(emphasis added).

28. Paragraph B.1.3 of Schedule B to the HPSS Award (describing a Support Services employee – level 3) relevantly provides:

**Indicative roles performed at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Driver (less than 3 tonne) who is required to hold a St John Ambulance first aid certificate.</i>	<i>Food monitor (an employee whose primary function is to liaise with patients and staff to obtain appropriate meal requirements of patients, and to tally and collate the overall results).</i>	<i>Instrument technician</i>
<i>General clerk/Typist (second and subsequent years of service)</i>		<i>Laboratory assistant</i>
<i>Receptionist</i>		<i>Personal care worker grade 2</i>
		<i>Theatre technician</i>

(emphasis added).

29. Paragraph B.1.4 of Schedule B to the HPSS Award (describing a Support Services employee – level 4) relevantly provides:

**Indicative roles performed at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Clerk (ward, casualty, medical records etc.)</i>	<i>Trade cook</i>	<i>Dental assistant (qualified)</i>
<i>Driver (3 tonne and over)</i>		<i>Dental technician</i>
<i>Gardener (trade)</i>		<i>Instrument technician (qualified)</i>
<i>Medical imaging administration</i>		<i>Orthotic technician</i>
<i>Printer (trade)</i>		<i>Pathology collector</i>
<i>Security officer</i>		<i>Pathology technician</i>
		<i>Personal care worker grade 3</i>
		<i>Theatre technician (qualified)</i>

(emphasis added).

30. Paragraph B.1.5 of Schedule B to the HPSS Award (describing a Support Services employee – level 5) relevantly provides:

**Indicative roles performed at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Interpreter (unqualified)</i>	<i>Senior cook</i>	<i>Dental assistant</i>
<i>Medical audio typist</i>		<i>Orthotic technician</i>
<i>Medical imaging administration</i>		<i>Pathology collector</i>
<i>Medical stenographer</i>		<i>Personal care worker grade 4</i>
<i>Secretary</i>		<i>Pharmacy technician</i>
		<i>Theatre technician</i>

(emphasis added).

31. Paragraph B.1.6 of Schedule B to the HPSS Award (describing a Support Services employee – level 6) relevantly provides:

**Indicative roles performed at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Computer clerk (advanced)</i>	<i>Chef</i>	<i>Anaesthetic technician</i>
<i>Gardener (advanced)</i>		<i>Pathology collector</i>
<i>Pay clerk (advanced)</i>		<i>Pathology technician</i>
<i>Library technician</i>		<i>Pharmacy technician</i>
<i>Medical imaging administration</i>		
<i>Printer (advanced)</i>		

(emphasis added).

32. Paragraph B.1.7 of Schedule B to the HPSS Award (describing a Support Services employee – level 7) relevantly provides:

**Indicative roles performed at this level are:**

<b><i>General and administrative services</i></b>	<b><i>Food services</i></b>	<b><i>Technical and clinical</i></b>
<i>Gardener superintendent</i>	<i>Food services supervisor</i>	<i>Personal care worker grade 5</i>
<i>General clerical supervisor</i>	<i>Senior chef</i>	<i>Technical and therapy supervisor</i>
<i>General services supervisor</i>		
<i>Interpreter (qualified)</i>		
<i>Medical imaging Administration</i>		

(emphasis added).

33. Paragraph B.1.8 of Schedule B to the HPSS Award (describing a Support Services employee – level 8) relevantly provides:

**Indicative typical duties and skills in this level may include:**

- *operating and having responsibility for a complex and diverse payroll system;*
- *applying detailed knowledge of the organisation's objectives, performance, projected areas of growth, product trends and general industry conditions for the purposes of assisting in developing policy or new products and services to meet changing market needs or other circumstances;*
- *using computer software packages including evaluating and determining optimum software solutions or the integration of complex word processing/data/graphics text;*
- *finalising quotations or costings by applying a detailed knowledge of variable inputs, margins, market conditions, supply and delivery arrangements; or*
- *preparing internal reports for management in any or all of the following areas:*
  - (a) *account/financial;*
  - (b) *staffing;*
  - (c) *legislative requirement; and*
  - (d) *other significant company activities/operations.*

(emphasis added).

34. Paragraph B.1.9 of Schedule B to the HPSS Award (describing a Support Services employee – level 9) relevantly provides:

**Indicative typical duties and skills at this level may include:**

- *supervising staff, setting priorities, monitoring work flow, and the development of strategies or work practices;*
- *having responsibility for the development of appropriate training programmes related to group development;*
- *applying equal employment opportunity and industrial relations principles;*
- *providing advice in relation to personal and career development related to work requirements;*
- *liaising or communicating with clients or other interested groups;*
- *general knowledge of the organisation's operations, combined with specialist knowledge of major activities within the work area; or*
- *being able to investigate interpret or evaluate information where legislation, regulations, instructions or procedural guidelines do not give adequate or specific answers.*

(emphasis added).

35. The introductory paragraph of paragraph B.2 of Schedule B to the HPSS Award (which includes the classification definitions for health professionals) provides:

*A list of common health professionals **which are covered** by the definitions is contained in Schedule C—List of Common Health Professionals.*

(emphasis added).

36. At no time is the word 'indicative' used in paragraph B.2 of Schedule B to the HPSS Award (which includes the definitions for health professionals).
37. Unlike in paragraph B.1 of Schedule B to the HPSS Award (which uses general language such as 'indicative'), paragraph B.2 of Schedule B to the HPSS Award uses definitive language, and specifically the term '*which are covered*', when describing the classes of employees falling within the classification definitions. Given the rules of interpretation detailed in paragraph 24 above, it is submitted that the Commission must accept that in drafting the HPSS Award, the AIRC intentionally used different language in paragraphs B.1 and B.2 of Schedule B to the HPSS Award such that it intended to have the classification definitions operate in a different manner. Further, it is submitted that the Commission should be satisfied that the AIRC, in drafting the HPSS Award, was a sophisticated drafter such that the Commission should apply a more strict interpretation than other types of instruments such as an enterprise agreement (see, for example, *Kucks v CSR Limited* (1996) 66 IR 182).

38. Given the above, ADA Inc submits that the Commission must find, applying conventional rules relating to the interpretation of an industrial instrument, that Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) contains an exhaustive list of health professionals who are covered by the HPSS Award

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

39. 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;*

...

40. 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.

41. 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)*, a copy of which is included as annexure "A". 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).

42. 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).

43. 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.

44. 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).

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

46. 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*

47. 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).

48. 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).
49. 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.

50. 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.*

51. 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.*

52. 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.

53. 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).

54. 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).

55. On 13 February 2009, the HSU filed further submissions with the AIRC, a copy of which are included as annexure “E” (**HSU’s February 2009 Submissions**). 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).

56. 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.

