

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply submission

4 Yearly Review of Modern Awards
Health Professionals and Support
Services Award 2010
(AM2016/31)

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Ai
GROUP

4 YEARLY REVIEW OF MODERN AWARDS
AM2016/31 – HEALTH PROFESSIONALS AND SUPPORT SERVICES
AWARD 2010 – COVERAGE

1. INTRODUCTION

1. This reply submission is made by the Australian Industry Group (**Ai Group**) in response to the Amended Directions issued by the Fair Work Commission (**Commission**) on 17 September 2019 (**Amended Directions**) concerning the *Health Professionals and Support Services Award 2010 (HPSS Award)*. Specifically, these submissions are confined to the question of whether the List of Common Health Professionals contained in Schedule C of the HPSS Award should be indicative or exhaustive.
2. Ai Group has filed materials with the Commission in relation to this question on which we continue to rely, including the following:
 - [Ai Group Submission 8 June 2017](#)
 - [Ai Group Submission 31 July 2019](#)
 - [Ai Group Submission in Reply 19 August 2019](#)
 - [Ai Group Correspondence 18 October 2019](#)
3. The Amended Directions confirmed that the Commission has determined to deal with the issue of whether the List of Common Health Professionals in Schedule C of the Award should be exhaustive or indicative, prior to addressing the separate proposal by the HSU for the occupations of dental hygienist and oral therapist to be included in the same Schedule.
4. At paragraph [1] of the Amended Directions, the Commission invited parties to file submissions, witness statements and other material upon which each intended to rely in relation to the question of whether the List of Common Health Professionals should be indicative or exhaustive. In response to the Amended

Directions, Ai Group advised the Commission that we rely upon our previous submissions.

5. The Health Services Union (**HSU**) also determined to rely on its past submissions in relation to this question.¹
6. A number of other parties made submissions dealing with the extant issue in response to the Amended Directions. Each of these accorded with Ai Group's position that the List of Common Health Professionals in Schedule C of the HPSS Award should be exhaustive rather than indicative.
7. Ai Group has considered the submissions made in relation to this question and files these submissions in reply pursuant to paragraph [2] of the Amended Directions. Specifically, this submission responds to the following:
 - [Submissions of the Australian Business Industrial and New South Wales Business Chamber Submission](#), filed 14 October 2019 (**ABI/NSWBC Submission**)
 - [Submissions of the Australian Dental Association and the Australian Dental Prosthetists Association](#), filed 14 October 2019 (**ADA/ADPA Submission**)
 - [Submissions of the Dental Hygienists Association of Australia Limited Submission](#), filed 14 October 2019 (**DHAA Submission**)
8. Although Ai Group supports each of these submissions made as they relate to the question as to whether the List of Common Health Professionals in Schedule C of the Award should be exhaustive or indicative, Ai Group disagrees with certain points raised and proposals made therein for the reasons outlined below.

¹ AM2016/31 [Submission of the Health Services Union](#) (14 October 2019).

ABI/NSWBC Submission

9. ABI and the NSWBC state, at paragraph 2.1 of their submissions, that they do not seek to depart from the position put in submissions dated [2 February 2015](#) and [21 August 2015](#) that the List in Schedule C is non-exhaustive.
10. Although the current proceedings are confined to the question of whether the List of Common Health Professionals in Schedule C *should* be indicative or exhaustive, Ai Group notes that the issue of the correct interpretation of the HPSS Award was addressed in our submissions of 8 June 2017, and at paragraphs [13] to [29] of our submissions of 31 July 2019. Ai Group continues to rely on these submissions and opposes ABI and the NSWBC's assertion that the List of Common Health Professionals in Schedule C is a non-exhaustive guide to the types of health professionals who would be covered by the Award.
11. Ai Group agrees with the statement made at paragraph [2.7] of the ABI/NSWBC Submission that the use of the indefinite article in Schedule C i.e. 'a list' is confusing, as is the reference to a list of *common* health professionals. Nevertheless, these words should not persuade the Commission to interpret the list as non-exhaustive.
12. Ai Group's 31 July 2019 Submission referred to the following extract from a Statement by the AIRC in the course of the Part 10A Award Modernisation Proceedings:² (emphasis added)

[78] The exposure draft of the Health Professionals and Support Services Industry and Occupational Award 2010 is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally. At this stage we have not attempted to attach particular professions or skills to any particular pay point. We invite the parties to examine this and provide advice during the consultations. We have attached as Schedule B to the award a list of common occupation names which should also be considered.

² [2009] AIRCFB 50.

