

IN FAIR WORK COMMISSION

FWC Matter No: AM2016/4

Applicant: Community and Public Sector Union (“The CPSU”)

In the matter of an application to vary the coverage of a modern award during a review of modern awards –s 156

CPSU OUTLINE OF SUBMISSIONS

1. CPSU application – preliminary:

- 1.1 On 4 February 2015, pursuant to a Fair Work Commission statement of 14 December 2014 as part of the 2014 Modern Awards Review, the CPSU filed submissions and a draft determination to vary the coverage of the *Broadcasting and Recorded Entertainment Award*. The CPSU seeks to cover worked performed by CPSU members who are captioners/audio-describers and subtitlers/subtitling editors. The work performed by these employees in this discrete area of the industry is not currently provided for by the *Broadcasting and Recorded Entertainment Award*.
- 1.2 These submissions are made in support of that application. The CPSU application contains two main elements. Firstly it seeks to include new classifications of captioner/audio describer to cover this work and secondly subtitler/subtitling editor in the *Broadcasting and Recorded Entertainment Award 2010*.
- 1.3 Annexed to these submissions is an amended draft determination. See Annexure “A”.
- 1.4 Captioner/audio describers use speech or keyboard computer technology to provide captions or visual script for release as part of television broadcast content or other mediums including digital release. The purpose of captions is to make that content available to people with disabilities in particular those with special needs, including hearing disabilities. Captioning is performed pursuant to the *Broadcasting Services Act 1992* which requires television broadcasters to provide a captioning service during designated hours. Currently free to air Television Broadcasters are required to

provide a captioning service on their main channel for programs transmitted between 6 am and midnight each day.

- 1.5 Subtitlers translate foreign language programs into English to be used as subtitles and subtitling editors check and prepare subtitles created by a subtitler. This work is performed for television broadcast or release of content on other digital platforms. The main employer of subtitlers and subtitling editors is SBS, where employees are covered by the *SBS Enterprise Agreement 2016*, underpinned by the *Australian Government Industry Award 2016*.
- 1.6 Captioning and audio describing performed by employees at Erisson are covered (through transfer of business) by the *Red Bee Media Australia Enterprise Agreement 2015*, which is underpinned by a pre-reform enterprise award *Community and Public Sector Union (Subtitlers) Award 1999* for which an application to modernise has been made on 22 December 2013 in AM2013/71. That application has not been determined and the CPSU has requested it not be dealt with until this application to vary the *Broadcasting and Recorded Entertainment Award 2010* has been determined.
- 1.7 Outside Ericsson, there are no Enterprise Agreements the CPSU is aware of that cover captioners. In terms of award coverage, the *Miscellaneous Modern Award* covers basic terms and conditions of those employees.
- 1.8 The CPSU does not believe the existing award coverage for captioners/audio describers is sufficient, and they are deserving of consistent and appropriate minimum safety net of terms and conditions which reflects their unique work as part of the industry in which their work is a critical element. Similarly, while subtitlers and subtitling editors are currently covered by appropriate instruments at SBS, those working outside that organisation do not have appropriate award coverage for the work they perform.

2. CPSU evidence

2.1 The CPSU relies upon the following evidence:

- The statement of Stuart Brewer-McCabe 7 April 2017. Mr Brew-McCabe, a union organiser provides a brief history of CPSU representation of captioners/audio-describers and subtitlers/subtitling editors.

- The statement of Michael McGettigan of 6 April 2017. Mr McGettigan is a CPSU member and captioner at Ericsson. His evidence outlines his experiences of changes in the industry since 2001 and the role and duties he performs as a captioner.
- The statement of Joanne Ellis of 7 April 2017. Ms Ellis' statement explains the role and duties of an audio-describer and how that differs from a live and file captioner.
- The statement of Michael Pentecost of 5 April 2017. Mr Pentecost is a subtitling editor and his evidence reveals the type of work he and subtitlers perform and the changes he has seen to his profession to industry since he became a subtitling editor in 2005.

That evidence supports the classification levels and descriptors contained in the CPSU's amended draft determination. It also supports the discrete conditions the CPSU is seeking to include, which are a paid 15 minute break every 2 hours for those attending visual displays and a 17% loading for afternoon shifts.

2.2 The evidence shows the CPSU has been active in representing the industrial interests of captioners and audio-describers. In terms of instrumental coverage, the CPSU obtained a dispute finding against the Australian Captioning Centre in 1994 (SDP Harrison, Sydney 28 July 2994 in S Print L4507) and a consent award in 1996 *the Community and Public Sector Unions Subtitlers Award 1996* (SDP Duncan Sydney 23 May 11996 in N1691). That award was simplified in 1999 (N Print R7824) and an application to modernise that instrument was made 22 December 2013 (AM2013/71).