57. On 19 February 2009, Australian Federation of Employers & Industries (**AFEI**) filed submissions with the AIRC, a copy of which are included as annexure "F" (**AFEI February 2009 Submissions**). In relation to the proposed award for health professionals and support services staff, AFEI made the following submission:

2. *AFEI opposes the making of the proposed award for health professionals and support service staff for the following reasons:*

- (i) *it **extends coverage to classes of employees who have traditionally been award free;***
- (ii) *it attempts to group classifications that have previously not been grouped together due to the diversity in the nature of their work and differences in their work environments;*
- (iii) *it does not include a minimum weekly wage structure which includes trainees and students who currently have strong career and wage structures in place;*
- (iv) *the **span of hours proposed are highly restrictive for an industry and for occupations whose services are in demand by the community for extended hours including weekends.***

...

#### **Award-free classifications**

- 4. **AFEI submits that current award-free classifications should not be placed under the Award.**
- 5. *The following classifications which are listed in Schedule B of the Award are not currently covered by an award in Australia: Acupuncturist, Aromatherapist, Counsellor, Exercise Physiologist, Genetics Counsellor, Homeopathist, Musculoskeletal Therapist, Myotherapist, Naturopathist, Osteopath, Pastoral Carer, Play Therapist and Reflexologist. **There are other classifications such as physiotherapists and dentists who are employed by small practices (outside of institutions such as hospitals) and are not currently covered by awards in NSW.***
- 6. **To include all of these health professionals in an award would mean that it would cover classifications previously award-free. Such a result would appear to be directly contrary to clause 2 (a) of the Minister's Request. Specially it would "extend award coverage to those classes of**

employees... who, because of the nature or seniority of their role have traditionally been award free.”

(emphasis added)

58. On 14 February 2009, ADA Inc filed submissions with the AIRC, a copy of which are included as annexure “G” (**ADA Inc’s February 2009 Submissions**). In those submissions, ADA Inc stated:

- 6.14 *It follows that employed Dentists in private practice are a class of employee who have traditionally been award free. Indeed the very power to make the order existed only because they were not subject to an award.*
- 6.15 *Nor can it be said that dentistry is a new industry nor that dentist is a new occupation, thus it is not within the terms of the exception set out in the ministers consolidated request.*
- 6.16 **Accordingly for an Award to apply to employed dentists in the private sector would involve the Commission impermissibly extending award coverage to a class of employees, who, because of the nature or seniority of their role, have traditionally been award free.**
- 6.17 *Even if, contrary to these submissions, the Commission were to hold that the minimum wage order was an award, it is clear that it does not provide for conditions such as those set out at paragraph 6.12 above. To include Dentists in an Award would therefore involve extending those conditions for the first time. The clear and unavoidable inference of extending such conditions is that it must involve an increase in costs not only to employers, but also to the general public.*

(emphasis added).

59. It cannot be contested that ADA Inc brought to the attention of the AIRC that dentists, for instance, were a class health professional over which it would be impermissible for the AIRC to prescribe coverage by a modern award.

60. In February 2009, ADA Inc filed with the AIRC a draft award which ADA Inc proposed should be made. This draft award was titled the *Dental Private Practice Award 2010 (Dental Award)*, a copy of which is included as annexure “H”. The coverage clause of the Dental Award relevantly provided:

#### **4. APPLICATION**

##### **4.1 Coverage of this award**

*This award applies throughout Australia to employers of **employees in the private dental practice sector engaged wholly or principally as dental assistant and dental receptionists.** It also **includes those employees who wholly or partly undertake secretarial, clerical and administrative duties within a dental practice. Dental technicians, dental therapists and dental hygienists are also covered** by the scope of this award.*

(emphasis added).

61. Schedule A to the Dental Award (which set out the proposed classifications) made provision for dental assistants, dental technicians, dental hygienists, dental therapists and dental prosthetists.
62. On 20 March 2009, the HSU filed further submissions with the AIRC, a copy of which are included as annexure "I" (**HSU's March 2009 Submissions**). In relation to the classification structure contained within the Proposed Hybrid Award, the HSU made the following submission:

*The HSU takes this opportunity to briefly add to our earlier submissions and reaffirm our position. **We continue to advocate for one Modern Award to cover the whole of the Health Industry and Health Occupants, this is, an industry/occupation hybrid modern health award. This approach is consistent with the Minister's referral and reduces the number of awards employers need to refer to while continuing to group workers together on an industry basis.***

*We request the "List of Common Health Professionals" contained in Schedule B of the Health Professionals and Support Services Industry and Occupation Award be amended to include "Occupational Therapist" and "Diversional Therapist" as we believe these professions have been accidentally omitted from the exposure draft.*

(emphasis added)

63. On 3 April 2009, the AIRC handed down its decision in *Re: Award Modernisation* [2009] AIRCFB 345 through which the AIRC made the HPSS Award. Importantly, the AIRC did not make a modern award in the form proposed by the HSU. Instead, after accepting submissions from a number of parties about the lack of power for the AIRC to make an award that covered all health professionals, including the AFEI February 2009 Submissions and ADA Inc's February 2009 Submissions, the AIRC made the HPSS Award.
64. In light of the limitations imposed on the AIRC under the Request, the AIRC could not make a modern award that would extend to employees who, because of the nature or seniority of their role, have traditionally been award free. In that context, it is critical to note that while the AIRC was on notice that there were categories of health professionals over which it could not extend coverage of modern awards, and while the AIRC was faced with a claim for a modern award to cover all health professionals, the AIRC did not include a clause in the HPSS Award excluding from its coverage those classes of employees over which the HPSS Award could not have coverage given the terms of the Request. ADA Inc submits that this leads to the inevitable conclusion that the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is an exhaustive list. If this was not the case, the AIRC acted outside of its jurisdiction in making the HPSS Award.
65. The position outlined above is supported by the decision of the AIRC on 24 December 2009 in *Re: Health Professionals and Support Services Award 2010* [2009] AIRCFB 948 in which the AIRC granted an application by the Dental Hygienists Association of Australia Inc (**DHAA**) to



have the profession of 'dental hygienist' removed from Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award). In granting the DHAA's application, the AIRC simply deleted the words 'dental hygienist' from Schedule C to the HPSS Award with the intended effect of removing dental hygienists from the coverage of the HPSS Award. The DHAA's application is discussed in further detail in paragraphs 81 and 82 below.

66. In light of the above, ADA Inc maintains 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 definitively stating the classes of health professionals over which the HPSS Award has coverage.

(c) **HSU's claim that it would lead to confusion, uncertainty and inconsistency**

67. The HSU, at paragraphs 10 and 11 of the HSU's March 2017 Submissions, states:

10. **A logical approach requires the list of health professions in Schedule B to be treated as indicative. To treat it as exhaustive would lead to confusion, uncertainty and inconsistency.** *As the statement of Leszczynski suggests, treating the list as exhaustive could potentially lead to an overly literal, and erroneous, approach which makes illogical distinctions between professional classifications. Some examples are provided below.*

11. *If the list is exhaustive, then at least arguably, an employee whose job was termed 'Remedial Masseur' would be covered by the Award, but an employee performing the same job with the same qualifications, but termed a 'Massage Therapist' would not be, and could arguably be award-free. This would be nonsensical, and would seriously contradict the modern awards objective principle of equal remuneration for work of equal and comparable value.*

(emphasis added).

