

22 May 2017

(AM2014/204)(AM2016/31) formerly (AM2014/204)

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

SUBMISSION IN REPLY



DENTAL HYGIENISTS ASSOCIATION OF AUSTRALIA LIMITED.

The Dental Hygienists Association of Australia Limited (DHAA) is the peak professional national organisation of dental hygienists and oral health therapists in Australia, with 1030 members.

The DHAA files this submission in reply in relation to the 4 Yearly Review of the *Health Professionals and Support Services Award 2010* ("the Award") in accordance with Directions issued on 23 November 2016.

This submission in reply supports the DHAA's submission and supporting Witness Statement from Dr Melanie Hayes, President of DHAA filed on 17 March 2017. That submission related solely to our view that the Award's Schedule B - List of Common Health Professionals, is exhaustive in nature as opposed to indicative, meaning that any occupation not listed in the Schedule is unambiguously and unequivocally not covered by this award. The status quo of the occupations of dental hygienist and oral health therapist is that they are not covered by this or any modern Award. The DHAA submits that this status quo should not be disturbed. Any variation to the award consequential of these proceedings must not result in any ambiguity with regard to the current award-free status of these two occupations.

The 17 March 2017 DHAA submission addressed the submissions of the Health Services Union of Australia of 28 January 2015, 4 March 2015 and 16 July 2015 at paras 10-24, notwithstanding that at paragraph 22 the HSUA acknowledges that dental hygienists were removed from award coverage by [2009] AIRCFB 948) and the Australian Workers Union (15 July 2015 at para 4) that Schedule B – List of Common Health Professionals is indicative, not exhaustive.

This DHAA submission in reply addresses paragraphs 4 to 37 inclusive of the HSUA's submission of 17 March 2017. DHAA will cross-examine the HSUA's Industrial Officer Alex Leszcynski regarding the content of his witness statement when this matter is heard before the Full Bench.

List of Common Health Professionals – the HSUA's Views

The HSUA posits that the List of Common Health Professionals must be seen as indicative rather than exhaustive because:

- a) This the only logical interpretation (paragraph 4 of HSUA 17 March submission)
- b) This is common sense (para 5)
- c) This is consistent with the approach taken by the Commission (para 5)
- d) This is consistent with the modern awards objective (para 5)
- e) The classification structure in the Award is broad enough to cover all health professionals. Therefore because, the term "health professionals" is not specifically defined in the award, it follows that the default position should be that **all** health professionals are covered by the

award, unless expressly they are not (such as the dental hygienists, presumably as per para 33). Making the list indicative rather than exhaustive neatly accommodates this view of universal coverage as the default position.

- f) Because of the use of the word “common” which according to the HSUA means that there would be other Health Professionals in the list who fall within the scope of the classifications but are not on the list, and because the HSUA believe that the classification structure covers **all** health professionals (para 7), it would be “perverse” to regard the Schedule as anything other than indicative (para 9).
- g) The titles of health professionals alter from organisation to organisation, and from time to time, there are “frequent changes” (para 20) as per the once in four years change of the Play Therapist versus Child Life Therapist example elucidated in Mr Leszcynski’s witness statement and referred to in para 19. Therefore the HSUA posits that making the list indicative rather than exhaustive is the logical conclusion from this state of flux, otherwise an occupation could end up denied of award coverage because the title they were using for their occupation was not the exact words used to describe that occupation in Schedule B. (paras 11, 12, 19, 20 et al). There is no mention of the option of the HSUA or other interested party seeking to vary the award under s 160 of Fair Work Act to correct the occupational name change.
- h) Some occupations are not included in the list but should be. Again, the best course of action is apparently not for the HSUA to seek to vary the award to effect coverage (under s 158(1)(3)), but to assert that it makes more sense for the List to be indicative.
- i) HSUA states that The Australian Dental and Oral Health Therapists Association claims that its members are confused (para 22) because their occupation is not in the Schedule. HSUA posits that it is a better option to make the list indicative to ease that confusion. It is not clear how this will ease ADOHTA’s confusion. Again, for reasons that are not apparent, HSUA asserts that is a better option to make things vaguer with an “indicative” list than to make things definite by accepting the list as is (viz. exhaustive) and HSUA and/or ADOHTA seeking to vary the award for the occupation of oral health therapist to be covered by the award (if that is indeed what ADOHTA members want.) APESMA (Outline of Submissions 17 March 2017) has taken the usual approach of employee associations in these proceedings to seek to vary the award to include Translators and Interpreters in the List of Common Health Professionals (Schedule B.) It is not clear why ADOHTA or HSUA cannot do the same.
- j) HSUA states that because the nature of health professional terminology is of an “evolving nature” the Schedule must be indicative 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.” Given that the Four Yearly Proceedings are designed specifically for interested parties to make application to correct ambiguity and update the awards, it is part of the role and purpose of employee associations such as the HSUA to make application to vary the award if they believe that there is a cogent and supportable argument to support a change (as apparently they do with the Child Life Therapists/ Play Therapists.)
- k) The HSUA posits that to make the list indicative will work to “minimise confusion about award coverage” (para 22) The HSUA references the undesirability of “lack of certainty.” (23). It is illogical to suggest that an “indicative” list is “clearer” than an exhaustive list. If this was the case, the HSUA would have drafted their own Rules (R2016/196) on the same indicative lines. But they are not drafted in such a way. Their Rules, like all well drafted