2.3 In terms of collective bargaining, the CPSU negotiated the *Australian Caption Centre Online Employees Certified Agreement 1998* (AG768017), the *Australian Caption Certified Agreement 2002* (AG818241) the *Red Bee Media Australia Union Collective Agreement 2007* (AC312771) and the *Red Bee Media Australia Enterprise Agreement 2015* (AE414358).

2.4 The CPSU has a lengthy history of representing workers at SBS.

3 The Commission's approach to varying modern awards

3.1 In the Commission's *Preliminary Jurisdictional Issues Decision [2014] FWCFB 1788* explanation was given about how the Commission would approach conducting the 4 yearly review. The Commission emphasised the need for applications to be supported by evidence:

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, 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.

3.2 In considering claims to vary the *Security Services Award 2010* in [2015] FWCFB 620, the Commission said:

[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

3.3 In consideration applications to vary awards during the 2014 Modern Award Review process, the Commission has also highlighted the requirements in s138 of the Act, saying:

[36] . . . Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.

3.4 The *Preliminary Jurisdictional Issues Decision* adopted Justice Tracey’s approach to what is necessary to meet the modern awards objective from *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227. There Tracy J said:

That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.”

3.5 This approach has recently been affirmed in the *Penalty Rates Case [2017] FWCFB 1001*, where the Commission said:

[141] Contrary to the Unions’ contention the Commission’s task in the Review is to make a finding as to whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’ (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied. The approach outlined is supported by the terms of s.138 itself, the legislative context and the judgement of the Full Court of the Federal Court in *National Retail Association v Fair Work Commission*.

3.6 The approach of the Commission to award variation is clear from the above: a significant change to an award must be supported by evidence, whether the proposed variations are necessary for the award to meet the modern awards objective and necessary is a value judgment informed by the considerations of the modern awards objective and the evidence. The CPSU says its application meets the criteria outlined above and these changes are necessary and required for the Award to meet the modern awards objective as outlined in s138 of the Act.

3.7 CPSU's application must meet the criteria outlined in s134 of the Act. The CPSU must demonstrate that having regard evidence provided and the type of work performed, those variations are necessary for the *Broadcasting and Recorded Entertainment Award* to meet the modern awards objective. Regarding the modern award objective criteria contained in s134 of the Act, the Commission said:

[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.

3.8 The above quotation shows the Commission must treat each matter in s134 as a important consideration but that no one factor should be accorded greater significance than another. The CPSU will address each of these factors in turn.

4. CPSU's application meets the modern awards objective of a 'fair and relevant safety net'

4.1 The CPSU's application meets the requirements of the *Fair Work Act 2009* to vary the coverage of the *Broadcasting and Recorded Entertainment Award*. That application, as evidenced in the amended draft determination is to insert classifications of captioner/audio-describer and subtitler/subtitling editor in the *Broadcasting and Recorded Entertainment Award*.

4.2 Section 134(1) of the Act provides the modern awards objective.

'A fair and relevant minimum safety net of terms and conditions'

4.3 In the *Penalty Rates Decision*, the Commission considered the scope and meaning of this expression, saying:

[115] The modern awards objective is to '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 the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. 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.

[116] While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. As to the proper construction of the expression 'a fair and relevant minimum safety net of terms and conditions' we would make three observations.

[117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the

employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In *Shop Distributive and Allied Employees Association v \$2 and Under (No. 2)* Giudice J considered the meaning of the expression ‘a safety net of fair minimum wages and conditions of employment’ in s.88B(2) of the *Workplace Relations Act 1996* (Cth) (the WR Act). That section read as follows:

‘88B Performance of Commission’s functions under this Part ...

(2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;

(b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;

(c) when adjusting the safety net, the needs of the low paid.’

[118] As to the assessment of fairness in this context his Honour said:

‘In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest.’

[119] While made in a different (albeit similar) statutory context the above observation is apposite to our consideration of what constitutes a ‘fair ... safety net’ in giving effect to the modern awards objective. We would also endorse the following observation by the Full Bench in the *Equal Remuneration Decision 2015*:

‘We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for ‘fair minimum wages’ is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.’

[120] Second, the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) we think the word ‘relevant’ is intended to

convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations.*’ (emphasis added)

[121] Finally, as to the expression ‘minimum safety net of terms and conditions’, the conception of awards as ‘safety net’ instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the 1993 Reform Act). The *August 1994 Review of Wage Fixing Principles decision*⁴² summarised the changes made to the legislative framework by the 1993 Reform Act. In particular, the Commission noted that:

‘The Act now clearly distinguishes between the arbitrated award safety net and the bargaining stream. It intends that the actual wages and conditions of employment of employees will be increasingly determined through bargaining at the workplace or enterprise.