68. ADA Inc submits that the coverage of the HPSS Award is clear and unambiguous in that the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is an exhaustive list. Further, ADA Inc submits that there is nothing about its interpretation of the HPSS Award that would result in confusion, uncertainty or inconsistency. If a person is working in a health profession listed in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award), the person falls within the coverage of the HPSS Award. Otherwise, the person would not be covered by the HPSS Award. The position could not be simpler.

69. The HSU's March 2017 Submissions demonstrate why the list of health professionals listed in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) must be an exhaustive list in order to ensure there is clarity as to the coverage of the HPSS Award. In paragraph 33 of the HSU's March 2017 Submissions, the HSU acknowledges that the profession of dental hygienists falls outside the coverage of the HPSS Award. Despite this, there is nothing contained within the HPSS Award which expressly excludes dental hygienists from its

coverage. This indicates that the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) must be an exhaustive list. If this were not the case, there would clearly be scope for there to be confusion or uncertainty as to whether the HPSS Award covered a dental hygienist. The only way a person could confirm the position would be to have recourse to a decision of the AIRC, the Commission's predecessor body, a situation surely inconsistent ensuring a simple, easy to understand, stable and sustainable modern award system as part of the Commission achieving the modern awards objective.

70. ADA Inc submits that the HSU is taking an overly pedantic reading to the HPSS Award focusing on technicality rather than substance. The HSU does so by reference to the prospect of a person with the same qualifications and performing the same duties as a Remedial Masseur but employed as a 'Massage Therapist' falling outside the coverage of the HPSS Award because of their position title. As is identified in paragraph 7 of the HSU's March 2017 Submissions, the term 'health professional employee' is not defined in the HPSS Award and, as such, the words attract their ordinary and natural meaning. Similarly, as the HPSS Award does not include definitions for the health professionals listed in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award), they will attract their ordinary and natural meaning. The fact that an employee is given a different title does not affect the nature of the health profession in which they are engaged. Were an employer to engage an employee under a particular novel position title so as to attempt to avoid the coverage of the HPSS Award, they may be engaging in conduct in contravention of section 345 of the FW Act if they made a false or misleading about the employee's workplace right (being whether the employee is entitled to the benefit of the HPSS Award).

71. In light of the above, ADA Inc submits that to ensure certainty as to the coverage of the HPSS Award, the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) must be an exhaustive list, as this would reduce the likelihood of any confusion arising. If a health professional is included in the list contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award), the health professional is covered by the HPSS Award. Otherwise, the HPSS Award will not apply to a health professional. The position is definitive and does not give scope for debate as to whether an employee is a 'health professional' (which the HSU acknowledges is not defined in the HPSS Award).

**(d) HSU's claim that the HPSS Award would be 'stuck' with the health professional nomenclature of a particular point in time, and would quickly become out of date**

72. The HSU submits, at paragraph 25 of the HSU's March 2017 Submissions, that:

*It is our strong view that, given this evolving nature of health professional terminology, the list in the Schedule must be indicative, and should be clarified to be such. Otherwise, the HPSS Award would be stuck with the health professional*

*nomenclature of a particular point in time, and would become quickly out of date, not adequately reflecting contemporary terminology and health and medical advances*

73. The HSU's submission ignores the various mechanisms contained within the FW Act to ensure that a modern award, such as the HPSS Award, remains current.
74. As noted above, the modern awards objective, as set out in section 134 of the FW Act, requires that the Commission provide a fair and relevant minimum safety net of terms and conditions. The FW Act provides a number of mechanisms to assist the Commission to do so. Relevantly:

- (a) under Division 4 of Part 2-3 of the FW Act, the Commission is required to review all modern awards every 4 years (and, by virtue of section 134 of the FW Act, in doing so, the Commission is required to ensure that the modern awards objective is achieved); and
- (b) under Division 4 of Part 2-3 of the FW Act, the Commission has the power, either on its own initiative or on by application, to vary a modern award outside of the 4-yearly review process:
  - (i) if this is necessary to achieve the modern awards objective (section 157 of the FW Act); or
  - (ii) to remove an ambiguity or uncertainty (section 160 of the FW Act).

75. In light of the mechanisms within the FW Act for a modern award to be varied to achieve the modern awards objective, either as part of the structured Review or outside of that process, and the need for the Commission to ensure, as part of achieving the modern awards objective, that a modern award provides for a relevant minimum safety net of terms and conditions, ADA Inc submits that there is a more than adequate opportunity for any changes to the titles of health professionals to be addressed. This position is reinforced given the limitations on the ability of the Commission to vary a modern award so that particular employees are no longer covered as discussed in paragraphs 77 to 80 below.

(e) **HSU's claim that it would result in the removal from award coverage of health professionals who have hitherto been regarded as covered by the HPSS Award**

76. The HSU submits, at paragraph 29 of the HSU's March 2017 Submissions, that:

*To regard the Schedule as exhaustive would have undesirable and anomalous consequences, including the removal from award coverage of health professionals who have hitherto been regarded as covered by the HPSS Award.*

77. That submission demonstrates a fundamental misunderstanding of the powers of the Commission when varying a modern award, including as part of the Review.

78. Section 163 of the FW Act relevantly provides:

**163. Special criteria relating to changing coverage of modern awards**

*Special rule about reducing coverage*

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

79. If the HSU's submission is correct, in that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is an indicative list rather than an exhaustive list, the Commission would be unable to vary the HPSS Award to remove coverage of health professionals who had previously been covered by the HPSS Award as the HSU has claimed. It is expressly prohibited from doing so under section 163(1) of the FW Act unless those employees (or employers) would otherwise be covered by another modern award.

80. To put it simply, either the health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) are the only employees covered by the HPSS Award (which, for the reasons outlined in these submissions, is the correct position) or they are not (in which case the Commission cannot vary the HPSS Award so that any health professionals falling within the descriptions set out in paragraphs B.2 of Schedule B to the HPSS Award (paragraph A.1 of Schedule A to the Plain HPSS Award) are no longer covered by it). There are no circumstances in which the Commission can remove modern award coverage for an employee.

81. The HSU has sought to have the Commission disregard the decision of the AIRC in *Re: Health Professionals and Support Services Award 2010* [2009] AIRCFB 948 in which the AIRC granted an application by the DHAA to have the profession of 'dental hygienist' removed from Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award).