industrial instruments, are very specific as to coverage and non-coverage issues. For example, clause 38(d) (refer Attachment) provides a list of health classifications which may be members of the Victoria No. 3 Branch of the HSUA. The list is exhaustive. It is clearly designed to ensure there is no confusion. As an exhaustive list, it provides clarity about who is covered and who is not. Such is the nature and purpose of an exhaustive list. The Rules contain specific provisions about how the list can be altered/updated – analogous to the provisions available to vary the Award via application to Fair Work Commission.

- l) HSUA maintains that the fact that the Award has an exhaustive list of occupations is not usual with regard to modern awards. They give two examples of the 130 modern awards as evidence for this point. They state that there is “no reason” why the Award should be “an exception to other modern awards by creating an exhaustive list of health professionals.”

HSUA first makes reference to Schedule B of the Aged Care Award 2010. This schedule defines the classifications into levels. i.e. Level 1 through to Level 7. Each level has a list of ‘indicative tasks’ such as cleaner and laundry hand. The Health Professionals and Support Services Award 2010 also has a Schedule B which has classification definitions divided into levels with indicative tasks such as cleaner and laundry hand.

The Health Professionals and Support Services Award Schedule C cannot properly be compared to the Aged Care Award 2010 Schedule B, as it is entirely unrelated. The HPSS Schedule B is related, but not schedule C. The Health Professionals and Support Services Award Schedule C has a list of ‘Common Health Professionals’. Health Professionals who are in most cases degree qualified. To compare the Aged Care Award 2010 Schedule B and the Health Professionals and Support Services Award 2010 Schedule C is like comparing apples and oranges.

The HSU claims there is no reason why the HPSS Award should be an exception to other modern awards by creating an exhaustive list of health professions.

The DHAA submit that the format of the HPSS Award is not an exception. For example:

- . the Aboriginal Community Controlled Health Services Award 2010 has an exhaustive list of job titles at Schedule B, B.3. Dental. B.3. includes an exhaustive list including Dental Assistants and Dental Therapists. It also has an exhaustive list of ancillary staff being cleaners, drivers and caretakers.
- . the Ambulance and Patient Transport Industry Award 2010. Schedule B of this award has a very detailed exhaustive list at B1.
- . the Animal Care and Veterinary Services Award 2010 has a list of Exhaustive job titles at Schedule B, and indicative tasks to classify employees within the levels under that job titles.
- . the Broadcasting and Recorded Entertainment Award 2010 has an exhaustive list covered by seven separate Schedules. Only 3 of these schedules mention indicative tasks, all others are exhaustive.

If the HSUA continue to press this arm of their argument, the DHAA will submit documentary evidence of all 130 of the modern awards at arbitration to demonstrate that the HSUA’s

submission that the exhaustive list of health professions should be made indicative to be in line with other modern awards is unsubstantiated.