Under the Act the Commission, while having proper regard to the interests of the parties and the wider community, is now required to ensure, so far as possible, that the award system provides for ‘secure, relevant and consistent wages and conditions of employment’ (s 90AA(2)) so that it is an effective safety net ‘underpinning direct bargaining’ (s 88A(b)).’

...

[130] Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, the purpose of modern awards, together with the NES and national minimum wage orders, is to provide a safety net of fair, relevant and enforceable minimum terms and conditions of employment for national system employees (see ss.3(b) and 43(1)). They are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applies (see s.47).

4.4 Based upon the above considerations, the Act requires a modern award be a ‘a fair and relevant minimum safety net of terms and conditions’ that is to be fair to employees and employers, contain minimum wages that bear a proper relationship with the value of the work conducted, accords with community standards and

expectations and be a relevant safety net that secures wages and conditions and underpin collective bargaining.

4.5 The application intends to have the Common terms and the Television Broadcasting parts of the *Broadcasting and Recorded Entertainment Award* to apply to this work. That award contains terms and conditions applicable and unique to the Broadcasting industry. Captioners and audio describers work hand in hand with commercial and national broadcasters and their hours of work are largely influenced by the demands of those networks. Subtitling/subtitling editors do not perform work to such critical timeframes, but their working environment is within the industry. If the application was not granted, the award safety net for such work occurring outside Ericsson would remain as the *Miscellaneous Award*.

4.6 Not granting the application sought by the CPSU would not be fair to employees and employers. It would allow a differential standard of terms and conditions to apply to some employees and employers and not others. It would allow a lower safety net of pay and conditions to apply to captioners/audio-describers who work outside Ericsson. Such a safety net would not reflect the specific and unique work performed, or the television broadcasting environment in which it is performed. It would thereby also not satisfy the criteria of being relevant to contemporary Australia. This is because it would allow the minimum safety net of award terms and conditions for some captioners/audio-describers to be set by an award that does not reflect the nature or the working conditions of the industry in which the work is performed.

4.7 The CPSU says that without the *Broadcasting and Recorded Entertainment Award* be varied as sought, there will not be an adequate or consistent award safety net for captioners/audio describers and subtitlers/subtitling editors. In this manner, the CPSU's application is necessary, as intended by s138 of the Act, in order for the *Broadcasting and Recorded Entertainment Award* to meet the modern awards objective.

5. CPSU's application meets the modern awards objective of a secure, relevant and consistent safety net'

5.1 The reference in the above quotation to [121] and [130] of the *Penalty Rates Decision* shows how the Modern Awards objective has been interpreted by the Commission as requiring the achievement of an Award system that regulates employment of national

system employees through a minimum safety net of terms of conditions that is consistent and appropriate for all workers.

- 5.2 In the instance of captioners/audio-describers, the current state of award coverage is not reflective of this goal. There is a pre-reform enterprise award covering a single employer, an award that derives its coverage from the unique history of the Award system in the conciliation and arbitration power. Employees and employers outside this single employer have their terms and conditions set by a minimum safety net ‘catch-all’ award created during the hurried Modernisation process to transform awards from dispute settlement between industrial parties to regulatory instruments setting a minimum standard.
- 5.3 The current circumstances of a divided and inappropriate award coverage is an historically anomaly that has arisen through the changing purpose of Awards in the Australian industrial relations system. This anomaly is contrary to the Modern Awards objective and should be remedied by the granting of the CPSU’s application.
- 5.4 If the CPSU’s application is not granted, the *Miscellaneous Award* would cover some captioners in the industry, others covered by a pre-reform enterprise award until it is modernised or terminated. The *Miscellaneous Award* was not created to cover unique and specific work the subject of this application. Captioners/audio-describers and subtitlers/subtitling editors perform work as part of television broadcasting and the terms and conditions of that industry award as amended in this application should cover all employers and employees concerned. The *Miscellaneous Award* is simply not relevant to the nature of the work or the television industry.
- 5.5 The history and consideration of the *Miscellaneous Award* is as follows. It was created in 2010, pursuant to the amended award modernisation request. The coverage of the award is said not to be certain, but the intention in making the award was to prevent employees who are usually covered by an award losing that coverage through the award modernisation process, but not to expand award coverage to usually un-award covered industries. The Full Bench of the AIRC said in [2009] AIRCFB 945:

[146] The principal issue in relation to the *Miscellaneous Award 2010* (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

“4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a

similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

[147] Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

“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;
... ..”

[148] Several parties also drew our attention to s.143(7) of the Fair Work Act:

“143 Coverage terms

Employees not traditionally covered by awards etc.