82. A copy of the DHAA's application is included as annexure "J" to these submissions. The grounds on which the DHAA relied in making the application (being grounds which were squarely brought to the attention of the AIRC in considering the application despite the fact that the AIRC made orders consistent with the application without opposition from any party) make it abundantly clear that the DHAA's intention in making the application was to remove dental hygienists from the coverage of the HPSS Award. While the DHAA's application may have been unopposed, the AIRC understood the effect of the variation sought by the DHAA and granted the DHAA's application. If the AIRC intended the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) to be an indicative list rather than an exhaustive list, the variation to the HPSS Award

made by the AIRC would not have had the effect intended and, instead, the AIRC would have included a provision in the HPSS Award expressly excluding dental hygienists from its coverage. ADA Inc submits that this definitively supports its position that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is an exhaustive list. Therefore the ADA supports the DHAA's submissions. So specifically, the ADA supports the award-free status of dental hygienists that occurred as a consequence of the Dental Hygienists Association's application to Australian Industrial Relations Commission in 2009, to have the occupation rendered award free. The ADA is fully aware that the AIRC Full Bench's action to effect this decision to vary was an Order (MA000027 PR991493) to remove "dental hygienist" from the List of Common Health Professionals in the Award. The drafting of this Order is evidence that the Full Bench in 2009 interpreted the List of Common Health Professionals as being "exhaustive" rather than "indicative". The ADA certainly agrees with this interpretation. Again considering this then in summary the ADA's submission is that the List of Common Health Professionals can only be "exhaustive", not "indicative" and that any party that wishes to delete or add an occupation to the current list (or update the occupational description) should do so via the normal statutory award variation channels. This has been the process that has been undertaken in the past by those seeking to vary coverage in a modern award before the FWC.

83. In light of the above, ADA Inc submits that the HSU's submission that employees who have hitherto been covered by the HPSS Award would no longer have award coverage must be rejected by the Commission. Further, the concessions and acknowledgements by the HSU in the HSU's March 2017 Submissions in relation to the HPSS Award having no application to a dental hygienist supports ADA Inc's submission that the list of common health professionals contained within Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is exhaustive – if this were not the case, dental hygienists would fall within the coverage of the HPSS Award (as there is no specific exclusion for dental hygienists within the HPSS Award).

(f) **HSU's claim that it would contradict the principle of protecting the relative living standards and needs of the low paid**

84. The HSU, at paragraph 32 of the HSU's March 2017 Submissions, states:

*If the Commission accepts the submissions by several of the employer groups that the list is exhaustive, then the effect will be to disenfranchise any employee who is not employed in one of the specifically named health professions in the Schedule. That is, it would create an expanding group of employees that are excluded from modern award coverage except under the Miscellaneous Award 2010. This would also be in contradiction of the principle of protecting the relative living standards and needs of the low paid.*

85. The HSU's submission is predicated on an assumption that health professionals are low paid when the evidence before the Commission demonstrates that in many instances, this is not

the case. For instance, according to the recent graduate salaries report published in 2015, dentistry was ranked as having the highest median starting salary in the public health sector and the professional practice sector, with a median starting salary of \$80,000. It could not be said that it was necessary to extend coverage of the HPSS Award to include dentists, a class of health professionals, to protect the needs of the low paid.

86. In light of the above, ADA Inc submits that the need to protect the living standards and needs of the low paid is not a determinative consideration in determining whether the list of health professionals in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is exhaustive or inclusive when achieving the modern awards objective.

**(g) HSU's claim that it would seriously contradict the modern awards objectives in that it could potentially exclude from coverage emerging health professions**

87. The HSU, at paragraph 23 of the HSU's March 2017 Submissions, states:

*The HSU is of the view that clarifying the list as an indicative one will be of value to emerging health professions whose professional titles have emerged in recent years. It will work to minimise confusion about award coverage, and ensure that employers do not take advantage of the lack of certainty to argue that a health professional employee would not be covered by the award, or would be award-free. It is our view that it was not the Award's intention, nor would it be in accordance with the modern awards objective, to potentially exclude from coverage emerging health professions, such as the examples we have provided, by labelling the list of health professions in the Schedule as exhaustive.*

88. ADA Inc submits that if the list of health professionals in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is exhaustive, this does not mean that emerging health professionals are excluded from the coverage of the HPSS Award. All it means is that the coverage of the HPSS Award has not been extended to include those health professionals. There would be scope for the coverage of the HPSS Award to be extended to provide coverage for health professionals at any time if it was necessary to meet the modern awards objectives.

89. ADA Inc submits that before the Commission extends the coverage of a modern award to include classes of workers who have not previously been covered by a modern award (whether this is because their occupation or industry is emerging or otherwise), it is appropriate for the Commission to consider the characteristics of the occupation or industry. This allows the Commission to be satisfied that it is necessary to extend the coverage of a modern award to ensure that the modern awards objective is achieved. Specifically, it allows the Commission to consider whether the modern award, along with the NES, would provide a fair and relevant minimum safety net of terms and conditions for the occupation or industry concerned. Such an approach allows the Commission to consider matters such as flexible modern work practices, the principle of equal remuneration for work of equal value, any

potential overlap of modern awards and the likely impact of modern award coverage on business, including on productivity, employment costs and regulatory burden, to ensure that the modern awards objective is achieved.

90. Accordingly, ADA Inc submits that the list of health professionals in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) being exhaustive would not result in the exclusion from modern award coverage of emerging health professionals such that it is not necessary to vary the HPSS Award to ensure the modern awards objective is achieved.

**(h) HSU's claim that future employers could persuade the Commission why a particular professional group should fall outside coverage**

91. The HSU, at paragraph 35 of the HSU's March 2017 Submissions, states:

*Furthermore, if the professions in Schedule B are treated as indicative, future employers and professional groups will retain the capacity to persuade the Commission why a particular professional group should fall outside coverage, having regard to the principle in s.134(1)(g) of the Act. Any such application may then be considered on its own merits. The starting point, however, should be that all professions are covered.*

92. As outlined in paragraphs 77 to 80 above, the FW Act limits the Commission's modern award powers so that the Commission cannot vary a modern award such that employees who are covered by the modern award cease to be covered by the modern award unless the Commission is satisfied that the employees will be covered by another modern award.

93. In light of this, the HSU's submission cannot be accepted by the Commission. If the list of health professionals in Schedule C of the HPSS Award (Schedule B to the Plain HPSS Award) is not an exhaustive list, there would be no scope for a class of health professionals to fall outside the coverage of the HPSS Award as the result of an application by future employers or professional groups; all health professionals, regardless of whether they are new and emerging or established and stable, will be covered by the HPSS Award as soon as they come into existence and the FW Act does not give the Commission the power to remove that coverage.