13. It is notable that at the time this Statement was made, the coverage of the HPSS Award was not yet finalised. As such, the Commission's stated intention to accommodate "all health professionals (except doctors and nurses)" should be viewed through this lens. Also, Ai Group contends that the reference in the Statement to a "list of common names" which ultimately was included in Schedule C should be taken as an intention that the term 'common' was not intended to suggest a 'non-exhaustive' list of occupations but rather to provide for commonly used names denoting an exhaustive list of occupations covered by the HPSS Award.
14. The reference, in Schedule B of the HPSS Award to 'a list' as opposed to 'the list' of common health professionals which are covered may be considered, consistently with the AIRC's Statement reproduced above, to be suggestive of an intent that the list merely reflect a number of common occupational names which may be used to refer to covered occupations.

ADA/ADPA Submission

15. At paragraph [68] of the ADA/ADPA Submission, the claim is made that it would be proper and appropriate for the Commission to amend Schedule C to include 'Child Life Therapist' as a covered occupation.
16. Ai Group opposes this proposition. No arguments are made by the ADA/ADPA in support of the proposed variation.
17. Ai Group assumes that the proposed variation is a response to paragraphs [10] and [11] of a Witness Statement of Alex Leszczynski annexed to the HSU's [submissions of 17 March 2017](#) in the context of the current proceedings. The relevant portion of Mr Leszczynski's Witness Statement is reproduced below:

[10] Listed in Schedule C of the Award is the health profession Play Therapist. However there are in fact two groups of health professionals who called themselves Play Therapists, one whose professional Association is the Australian Play Therapists Association ('APTA'). Annexed to this statement is the APTA website home page (Annexure 4). The professional association of the other group of health professionals who called themselves Play Therapists was the Australian Association of Hospital Play Specialists. The fact that there were two groups of health professionals called Play Therapists caused confusion.

[11] As a result, the professional association that represented one of the Play Therapist health professions changed their name from the Australian Association of Hospital Play Specialists to the Association of Child Life Therapists Australia ('ACLTA'). They have also started calling their profession Child Life Therapists, though in some organisations they are still called Play Therapists. Annexed to this statement is a page from the ACLTA website explaining the switch in titles (Annexure 5). Would this change in the name of their profession mean that Child Life Therapists are no longer covered by the Award because Child Life Therapist is not listed in Schedule C of the Award? Again, I believe that any reasonable or logical person would think that Child Life Therapists are covered by the Award.

18. The same section of this Witness Statement was also referred to in paragraph [6] of Alex Leszczynski's Witness Statement annexed to the [HSU's 8 August 2019 Submission](#).
19. Ai Group understands that the material in the witness statement reproduced above was intended to support an argument in favour of an indicative list of common health professionals. It should not be considered as meeting the threshold required to convince the Commission that the inclusion of 'Child Life Therapists' in the HPSS Award would be necessary to meet the modern awards objective if it is ultimately determined that Schedule C should be an exhaustive rather than an indicative list.
20. If the Commission is minded to consider whether 'Child Life Therapists' should be included in Schedule C, Ai Group proposes that this be dealt with as a discrete issue once the two current questions concerning the coverage of the HPSS Award are addressed by the Commission. Any party considering a substantive variation to the HPSS Award to include 'Child Life Therapists' should be required to file submissions and any evidence in support of this proposal, with an associated opportunity for other parties to make submissions in reply.
21. The ADA/ADPA Submission proposes, at paragraph [70], to alleviate existing ambiguity concerning the coverage of the HPSS Award by the inclusion of an opening paragraph to Schedule C along the following lines:

This Award applies to those health professionals whose duties and qualifications are the same or substantially the same as the common titles for those professionals in the following list.

22. Ai Group opposes the inclusion of these or similar words in Schedule C of the HPSS Award.
23. The reference in the proposed wording to *health professionals* whose duties and qualifications are the same or substantially the same as *common titles* makes little sense. The sentence seeks to allow for a comparison of 'health professionals' with 'common titles'. Such a comparison between a profession and the term which denotes it would be impossible.
24. If the ADA/ADPA Submission actually seeks to allow for coverage of 'health professions', the duties and qualifications of which are substantially the same as those denoted by the terms in Schedule C, Ai Group proposes that this would be similar to allowing for an indicative list of common health professionals in Schedule C. Such a proposition would fail to provide needed clarity as to the coverage of the HPSS Award and potentially allow for coverage of an extended number of occupations which are not referred to in Schedule C. Ai Group considers that this would cause similar problems to the inclusion of an 'indicative list' of common health professionals. As such, Ai Group opposes the ADA/ADPA proposed variation for the same reasons outlined in earlier submissions which argue that an indicative list would be contrary to the modern awards objective.
25. The ADA/ADPA's proposed variation would not simplify the coverage clause but would rather introduce further uncertainty, potentially allowing for more frequent disputes concerning award coverage. If the ADA/ADPA's proposed variation were made, this would provide little clarity to employers and employees reading the schedule as to whether or not coverage extends to a specified engagement. Employers and employees should not be required to apply a test of 'substantial similarity' in ascertaining coverage. Such a test is liable to be interpreted in a litany of different manners by those applying the Award and would likely become a source of further disputes.