... ..

- (7) A modern award must not be expressed to cover classes of employees:
- (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
 - (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.”

[149] Although s.143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the Miscellaneous Award in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature

or seniority of their roles have traditionally not been covered by awards. Many different approaches and drafting techniques were proposed to encapsulate that requirement. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards.

5.6 The *Miscellaneous Award* does not contain rates of pay or conditions and hours of work provisions which are suited to the work performed by the employees subject to this application. Nor was the *Miscellaneous Award* intended to cover such work on an ongoing basis. The *Miscellaneous Award* was created as a safety net to catch any workers who were not covered by another industry award and an unintended consequence of the award modernisation process. It was not intended to provide a proper safety net for specific forms of traditionally award covered work. The growth, expansion and commercially oriented nature of the captioning industry since the inception of the pre-reform enterprise specific *CPSU (Subtitlers) Award 1999* demonstrate the need for that type of work to be covered by a modern industry award rather than an enterprise award and the *Miscellaneous Award*.

5.7 The *Miscellaneous Award* provides a basic 4 level classification system:

Schedule B—Classification Structure and Definitions

Level 1 \$672.70

An employee at this level has been employed for a period of less than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 2 \$718.60

An employee at this level has been employed for more than three months and is not carrying out the duties of a level 3 or level 4 employee.

Level 3 \$783.30

An employee at this level has a trade qualification or equivalent and is carrying out duties requiring such qualifications.

Level 4 \$854.60

An employee at this level has advanced trade qualifications and is carrying out duties requiring such qualifications or is a sub-professional employee.

5.8 The CPSU does not know the extent to which wages for captioners/audio describers outside Ericsson are paid on the minimum rate in the *Miscellaneous*

Award or above those amounts and if so, how far above. The same applies for subtitlers/subtitling editors who perform work outside SBS.

5.9 The *Miscellaneous Award* does not provide classification levels or minimum wages which bear resemblance to the value of the work performed by captioners/audio describers. That work is complex, technical, requires a high degree of accuracy and advanced language skills. For subtitlers and subtitling editors their work requires in addition to technical skills an intimate knowledge of other languages and cultures and university degrees. Consideration of work value was one key part of a fair safety net as identified at [119] of the *Penalty Rates Decision*, cited above. This supports the submission that the *Miscellaneous Award* is entirely unsuitable to cover a minimum award standard for this work. It does not contain wage rates which reflect the minimum valuation of that work relative to other award based occupations. .

5.10 In terms of setting minimum wages for the work performed by captioners/ audio describers, a comparison can be drawn between the classifications in the *Broadcasting and Recorded Entertainment Award* and the pre-reform *Community and Public Sector (Subtitlers) Award 1999*. That award was simplified and wages set consistent with the wage fixing principles then in force. Since simplification there has been significant technical change in the industry, making those classifications not directly relevant or reflective of the way the work is now structured and performed. However, a rough comparison can be drawn between the two awards and the CPSU's proposed classifications as follows:

TABLE 1

BREA GRADE	BREA wage to 2016 p/w	1999 Award as updated to 2016 p/w	1999 Award classification	Proposed CPSU classifications
16	1059.10	1059.30	Online Supervisor	
15	1014.80			Captioner/Audio Describer Shift Leader or Trainer

				Subtitler/Subtitling Editor
14	977.70			Advanced Multi-skilled Captioner/Audio Describer
		928.60	Online	
11	916.30			Multi-skilled Captioner/Audio Describer
		900.70	Captioner Trainer	
10	897.90			
		891.20	Online Trainee (to six months)	
		885.60	Shift Leader	
9	878.50			
		864.50	Grade 3	
8	854.60			Captioner/Audio Describer
		843.00	Grade 2	
7	832.30			
		824.00	Grade 1	
6	807.70			
5	783.30			Trainee Subtitler/Subtitling Editor
4	743.30			Trainee Captioner/Audio Describer
		715.60	In Training	

5.11 The above TABLE 1 contains the CPSU's proposed classifications and the comparable levels of rate of pay in the *Broadcasting and Recorded Entertainment Award*. The main difference in classifications that is old Award had a clear separation of classification between online from offline captioning. Such a

division is no longer reflective of how the work is now performed. Live and file captioners are increasingly expected to perform both roles in a multi-skilled environment. The proposed classification structure for captioners/audio describers rises according to multi-skilled capacity, specialisation, complexity of work and responsibility.

5.12 In terms of subtitlers/subtitling editors, their work at SBS is covered by the Australian Government Industry Award 2016 and Schedule O to that award, which provides a rate of pay for that work at Level 4 of \$1058.70 p/w.