94. Despite the inconsistency between paragraph 35 of the HSU's March 2017 Submissions and the limitations imposed under the FW Act, the HSU's March 2017 Submissions include an important acknowledgement by the HSU that not all health professionals should fall within the coverage of the HPSS Award. In fact, while the HSU acknowledges that in appropriate circumstances, certain classes of health professionals should not be covered by the HPSS Award, in paragraph 34 of the March 2017 HSU Submissions, the HSU specifically confirms it is not opposed to a clause excluding dental hygienists from the coverage of the HPSS Award.

95. In light of the limitations which are imposed on the Commission when varying a modern award, ADA Inc submits it would be entirely inappropriate, and inconsistent with the reasonable and pragmatic acknowledgement of the HSU, for all health professionals to be covered by the HPSS Award such that this is *'the starting point'*. If anything, this supports ADA Inc's submission that the list of health professionals contained in Schedule C to the HPSS Award (Schedule B to the Plain HPSS Award) is, and should remain, an exhaustive list.

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

96. 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.

97. 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.

98. 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.

99. 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) to be indicative for the modern awards objective to be achieved.

### **Summary and conclusion**

100. 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) 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.
101. 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.
102. 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) 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 span of ordinary hours under the HPSS Award**

103. 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 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 6:00 am and 6:00 pm, Monday to Friday.
104. 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 under the HPSS Award, as currently provided:
  - (a) is confusing and has not resulted in a simple and easy to understand system;
  - (b) it is not sustainable to allow for separate spans of hours for certain practice types;

- (c) is inconsistent with the 'core' modern awards objective of providing 'a fair and relevant minimum safety net';
- (d) is inconsistent with the modern awards objective of encouraging collective bargaining; and
- (e) is inconsistent with the modern awards objective of providing additional remuneration for employees working shifts and overtime.

105. For the reasons set out below, ADA Inc submits that each of the HSU's submissions should be rejected by the Commission.

106. ADA Inc also submits that the Commission should decline to vary the span of ordinary hours provisions of the HPSS Award for dayworkers in the manner sought by the HSU having regard to the following matters relevant to the modern awards objectives:

- (a) the relative living standards and the needs of the low paid;
- (b) promoting flexible modern work practices and the efficient and productive performance of work
- (c) the likely impact on business, including on productivity, employment costs and the regulatory burden,

each of which are addressed further below.

(a) **HSU's claim that the span of hours provisions of the HPSS Award is confusing and has not resulted in a simple and easy to understand system**

107. The HSU, at paragraphs 39 to 41 of the HSU's March 2017 Submissions, states:

- 39. *As part of the modern awards objective, the FWC must consider the need to ensure a simple, easy to understand, stable and sustainable modern award system.*
- 40. *Part of the purpose of the development of Modern Awards was to rationalise the number of industrial instruments. An outcome of the process was standardisation of terms and conditions, meaning parties were required to accept some alteration to past conditions in the name of greater uniformity and simplicity within an industry.*
- 41. *The HSU submits that clause 8.2 is unnecessarily convoluted in that it provides for 5 different spans of hours. Allowing for so many exceptions and alternatives in this clause is confusing to the reader, and undermines the purpose of the award modernisation process, which is to create a simple and easy to understand system.*

108. ADA Inc does not agree that the span of ordinary hours provisions of the HPSS Award for dayworkers is confusing and relies on the evidence of each of its witnesses in doing so.

109. ADA Inc submits that if the Commission finds that the span of ordinary hours provisions of the HPSS Award for dayworkers is confusing (which, ADA Inc maintains is not the case in light of the evidence it has led), the Commission could adequately address this confusion by redrafting clause 8.2 of the Plain HPSS Award as follows:

**8. Ordinary hours of work and rostering**

**8.1 Ordinary hours**

- (a) *The ordinary hours of work for a full-time employee are an average of 38 hours per week in a fortnight or four week period.*
- (b) *Not more than 10 ordinary hours of work (exclusive of meal breaks) are to be worked in any one day.*

**8.2 Span of hours – dayworkers**

- (a) *Unless performing work in a private medical, dental or pathology practice (in which case paragraph (b) applies), in a private medical imaging practice (in which case paragraph (c) or (d) applies) or in a physiotherapy practice (in which case paragraph (e) applies), ~~t~~The ordinary hours of work for a day worker are worked between 6.00 am and 6.00 pm, Monday to Friday, unless otherwise stated.*

**(b) Private medical, dental and pathology practices**

*The ordinary hours of work for a day worker in private medical, dental and pathology practices are worked between:*

- (i) *7.30 am and 9.00 pm, Monday to Friday; and*
- (ii) *8.00 am and 4.30 pm on Saturday.*

**(c) Private medical imaging practices—five and a half day practices**

*Where a practice services patients on a five and a half day a week basis, the ordinary hours of work for an employee are worked between:*

- *7.00 am and 9.00 pm, Monday to Friday; and*
- *8.00 am and 1.00 pm on Saturday.*

**(d) Private medical imaging practices—seven day practices**

- (i) *Where a practice services patients on a seven day a week basis, the ordinary hours of work for an employee at that location are worked between 7.00 am and 9.00 pm, Monday to Sunday.*

(ii) *Payment for weekend work under clause 8.2(d)(i) is paid in accordance with clause 18.2.*

(e) **Physiotherapy practices**

*In physiotherapy practices, the ordinary hours of work for a day worker will be worked between:*

(i) *6.00 am and 6.00 pm, Monday to Friday; and*

(ii) *6.00 am to 12.00 noon on Saturday.*

110. Such a variation would address any concern that could possibly be held by the HSU as to whether the span of hours provisions of the HPSS Award is confusing meaning that there is no need to remove the alternate span of hours included in the HPSS Award for specific, identified sectors.

(b) **HSU's claim that it is not sustainable to allow for separate spans of hours for certain practice types**

111. The HSU, at paragraphs 42 and 43 of the HSU's March 2017 Submissions, states:

42. *Further, it is not stable or sustainable to allow for separate spans of hours for a handful of certain health and medical practice types. It is not clear why these workplaces are particularly special cases. Moreover, as we have seen in the four year review process, other parties to these proceedings have made claims for further separate iterations of these spans of hours. If granted, the number of possible spans of hours in this clause could balloon to 12, providing for even greater unnecessary convolution.*

43. *The HSU submits that the span of hours clause in the HPSS Award should not diverge so greatly from the other health awards in the modern award system. The HSU has based its draft clause on the Nurses Award, which provides that ordinary hours for a day worker will be between 6:00am and 6:00pm from Monday to Friday, with employees regularly rostered to work outside the span of hours to be defined as shiftworkers. The Aged Care Award provides for a similar span of hours clause, as does the Medical Practitioners Award 2010 (with only one exception for Senior Doctors).*

112. The grounds adopted by the HSU in supporting its claim for a variation to the span of ordinary hours in the HPSS Award for dayworkers are, with the exception of the HSU's claim that the provisions are confusing (which, ADA Inc submits is not the case for the reasons outlined in paragraphs 108 and 109) and that applications have been made by other practice types to vary the span of hours of the HPSS Award (which, ADA Inc submits should not be a relevant consideration and each application must be considered on its own merits to ensure that the modern awards objective is achieved), the same as those advanced by the HSU in the AIRC's award modernisation proceedings which resulted in the making of the HPSS Award. Up until the making of the HPSS Award, the HSU sought to have employees covered by the HPSS Award and the *Nurses Award 2010* covered by the same modern award with the same

ordinary hours of work. The HSU seeks to now achieve effectively the same outcome through a variation to the HPSS Award.