26. Ai Group proposes that if the Commission decides to confirm that the List of Common Health Professionals in Schedule C to the HPSS Award is exhaustive rather than indicative, then clarity may be simply achieved via a note to this effect.

DHAA Submission

27. Ai Group does not support the DHAA's suggestion, expressed at paragraphs [4] and [20] of its submission, that certainty of coverage may be aided by adding another list of health occupations that are not covered by the HPSS Award, i.e. an 'exclusion list'.
28. The present proceedings have highlighted perceived ambiguity concerning coverage of the HPSS Award generally. If the Commission is minded to accept Ai Group's position that the list in Schedule C is not indicative, the inclusion of a list of excluded occupations is unnecessary. Such an approach is likely to lead to further coverage disputes. The coverage issues can be comprehensively resolved by an amendment stating that the list in Schedule C is exhaustive.
29. Moreover, Ai Group notes that the inclusion of a list of excluded occupations would be contrary to the stated positions of both Ai Group and the DHAA concerning the correct interpretation of Schedule C and each organisations' submissions that the list should not be amended to provide for an indicative list.
30. The DHAA made its position clear in its [submission of 17 March 2017](#) that the List of Common Health Professionals in the HPSS Award is exhaustive, as opposed to indicative, in nature.³ This position was repeated at paragraph [5] of the [DHAA's 31 July 2019 Submission](#) and once again in the DHAA's 14 October 2019 Submission.

³ AM2016/31, Submission, *The Dental Hygienists' Association of Australia Ltd.*, 17 March 2017, 1.

31. Ai Group made detailed submissions on 8 June 2017 regarding the correct interpretation of Schedule C of the HPSS Award, providing extensive arguments as to why the List of Common Health Professionals in the Award is exhaustive in nature. Ai Group continues to rely on these submissions and further submissions provided to the Commission on 31 July 2019.
32. The DHAA stated in its submissions of 31 July 2019 and 14 October 2019 that clarity concerning the coverage of the HPSS Award may be achieved by an exhaustive list in Schedule C of the Award.
33. At paragraphs [29] – [70] of Ai Group’s 31 July 2019 submissions, Ai Group provided detailed reasons as to why the list of Common Health Professionals should be exhaustive and why amending the award to create an ‘indicative’ list would not be necessary to achieve the modern awards objective.
34. The inclusion of a list of excluded occupations as proposed by the DHAA would be inconsistent with the common position that the list in Schedule C is exhaustive. Such a list would only have work to do if the list were indicative. As such, Ai Group does not support the inclusion of such a list if the Commission agrees with Ai Group’s argument that the List of Common Health Professionals is exhaustive in nature.
35. For the same reason, if the Commission is minded to vary the HPSS Award to provide for an exhaustive list, the addition of a list of excluded occupations would likely cause confusion as it would suggest the list in Schedule C is indicative in nature. As such, the DHAA’s proposition would likely lead to further confusion concerning coverage of the HPSS Award and would not be consistent with the need to ensure a simple, easy to understand, stable and sustainable modern award system.
36. Paragraphs [22] to [29] of the DHAA’s Submission refers to a number of awards which contain provisions excluding various occupations. In none of these awards does the specified exclusion pertain to a list of occupations which would otherwise be interpreted to be exclusive. In each case, the award excludes certain occupations from coverage in awards which cover multiple potential

occupations that are not narrowly defined. For example, Schedules E and H of the *Broadcasting, Recorded Entertainment and Cinemas Award 2010* include graded classification structures denoted by levels pertaining to listed duties and responsibilities. Coverage under these classification structures is not restricted, as in the case of health professionals under the HPSS Award to a list of discrete occupations.

37. Ai Group considers that a variation to provide for a list of 'excluded occupations' would create greater uncertainty if the Commission ultimately determines that the List of Common Health Professionals in Schedule C of the Award should be exhaustive. The same issues do not arise with respect to the awards listed in paragraphs [22] to [29] of the DHAA's submissions as such exclusions would not be inconsistent with an exhaustive list of occupations.
38. Should the Commission ultimately find that the List in Schedule C of the HPSS Award should be exhaustive rather than indicative, then a note to this effect would clearly resolve any existing confusion.