5.13 In conclusion it is necessary for the proposed change to be included in the *Broadcasting and Recorded Entertainment Award* to ensure there is an appropriate fair and appropriate safety net of terms and conditions of employment that properly reflect valuable and important work performed by captioners/audio-describers and subtitlers/subtitling editors. The *Miscellaneous Award* is not relevant to the nature of this work and the industry in which it is performed.

6. CPSU's application meets the modern awards objective s134 criteria

6.1 The CPSU addresses the Modern Awards Objective in turn:

(a) relative living standards and the needs of the low paid; and

6.2 This is a neutral consideration

(b) the need to encourage collective bargaining; and

6.3 An appropriate award safety net for all captioners/audio describers and subtitlers/subtitling editors will establish a uniform set of terms and conditions of employment for that type of work. A level playing field across the industry will enable employees and employees who wish for higher wages and/or greater flexibility to engage in enterprise bargaining from the same minimum basis. Currently there is only one enterprise agreement covering captioners/audio describers at Ericsson. Appropriate award coverage should better position other employees outside Ericsson to engage in bargaining.

(c) the need to promote social inclusion through increased workforce participation; and

6.4 Appropriate award coverage by captioners/audio describers and subtitlers/subtitling by the *Broadcasting and Recorded Entertainment Award* should make this work more stable and attractive an industry for employees to obtain stable and permanent employment in.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

6.5 The *Broadcasting and Recorded Entertainment Award* contains terms and conditions of employment unique to the circumstances and working arrangements of television broadcasting. It contains industry standards and appropriate flexibilities to enable efficient and productive work. It is an environment which captioners/audio-describers and subtitlers/subtitling editors already work within.

(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**

6.6 The *Broadcasting and Recorded Entertainment Award* contains hours of work and penalty provisions which are have historically developed in that industry and are appropriate to the type of work performed and how that work is performed in a 24/7 environment. *The Miscellaneous Award's* operation as a generic award safety net for workers otherwise not covered by an appropriate industry award means those provisions may not reflect the specialised work in television broadcasting.

6.7 Additionally, the CPSU's amended draft determination includes provision for an afternoon shift penalty that is currently provided for in the pre-reform *CPSU (Subtitlers) Award 1999*.

(e) the principle of equal remuneration for work of equal or comparable value; and

6.8 This is a neutral consideration.

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

6.9 The impact of the Commission not granting the CPSU's application is to impose an inconsistent safety net standard on different parts of the captioning industry. This could affect productivity and employment costs and regulatory burdens.

6.10 The impact of the Commission granting the CPSU's application is to create a consistent safety net across the industry of terms and conditions which are reflective of the broader television broadcasting industry. This should have consequential positive impacts on business and productivity. The CPSU does not have information whether the rate of pay in the *Miscellaneous Award* is paid to those employees who are covered by that award, or if wages are above that amount are and if so by how much. If there are businesses in the captioning industry paying rates based on the *Miscellaneous Award* only, creating an appropriate safety net may impact employment costs. However any impact on employment costs is due to those businesses providing rates of pay which do not reflect the appropriate value of the work performed and the historically award set rates of pay for this type of work. The *Broadcasting and Recorded Entertainment Award* is the appropriate modern award to cover the work performed in this industry.

(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

6.11 Granting the CPSU's application would provide clear and unambiguous modern award coverage of this work. It would create a stable and consistent set of minimum terms and conditions of employment across the industry and avoid parts of the captioning industry being covered by an enterprise award and other parts being covered by the *Miscellaneous Award*.

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

6.12 This is a neutral consideration.

7 Conclusion

7.1 Granting the CPSU's application would provide certainty for the workers subject to this application. It would provide an appropriate safety net of terms and conditions of

employment that reflects the value of the work performed as part of the broader television broadcasting industry. Not granting this application would leave the captioning industry without a uniform safety net, which would be unfair to employees, employers and contrary to the modern awards objective. The CPSU's application is necessary for the *Broadcasting and Recorded Entertainment Award* to be fair, relevant and consistent and achieve the objectives contained in the *Fair Work Act 2009*.

CPSU

SYDNEY

7 APRIL 2017

FAIR WORK COMMISSION

DRAFT DETERMINATION

Fair Work Act 2009

s.156 – 4 yearly review of awards

(AM2016/4)

BROADCASTING AND RECORDED ENTERTAINMENT AWARD 2010 [MA000091]

DATE CITY MEMBER

Application to vary coverage terms of a modern award in matter number (AM2016/4)XXXX

[1] Further to the decision and reasons for decision, and pursuant to s156 of the *Fair Work Act 2009*, the *Broadcasting and Recorded Entertainment Award 2010 [MA000091]* be varied as follows.