113. Section 576A of the WR Act imposed obligations on the AIRC in making modern awards. Section 576A of the WR Act relevantly provided:

**576A Object of Part**

- (1) *The object of this Part is to provide for the Commission to make modern awards in accordance with an award modernisation request.*
- (2) *Modern awards:*
- (a) *must be **simple to understand and easy to apply**, and must reduce the regulatory burden on business; and*
  - (b) *together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and*
  - (c) *must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and*
  - (d) *must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and*
  - (e) *must result in a certain, **stable and sustainable modern award system** for Australia.*

(emphasis added).

114. When released by the AIRC on 23 January 2009, the First Exposure Draft provided, in relation to private dental practices:

*The ordinary hours of work for a full-time day worker will be worked between 7.30 am and 9.00 pm Monday to Friday and between 8.00 am and 4.30 pm on Saturday.*

115. When the AIRC ultimately made the HPSS Award, it retained the specific hours for private dental practices, despite the HSU's ongoing submission that all health professions should have the same span of ordinary hours of work for dayworkers. In *Re: Award Modernisation* [2009] AIRCFB 345, the decision of the AIRC making the HPSS Award, the AIRC stated:

*[154] Particular submissions were made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors. Whilst some rationalisation has taken place we have sought to maintain a specific spread in these areas.*

116. In making the HPSS Award, the AIRC was specifically required to have regard to the matters referred to by the HSU in paragraph 39 of the HSU's March 2017 Submissions. In the HSU's

March 2017 Submissions, the HSU raises those matters again, on the same basis, despite the ultimate decision of the AIRC in making the HPSS Award.

117. The HSU has raised no new grounds as to why it is not sustainable to maintain a separate span of ordinary hours for dayworkers engaged in particular professions and has simply raised again grounds which were considered but ultimately did not persuade the AIRC when the HPSS Award was first made. In the circumstances, ADA Inc submits that the HSU's submission should be disregarded and that the HSU's proposed variation to the span of ordinary hours of the HPSS Award for dayworkers is not necessary to achieve the modern awards objective.

(c) **HSU's claim that the span of hours provisions of the HPSS Award is inconsistent with the 'core' modern awards objective of providing 'a fair and relevant minimum safety net'**

118. The HSU, at paragraph 44 of the HSU's March 2017 Submissions, states:

*The existence of multiple spans of hours in this award, and the further applications for even more possible spans, tends to suggest that there has been a departure from the core modern awards objective of providing a "fair and relevant minimum safety net" and a tendency to seek, in an award context, outcomes that should be the subject of bargaining. The inclusion of extended and specialised spans is, in the HSU's submission, contrary to the modern award objective at s. 134(1)(b) of the Act the need to encourage collective bargaining.*

119. ADA Inc submits that the inclusion of multiple spans of ordinary hours in the HPSS Award for dayworkers does not depart from the modern awards objective of providing a fair and relevant minimum safety net. In fact, ADA Inc submits that including multiple spans of ordinary hours in the HPSS Award for dayworkers ensures that the HPSS Award provides a relevant minimum safety net. Evidence led by ADA Inc has clearly demonstrated a need in the private dental industry for employees to ordinarily be engaged after 6:00 pm during the week and on Saturdays. Making provision for this in the HPSS Award ensures that the HPSS Award provides a relevant minimum safety net for the private dental industry in Australia given its particular characteristics and the needs of the community as a whole.
120. In these circumstances, ADA Inc submits that the variations to the span of ordinary hours provided for in the HPSS Award for dayworkers proposed by the HSU would not have the result of ensuring a fair and relevant safety net and, instead, would have the effect of reducing the relevance of the HPSS Award to the private dental industry. Accordingly, ADA Inc submits that that the HSU's proposed variation to the span of hours of the HPSS Award is not necessary to achieve the modern awards objective.

(d) **HSU's claim that the span of hours provisions of the HPSS Award is inconsistent with the modern awards objective of encouraging collective bargaining**

121. As noted in paragraph 118 above, the HSU, at paragraph 44 of the HSU's March 2017 Submissions, states:

*The existence of multiple spans of hours in this award, and the further applications for even more possible spans, tends to suggest that there has been a departure from the core modern awards objective of providing a "fair and relevant minimum safety net" and a tendency to seek, in an award context, outcomes that should be the subject of bargaining. The inclusion of extended and specialised spans is, in the HSU's submission, contrary to the modern award objective at s.134(1)(b) of the Act the need to encourage collective bargaining.*

122. ADA Inc submits that encouraging collective bargaining in the context of the Commission achieving the modern awards objective does not mean that the Commission, in exercising its modern award powers, should vary a modern award so as to not reflect the prevailing conditions in a particular industry (which, in the case of the private dental industry, is discussed in paragraphs 129 and 130 below) so that employers are compelled to collectively bargain.

123. The variation to the span of ordinary hours in the HPSS Award for dayworkers sought by the HSU would have the effect of prohibiting employers in the private dental sector in Australia from engaging employees to perform work at times when those employer currently do, and historically have done, without either engaging the employees as shiftworkers or being compelled to collectively bargain. This goes much further than the consideration in achieving the modern awards objective of the need to encourage collective bargaining and, instead, imposes a significant regulatory burden on employers, departing from other factors relevant to the Commission achieving the modern awards objective.

124. In these circumstances, ADA Inc submits that the variations to the span of ordinary hours provided for in the HPSS Award for dayworkers proposed by the HSU would not have the result of encouraging collective bargaining such that the proposed variations would further achieve the modern awards objective and that the HSU's proposed variation to the span of ordinary hours of the HPSS Award for dayworkers is not necessary to achieve the modern awards objective.

(e) **HSU's claim that the span of hours provisions of the HPSS Award is inconsistent with the modern awards objective of providing additional remuneration for employees working shifts and overtime**

125. The HSU, at paragraphs 45 and 46 of the HSU's March 2017 Submissions, states:

45. *A fair minimum standard would provide that an employee who is employed as a day worker is entitled to overtime if they are rostered to work, or work*

*outside the span of hours. An employee who is employed as a shift worker should be entitled to shift, weekend or public holiday rates unless they are working excess hours.*

46. *The HSU submits that the span of hours should be defined as those hours within which work is performed by non-shiftworkers and during what are broadly regarded as normal working hours. Hours that fall outside these hours would constitute ordinary hours of work for a shift worker, and attract penalties or loadings depending on the time and/or day. Each penalty or loading would be determined by where the hours worked fall within the day or week, regardless of which employer for whom an employee works.*

126. ADA Inc submits that the HPSS Award already provides for additional remuneration in a manner appropriate and relevant for the private dental sector.