- m) The HSUA argue that to regard the schedule as exhaustive would have “undesirable and anomalous effects including the removal from award coverage of health professionals who have hitherto been regarded as covered by the Award.” (para 29) No examples are given.
- n) The HSUA state “there can be no rationale for treating one type of health professional as covered by the award, and another as outside the scope of its benefits” (para 29). This is the core of the HSUA’s position – that **all** health professionals should be covered by the award, as the default position. They do not offer a rationale. There is of course a rationale opposing this position. An example of that rationale was accepted by the Full Bench of the AIRC, in their decision ([2009] AIRFB 958, to accept the DHAA’s application to vary the award by removing the occupation of dental hygienist from the List of Common Health Professionals to render the occupation award-free.
- o) The HSUA argue that the modern award objectives are not served by an exhaustive list (paras 29-32.) In fact, the opposite is the case. Certainty and simplicity is achieved by having a list which clearly states which occupations are covered, and which are not. This assists all parties, including Fair Ombudsman telephone advisors, to easily understand and give correct advice on award coverage to health sector employers.

Proposed Variation

As per our previous submissions, the DHAA submits to Fair Work Commission that the exhaustive status of Schedule B is not ambiguous. However to ensure that submissions to claim that it is ambiguous are quashed permanently, DHAA proposes the following variation with numbering based on the current award, not the current Exposure Draft. The proposed change is highlighted in bold.

Clause 4.1 (b): employers engaging a health professional employee falling within the classifications described in clause 15. **Clause 15 has application only to the occupations specified in Schedule B – List of Common Health Professionals.**

Yours sincerely,



Katrina Murphy, representing DHAA Ltd
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38 - BRANCHES

- (b) Any such plebiscite shall be conducted by secret postal ballot and shall be under the absolute control and direction of a Returning Officer who shall -
- (i) prepare ballot papers which shall contain the question to be voted on;
 - (ii) issue a ballot paper to each member entitled to vote;
 - (iii) determine the time and date for the closure of the ballot, having consideration for the convenience of the voters;
 - (iv) take such steps as are necessary to ensure that a result is correctly ascertained; and,
 - (v) report the result of the plebiscite to the first meeting of the National Executive held after the conclusion of the counting of the votes cast.
- (c) The returning officer shall be the appropriate officer from the Australian Electoral Commission.
- (d) A simple majority decision of the members voting shall be final and shall prevail over any contrary decision of the National Council or National Executive.

37 – STUDENT MEMBERS

- (a) Any person attending a course of study that upon graduation will enable them to seek employment in avocations covered by rule 2 and 3, Industry and Eligibility of these rules, shall be eligible to join the Union as a Student member.
- (b) The relevant Branch shall determine the conditions and benefits of student membership and any administration fee to be applied provided that student members shall not be deemed financial members for all purposes of these rules

PART C - BRANCH ORGANISATION

38 - BRANCHES

- (a) The Union may establish such Branches as the National Council may from time to time decide and the existence of the following Branches is hereby confirmed:-
- Victoria No. 1
 - Victoria No. 2
 - Victoria No. 3
 - Victoria No. 4
 - Tasmania
 - New South Wales
 - South Australia/Northern Territory
 - Western Australia
- (b) The Victoria No. 1 Branch shall consist of all members of the Union employed in Victoria other than members:-
- (i) employed under the provisions of the Public Administration Act 2004 (Vic) as amended from time to time; and/or

(ii) employed in or in connection with the provision of mental and/or mental retardation services; and/or

(iii) eligible to be members of the Victoria No.3 or Victoria No.4 Branches.

Note: The Public Administration Act 2004 (Vic) is a successor to the Public Service Act 1974 (Vic) due to the operation of Section 7(c) of Schedule 2 (Saving and Transitional Provisions) of the Public Administration Act 2004 (Vic).

(c) The Victoria No. 2 Branch shall consist of all members of the Union employed in Victoria who are -

(i) employed under the provisions of the Public Administration Act 2004 (Vic) as amended from time to time; and/or,

(ii) employed in or in connection with the provisions of mental health and/or mental retardation services.

Note: The Public Administration Act 2004 (Vic) is a successor to the Public Service Act 1974 (Vic) due to the operation of Section 7(c) of Schedule 2 (Saving and Transitional Provisions) of the Public Administration Act 2004 (Vic).