[2] Insert at clause 14.2 Common salary structure (d) Grade 4

Trainee Captioner/Audio Describer

[3] Insert at clause 14.2 Common salary structure (e) Grade 5

Trainee Subtitler/Subtitling Editor

[4] Insert at clause 14.2 Common salary structure (h) Grade 8

Captioner/Audio Describer

[5] Insert at clause 14.2 Common salary structure (k) Grade 11

Multi-skilled Captioner/Audio Describer

[6] Insert at clause 14.2 Common salary structure (n) Grade 14

Advanced Multi-skilled Captioner/Audio Describer

[7] Insert at clause 14.2 Common salary structure (o) Grade 15

Subtitler/Subtitling Editor

[8] Insert at clause 14.2 Common salary structure (o) Grade 15

Captioner/Audio Describer Shift Leader or Trainer

[9] Insert at PART 6 Television Broadcasting above clause 27

“This Part 6 applies to those employees classified as Captioners/Audio Describers and Subtitlers/Subtitling Editors contained in Schedule B”

[10] Insert after clause 28.5

28.6 No employee performing work as a Captioners/Audio Describers and Subtitlers/Subtitling Editors shall be required to work on a visual display terminal for more than two hours without a break. Each employee is entitled to a ten-minute break in respect of each such two-hour period worked. (This time shall count as time worked).

[11] Insert after clause 30.8

30.9 Employees’ performing work as a Captioners/Audio Describers and Subtitlers/Subtitling Editors will receive a penalty for all work on a shift commencing after 12.00 (noon) and before 6.00 p.m. and of at least seven hours duration of 17%

[12] Insert after Schedule B1.1(d)

(e) Captioner

Captioners perform captioning work as part of a television broadcast or for the release of content on other digital platforms as part of the broadcasting and recorded entertainment industry.

Captions are the transcription of speech, sound effects and other pertinent information which features as part of a soundtrack and would not otherwise be accessible to Deaf or hearing impaired viewers. Captions are either transmitted live-to-air or are prepared in

advance and are timecoded to keep in synch with the soundtrack. Captions can also include colouring and positioning to help identify speakers.

Captioning may involve the use of a range of computer technology (e.g. keyboard text entry, voice recognition or stenography short-hand keyboards) across a range of program types, prepared for live or file delivery. It requires maintaining accuracy and productivity standards and the use of computer equipment and software programs to achieve this.

(f) Audio Describer

Audio describers perform visual script work as part of a television broadcast or for the release of content on other digital platforms as part of the broadcasting and recorded entertainment industry.

Audio description is an additional soundtrack that provides vision impaired viewers with a description of what is happening on screen. Audio description is carefully timed and must be included in the gaps between on-screen dialogue.

Audio Describers use a range of computer technology (eg. keyboard text entry and specific Audio Description software) that allows them to create timed scripts and pinpoint the exact moment where the narration needs to be recorded so as not to overlap with the original soundtrack. It requires maintaining accuracy and productivity standards and the use of computer equipment and software programs to achieve this.

(g) Subtitler

Subtitlers translate foreign languages into English (or visa-versa) to be used as subtitles for a television broadcast or for the release of content on other digital platforms as part of the broadcasting and recorded entertainment industry.

Subtitling may involve the use of a range of computer technology (e.g. keyboard text entry, voice recognition or automatic translation) across a range of program types including general translations for recorded narrations for documentaries. It requires the use of computer equipment and software programs to achieve this. It requires high level English and foreign language skills, bilingualism and high level aural and written comprehension. It requires qualifications and accreditation in translation. It may require research skills in preparing subtitlers including research into the social, cultural, scientific and historic background of program content.

(h) Subtitling Editor

Subtitling Editors edit, check and prepare subtitles created by a Subtitler for a television broadcast or for the release of content on other digital platforms as part of the broadcasting and recorded entertainment industry.

Subtitling may involve the use of a range of computer technology (e.g. keyboard text entry, voice recognition or automatic translation) across a range of program types including general translations for recorded narrations for documentaries. It requires the use of computer equipment and software programs to achieve this. It requires high level English language skills and familiarity with a wide range of idiomatic English. A broad general knowledge is essential. The role of a subtitling editor is to make subtitles accessible to the reader and through the manipulation of syntax and the deployment of linguistic and cultural sensitivity, suitable for broadcast. It may require research skills in preparing subtitles including research into the social, cultural, scientific and historic background of program content. A graduate degree may be required.

11. Insert after B1.22

B1.23

(a) Trainee Captioner/Audio Describer

Skills, competencies, duties and responsibilities held and exercised

- (i)** Less than 6 months' service
- (ii)** In the course of training
- (iii)** Implements captioning standards across a range of limited program types
- (iv)** Subject to close supervision with supervisor/ trainer
- (v)** Strives to consistently meet minimum accuracy and productivity standards

Duties include file captioning, live captioning or audio description.