127. The HPSS Award already makes provision for additional remuneration for employees working shifts, overtime, unsocial or irregular hours, or on weekends or public holidays. Specifically, and relevantly for dental practices, the HPSS Award provides:

- (a) for an employee engaged as a day worker:
  - (i) to receive an additional 50% loading for all work performed between midnight Friday and midnight Sunday (clause 26.1 of the HPSS Award and clause 18.1 of the Plain HSPP Award);
  - (ii) to be paid at the rate of time and a half for the first 2 hours, and double time thereafter, for all hours worked outside of an employee's ordinary hours (unless worked on a Sunday in which case it is paid at the rate of double time) (clause 28.1 of the HPSS Award and clause 19.2 of the Plain HSPP Award); and
  - (iii) to be paid at double time and a half for all time worked on a public holiday (clause 32.2 of the HPSS Award and clause 23.1 of the Plain HSPP Award).
- (b) for an employee who meets the definition of a shift worker under the HPSS Award:
  - (i) to receive an additional 15% loading if the employee's rostered hours finish between 6:00 pm and 8:00 am, or commence between 6:00 pm and 6:00 am (clause 29 of the HPSS Award and clause 18.4 of the Plain HSPP Award);
  - (ii) to be paid at the rate of time and a half for the first 2 hours, and double time thereafter, for all hours worked outside of an employee's ordinary hours (unless worked on a Sunday in which case it is paid at the rate of double time) (clause 28.1 of the HPSS Award and clause 19.2 of the Plain HSPP Award); and



- (iii) to be paid at double time and a half for all time worked on a public holiday (clause 32.2 of the HPSS Award and clause 23.1 of the Plain HSPP Award).

128. Clearly, the HPSS Award already provides for additional remuneration for working overtime, unsocial or irregular hours, on weekends or public holidays and, for the reasons below, for working shifts.

129. ADA Inc submits that the concept of employees working shifts should be construed having regard to the accepted nature of the ordinary hours of work in a particular industry. In the case of the private dental industry, having regard to the terms of the awards that had application to dental practices before the making of the HPSS Award, it is clear that the accepted ordinary hours of work in the private dental industry included work on evenings and Saturday work. Specifically:

(a) AP779110CRV – the *Dental (Private Sector Victoria) Award 1998*, 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;

(b) AP822941 – the *Health Employees (Dental Health Services) Award 2003*, permitted ordinary hours to be worked at any time Monday to Friday (although this award only applied to the Metropolitan Health Service and Dental Health Service);

(c) AN140090 – the *Dental Assistants (Private Practice) Award – State*, permitted ordinary hours to be worked as follows:

(i) 7:30 am to 9:00 pm Monday to Friday; and

(ii) 7:30 am to 4:30 pm Saturday;

(d) AN120180 – the *Dental Technicians (State) Award 2006*, permitted ordinary hours to be worked as follows:

(i) 7:00 am to 7:00 pm Monday to Friday; and

(ii) 7:00 am to 7:00 pm Saturday;

(e) AN120179 – the *Dental Assistants and Secretaries (State) Award*, permitted ordinary hours to be worked as follows:

(i) 8:00 am to 6:00 pm Monday to Friday although an employer could roster hours until 8:00 pm on 3 nights each week; and

- (ii) 8:00 am to 12:00 noon Saturday;
- (f) AN140091 – the *Dental Technicians' Award – State 2002*, permitted ordinary hours to be worked as follows:
- (i) 7:30 am to 9:00 pm Monday to Friday; and
  - (ii) 7:30 am to 4:30 pm Saturday;
- (g) AN160098 – the *Dental Technicians' and Attendant/Receptionists' Award, 1982*, permitted ordinary hours to be worked as follows:
- (i) 7:30 am to 9:00 pm Monday to Friday; and
  - (ii) 8:00 am to 1:00 pm Saturday;
- (h) AN170025 – the *Dentists Award*, permitted ordinary hours to be worked as follows:
- (i) 7:30 am to 9:00 pm Monday to Friday (although Dental Technicians and Apprentices cannot work past 6:00 pm; and
  - (ii) 8:30 am to 12:00 noon Saturday;
- (i) AN150045 – the *Dental Technicians and Attendants Award*, permitted ordinary hours to be worked as follows:
- (i) in the case of Dental Technicians, 8:00 am and 5:30 pm (although by agreement at any time between 6:00 am and 6:30 pm); and
  - (ii) in the case of Dental Attendants:
    - (A) 8:00 am to 6:30 pm Monday to Friday; and
    - (B) 8:00 am to 12:00 noon Saturday;
- (j) AP773032CRV – the *Clerical and Administrative Employees (Victoria) Award 1999*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked as follows:
- (i) 7:00 am to 6:30 pm Monday to Friday (although this could be altered by up to 1 hour at either end by agreement); and
  - (ii) 7:00 am to 12:30 pm Saturday;

- (k) AP772208CRA – the *Clerks (ACT) Award 1985*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked between 7:30 am to 6:00 pm Monday to Friday (although this could be altered by agreement anytime between 6:00 am to 7:30 pm);
- (l) AP839196CRN – the *General Clerks (Northern Territory) Consolidated Award 1985*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked as follows:
  - (i) 7:00 am to 6:00 pm Monday to Friday; and
  - (ii) 7:30 am to 12:00 noon Saturday; however
  - (iii) if the employee’s duties were ancillary to those of the employer’s main business, the spread of hours that applied in the main business would apply;
- (m) AN120664 – the *Clerical and Administrative Employees (State) Award*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked as follows:
  - (i) 6:00 am to 7:00 pm Monday to Friday; and
  - (ii) 6:00 am to 12:00 noon Saturday;
- (n) AN140067 – the *Clerical Employees Award – State*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked as follows:
  - (i) 6:30 am to 6:30 pm Monday to Friday (although this could be altered by agreement); and
  - (ii) 6:30 am to 12:30 pm Saturday;
- (o) AN170017 – the *Clerical and Administrative Employees (Private Sector) Award*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked between 7:00 am to 6:30 pm Monday to Friday;
- (p) AN150039 – the *Clerks (South Australia) Award*, noting that this award had general application rather than specific application to the private dental industry, permitted ordinary hours to be worked between 6:00 am to 12:00 midnight Monday to Friday; and

(q) AN160066 – the *Clerks (Commercial, Social and Professional Services) Award*, noting that this award had a more general application rather than specific to the private dental industry, permitted ordinary hours to be worked on five days of the week and permitted hours to be worked:

(i) Monday to Friday; and

(ii) Saturday.