(d) The Victoria No. 3 Branch shall consist of all members of the Union employed in Victoria who are employed in the following classifications, other than those eligible to be members of the Victoria No. 2 or Victoria No. 4 Branches:-

Research Technologist (employed at the Peter McCallum Institute)

Medical Laboratory Technician

Physiotherapist

Radiographer/Medical Imaging Technologist

Radiotherapy Technician/Radiation Therapy Technologist

Hospital Librarian

Occupational Therapist

Orthoptist

Speech Therapist/Speech Pathologist

Medical Photographer

Medical Illustrator

Chiropodist/Podiatrist

Nulceographer/Nuclear Medicine Technologist

Orthotist (excluding those persons employed by the Commonwealth Government and its Statutory Authorities)

Orthotist/Prosthetist (excluding those persons employed by the Commonwealth Government and its Statutory Authorities)

Prosthetist (excluding those persons employed by the Commonwealth Government and its Statutory Authorities)

Recreation Therapist

Music Therapist

Dentist

Psycho-Therapist who would have been covered by the (Victorian) Health Professional Services Award as that award stood immediately before 1st March 1993

Recreation Worker
Welfare Worker
Youth Worker
Community Development Worker
Social Planner
Rehabilitation Counsellor
Behavioural Scientist who would have been covered by the (Victorian) Health Professional Services Award as that Award stood immediately before 1st March 1993
Orientation and Mobility Practitioners
Medical Records Administrator
Cardiac Technician
Safety Officer
Radiation Engineer

(e) (i) The Victoria No. 4 Branch shall comprise all person (other than those eligible to be a member of any other Branch of the Union) who would have been subject to or classified according to the (Victorian) Medical Scientists Award, the (Victorian) Psychologists Award or the (Victorian) Hospital Pharmacists Award immediately before 1st March 1993, including, but not limited to:

AUDIOLOGISTS: Without limiting the generality of the aforesaid classification, it shall include -

Otoneurologist

DIETITIAN

PHARMACIST

PSYCHOLOGIST: Without limiting the generality of the aforesaid classification, it shall include -

Behavioural Scientist

Psychotherapist other than a psychotherapist who would have been covered by the (Victorian) Health Professional Services Award as it stood immediately before 1st March 1993.

SCIENTIST: Without limiting the generality of the aforesaid classification, it shall include -

ANATOMICAL PATHOLOGY SCIENTIST

Histologist

Cytologist

BIOCHEMIST

Clinical Biochemist

Chemical Pathology Scientist

Enzymologist

CLINICAL PHARMACOLOGIST

Pharmacokineticist

ENDOCRINOLOGIST

GASTROENTEROLOGIST

GENETICIST

Cytogeneticist

Molecular Biologist

HAEMATOLOGIST

Immunohaematologist

Serologist

Blood Banking Scientist
 Haemodialysis Technologist/Scientist
 IMMUNOLOGIST
 INTENSIVE CARE SCIENTIST/TECHNOLOGIST
 LABORATORY MANAGER
 MEDICAL SCIENTIST/TECHNOLOGIST
 MICROBIOLOGIST
 Virologist
 Bacteriologist
 NEUROPHYSIOLOGIST
 EEG Scientist/Technologist
 EMG Scientist/Technologist
 PERFUSIONIST
 Clinical Perfusionist
 Cardiovascular Perfusionist
 PHYSICAL SCIENTIST
 Biophysicist
 Medical Physicist
 REPRODUCTIVE BIOLOGIST/TECHNOLOGIST
 Andrologist
 IVF Scientist
 RESPIRATORY SCIENTIST/TECHNOLOGIST
 STATISTICIAN
 TISSUE TYPING SCIENTIST
 TOXICOLOGIST
 VASCULAR SCIENTIST/TECHNOLOGIST.

Provided that Medical Officer shall not be eligible for membership of the Branch. All persons who were members of a relevant component association (i.e. the Medical Scientist Association of Victoria and the Victorian Psychologists Association) on the relevant day and who are eligible to be members of the Union, shall be eligible to be members of the Victoria No. 4 Branch.

(ii) Entrenching Provision

This rule 38(e) shall be an "Entrenched Rule", that is, notwithstanding any other provision of these rules, it shall not be altered except with the approval of the members of the Victoria No. 4 Branch assembled in general meeting. The requisite approval of the Victoria No. 4 Branch will only be obtained if, at a special general meeting (called in accordance with rule 55, a vote is held and a majority of the members present vote in favour of the alteration.

- (f) The Tasmanian Branch shall consist of all members of the Union in Tasmania.
- (g) The Western Australia Branch shall consist of all of the members of the Union in Western Australia.
- (h) The New South Wales Branch shall consist of all members of the Union employed in New South Wales and/or the Australian Capital Territory and/or Queensland.
- (i) The South Australian Branch shall consist of all members of the Union in South Australia and the Northern Territory.