(b) Subtitler and subtitling editor in training

Skills, competencies, duties and responsibilities held and exercised

- (i)** Less than 12 months continuous service
- (ii)** In the course of being trained as a subtitler or subtitling editor
- (iii)** Subject to close supervision
- (iv)** If a subtitler, has relevant qualifications and accreditation as a translator in at least one LOTE language

- (v) Advanced translation skills or advanced editing skills
- (vi) Utilises knowledge of both formal and idiomatic English
- (vii) Conducts background research into programs

Upon successful completion of approximately 1 years continuous service training the employee is to be progressed to subtitler or subtitling editor

(c) Captioner / Audio Describer

Skills, competencies, duties and responsibilities held and exercised

- (i) Performs the duties of the lower classification
- (ii) Qualified Captioner / Audio Describer
- (iii) Consistently meets minimum accuracy and productivity requirements
- (iv) **Works** across a range of programs and to full captioning standards
- (v) Works under broad supervision and applies appropriate discretion and judgment
- (vi) May be undertaking additional training or gaining experience across different program types and methods

Duties may include contributing to captioning or audio describing resources, some simple editing of their own and colleagues work, audio describing television programs and other shorter content, routine administrative tasks.

(d) Multi-Skilled Captioner /Audio Describer

Skills, competencies, duties and responsibilities held and exercised

- (i) Performs the duties of the lower classification
- (ii) Experienced in audio description, live or file captioning
- (iii) Meets a high standard of accuracy and productivity across a range of programs and output types to the required levels

(iv) Capable of working independently without direct supervision and applies appropriate discretion and judgment in carrying out work

(v) Provides support and guidance to other Captioners / Audio Describers

Duties may include specialised editing of own and others work, audio describing for movies and other longer more complex content and live output on a range of programs including sports and news and current affairs.

(e) Advanced Multi-Skilled and Specialised Captioner / Audio Describer

Skills, competencies, duties and responsibilities held and exercised

(i) Performs the duties of the lower classification

(ii) Has in-depth knowledge of equipment, software and procedures

(iii) Takes responsibility for a high level of troubleshooting

(iv) Exercises discretion and judgment for self and others with low level supervision

(v) Assists in training of other captioners / audio describers and provides ongoing support for work colleagues

(vi) Demonstrates superior technique and consistent application of higher accuracy and productivity to the required level

(vii) An employee at this level may perform a specialised role such as steno-captioner.

Duties may include development of new captioning or audio describing standards, training colleagues and live output on high profile and difficult programs including sport, entertainment and news and current affairs.

(f) Subtitler

Skills, competencies, duties and responsibilities held and exercised

(i) Has more than 12 months continuous service

(ii) Has relevant qualifications and accreditation as a translator in at least one LOTE language

(iii) Excellent translation skills

(iv) Has a good knowledge of both formal and idiomatic English

(v) Provides assistance and mentorship to other subtitlers

- (vi) Has discretion and judgment over own work
- (vii) High levels of accuracy and productivity
- (viii) Conducts background research into programs

(g) Subtitling editor

Skills, competencies, duties and responsibilities held and exercised

- (i) Has relevant qualifications
- (ii) May have experience as a subtitler
- (iii) Has a excellent English language skills and knowledge of idiomatic English
- (iv) Has high level skills and an editor of English
- (v) Exercises discretion and judgment over own work
- (vi) Conducts background research into programs
- (vii) Provides assistance and mentorship to other subtitling editors

(h) Captioning/ Audio Describing Supervisor or Trainer

Skills, competencies, duties and responsibilities held and exercised

- (i) Considerable experience in captioning or audio describing
- (ii) Is responsible for supervising a group of captioners / audio describers or conducting initial training of captioners/ audio describers
- (iii) Manages the performance of employees
- (iv) Assists in the assessment, recruitment and selection of staff
- (v) Involved in planning and organising work
- (vi) Regularly communicates and coordinates work with clients

Duties may include setting training courses, reviewing and managing accuracy and productivity of captioners/ audio describers, allocating appropriate resources, answering client queries, identifying training needs of employees, testing new equipment and managing workflows.

IN FAIR WORK COMMISSION

FWA Matter No: AM2014/259

Applicant: Community and Public Sector Union (“The CPSU”)

**In the matter of an application to vary the coverage of a modern award during a
review of modern awards –s 156**

Statement of STUART BREWER-MCCABE 7 APRIL 2017

I, Stuart Brewer-McCabe, 191-199 Thomas St Haymarket, Union Organiser, solemnly and sincerely make the following Statement:

1. I am a Lead Organiser employed by the Community and Public Sector Union (“the CPSU”), and I make this statement on its behalf. Except where otherwise indicated, I make this statement from my own knowledge. Where I refer to information provided to me, I believe such information to be true.
2. I make this statement in support of the CPSU’s application to vary the Broadcasting and Recorded Entertainment Award (the BREA) to cover work performed in the industry by captioners and subtitlers.
3. The CPSU is an organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009*.