130. It is apparent that the majority of the awards that applied to private dental practices, particularly those awards that had specific application to the private dental industry, made provision for ordinary hours to be worked of an evening or on Saturdays. In those circumstances, it is submitted that it cannot be claimed that employees performing work within those accepted ordinary hours are working 'shifts'.

131. Having regard to the above, and the lack of any explanation from the HSU as to why the HPSS Award, given the additional remuneration provided for working weekends, overtime, unsocial or irregular hours, on public holidays and shift work (in the proper sense of the term), does not meet the modern awards objective as claimed, ADA Inc submits that this factor would tend to indicate that the modern awards objective has been achieved and that the HSU's proposed variation to the span of ordinary hours of the HPSS Award for dayworkers is not necessary to achieve the modern awards objective.

(f) **The relative living standards and needs of the low paid**

132. ADA Inc submits that the HSU has failed to have regard to the relative living standards and needs of the low paid, including those who are not necessarily employees covered by the HPSS Award, in proposing the variations to the HPSS Award.

133. The evidence of Eithne Irving, Deputy Chief Executive Officer and General Manager of Policy of ADA Inc, details the difficulties faced by the public in accessing dental services in Australia and a number of initiatives that have been initiated by government to address the oral health needs of Australians, particularly for those who are low paid. Full details are set out in Ms Irving's evidence however, it is fair to say that Australia is facing an oral health crisis and that increasingly, persons from poorer socio-economic backgrounds are unable to access the dental services they need. There already can be difficulties in individuals accessing dental services and the evidence demonstrates that there is a greater demand for these services of an evening and on weekends than the market can currently supply.

134. The private practice dental industry in Australia is facing a number of challenges. In an economic environment where certain socio-economic demographics of the Australian public already have difficulties in accessing to dental services, either because of limited evening and

weekend trading or for financial reasons, and where costs are increasing and the rebates and assistance available to private dental practices is generally stagnating and not reflecting the increase in costs that are incurred, the Commission should be reluctant to make changes to the HPSS Award which would increase the costs of operating a dental practice, or limit the ability of the public to access these critical health services. This is particularly the case for lower paid workers who may be unable to afford time off work to access dental services during the week day

135. In light of the above, ADA Inc submits that limiting the span of ordinary hours of the HPSS Award for dayworkers would have a significant detrimental impact on the low paid. There would likely be less appointments available for individuals to access dental appointments and, given the barriers to obtain dental services already in place, costs may increase. ADA Inc 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, and in fact is unnecessary, to ensure the modern awards objective is achieved.

**(g) Promoting flexible modern work practices and the efficient and productive performance of work**

136. ADA Inc submits that the HSU has failed to have regard to the fact that varying the span of ordinary hours in the HPSS Award for dayworkers as sought by the HSU would be inconsistent with the promotion of flexible modern work practices by the Commission in the exercise of its modern award powers such that the Commission would not be achieving the modern awards objectives.
137. ADA Inc has led evidence detailing the nature of modern work practices in the private dental industry. Specifically, the industry is an industry which does, and historically has, operated such that ordinary hours are worked of an evening and on Saturdays. Further, there is a community expectation that dental practices will provide services of an evening and on Saturdays. In those circumstances, varying the span of ordinary hours of the HPSS Award for dayworkers so that ordinary hours in a dental practice cannot be worked by a day worker of an evening or on a Saturday cannot be said to be promoting flexible modern work practices. The effect would in fact be the opposite.
138. In light of the above, ADA Inc submits limiting the span of ordinary hours under the HPSS Award for dayworkers would not promote modern work practices. ADA Inc submits that this factor weighs 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.

(h) **The likely impact on business, including on productivity, employment costs and the regulatory burden**

139. ADA Inc submits that the HSU has failed to have regard to the fact that varying the span of ordinary hours in the HPSS Award for dayworkers as sought by the HSU would be likely to have a negative impact of productivity for business, increasing employment costs and the regulatory burden.
140. The evidence led by ADA Inc makes it clear that the change to the span of ordinary hours in the HPSS Award for dayworkers proposed by the HSU would result in an increase in employment costs. There can be no other consequence as a result of shortening the span of ordinary hours of work. Further, the evidence led by ADA Inc confirms that in an industry with tightening margins, employers would need to consider their operational models to determine if their hours of trade remained viable. It is clear that the HSU's proposed variations to the span of ordinary hours of the HPSS Award for dayworkers will increase the regulatory burden on business.
141. In light of the above, ADA Inc submits limiting the span of ordinary hours under the HPSS Award for dayworkers would have a negative impact on business, increasing employment costs and regulatory burden with the potential for a negative impact on productivity. ADA Inc 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.

**Summary and conclusion**

142. 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.
143. 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 working in particular industry sectors.
144. 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 to vary the weekend penalties under the HPSS Award for shiftworkers**

145. ADA Inc neither supports, nor opposes, the HSU's proposed variation to the HPSS Award relating to whether shiftworkers are entitled to receive a shift loading for hours worked on a Saturday and/or Sunday as detailed in paragraphs 49 to 54 of the HSU's March 2017 Submissions. ADA Inc does not wish to be heard on this aspect of the HSU's proposed variations to the HPSS Award.

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

146. As detailed in paragraphs 103 to 144 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.

147. 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).

148. 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 62 to 68 of the HSU's March 2017 Submissions.

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

149. 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 69 to 76 of the HSU's

March 2017 Submissions. ADA Inc does not wish to be heard on this aspect of the HSU's proposed variations to the HPSS Award.

**HSU's claims in relation to agreed matters**

150. ADA Inc confirms its agreement to the following variations to the HPSS Award proposed by the HSU:

- (a) the addition of the word 'ordinary' before the word 'hours' in clauses 19.1(a)(ii), 19.1(b)(ii), 19.1(b)(iii), 19.1(a)(ii), 19.1(c)(i) and 19.1(c)(ii) of the Plain HPSS Award as detailed in paragraph 78(a) of the HSU's March 2017 Submissions;
- (b) the addition of the words 'or 76 ordinary hours in a fortnight or 152 ordinary hours in a four week period' in clause 19.1(b)(iii) of the Plain HPSS Award as detailed in paragraph 78(b) of the HSU's March 2017 Submissions;
- (c) the addition of a new clause 19.3 of the Plain HPSS Award in the following terms as detailed in paragraph 78(c) of the HSU's March 2017 Submissions:

*Each day or shift (as relevant) stands alone.*

- (d) the amendment to the unpaid meal break provisions of the Plain HPSS Award as detailed in paragraphs 80 to 82 of the HSU's March 2017 Submissions.

**David Wilkinson**

General Manager – Industrial Relations

**Wentworth Advantage Pty Limited**

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

**Dated: 9 June 2017**



[Annexures A-J](#)

[Witness Statement of Dr Neil Hewson](#)

[Witness Statement of Eithne Irving](#)

[Witness Statement of Emma McKenny](#)