4. Since December 1999, I have performed work with the CPSU as an organiser and lead organiser. My duties as an organiser and lead organiser of the CPSU have included representing the industrial interests at a national level of members of the CPSU. My responsibilities have included the representing members in individual and collective issues, negotiation of agreements with Commonwealth departments and agencies and other employers on behalf of the CPSU.
5. Prior to employment at the CPSU, I performed work as a customer sales representative, customer service trainer and an exchange technician at Telstra.
6. In my work with the CPSU I have represented workers in the Broadcasting industry including at Ericsson, SBS, Channel 7, the Ten Network, and Southern Cross Broadcasting.

CPSU representation of captioners

7. The CPSU has been active in representing the industrial interests of captioners. The CPSU obtained obtaining a dispute finding against the Australian Captioning Centre in 1994 (SDP Harrison, Sydney 28 July 2994 in S Print L4507) and a consent award in 1996 *the Community and Public Sector Unions Subtitlers Award 1996* (SDP Duncan Sydney 23 May 11996 in N1691).
8. The CPSU participated in the simplification of that award and the creation of the *Community and Public Section Union (Subtitlers) Award 1999* (N Print R7824). An application to modernise that instrument was made 22 December 2013 (AM2013/71).
9. Collective bargaining was conducted between the CPSU and the Australian Captioning Centre. Certified agreements covering the Australian Captioning Centre were approved in 1998 (the *Australian Caption Centre Online Employees Certified Agreement 1998* AG768017) and in 2002 (the *Australian Caption Centre Certified Agreement 2002* AG818241).

10. In 2006, the Australian Captioning Centre sold its captioning functions to an English firm Red Bee. The CPSU made a union collective agreement in 2007 with Red Bee (the *Red Bee Media Australia Union Collective Agreement 2007* AC312771) and an enterprise agreement under the *Fair Work Act 2009* was made in 2015 (the *Red Bee Media Australia Enterprise Agreement 2015* AE414358). In 2015 a transfer of business occurred between Red Bee and Ericsson.
11. Through the negotiation of the Red Bee (now Ericsson) Enterprise Agreement the CPSU was able to work with both CPSU members and the employer to better define the type of work and how it is performed in the captioning industry and reflect that in the enterprise agreement. This meant that technical advances and changes in the requirements for how captioning work is done in Australia could be reflected in the EA.

CPSU representation of captioners outside Ericsson

12. Historically, the CPSU was active in representing captioners at Seven Network, and those employees obtained a discrete certified agreement at Seven Network in 2004 (the *Seven Network (Operations) Limited Captioners Agreement 2004* AG838448). It is my understanding that this instrument ceased to apply to captioners at Seven Network and to the best of my knowledge there are no captioners directly employed by Seven Network.
13. Outside of Ericsson, the CPSU does not have Enterprise Agreements covering other companies who perform captioning services.

Captioning in Australia

14. It is my understanding that the Australian Caption Centre (ACC) was a not-for-profit organisation co-founded by Adam Salzer and Alexandra Hynes in 1982. The Centre aimed to promote and produce captioning for Deaf or hearing impaired Australians and provided captioning services. The CPSU represented its members at the ACC. In 2006 the Australian Captioning Centre sold its commercial operations including captioning services to Red Bee Media, and became Media Access Australia. Media Access Australia has continued to provide not-for-profit services and advocacy for increasing access to media for people with a disability.

15. Australian broadcasters have been compelled to add closed captioning to programming since the introduction of the 1992 *Broadcasting Services Act*. This law gave Parliament the right to establish codes of practice that include captioning of programs for the hearing impaired.

16. Part 9D of the *Broadcast Services Act 1992* currently provides the legislative requirements for Broadcasters with respect to captioning. That Act requires each commercial television broadcasting licensee and each national broadcaster to provide a captioning service for television during designated viewing hours and television news or current affairs programs transmitted outside designated viewing hours.

17. Under that Act, Free to air Television Broadcaster are required to provide a captioning service on their main channel for programs transmitted between 6 am and midnight each day (designated viewing hours). Broadcasters are also required to provide captioning services for programs transmitted on their SDTV or HDTV multi channels if the program has previously been broadcast with captions on their main channel or any of their multi channels.

18. Between 2001-2011 100% of all news & current affairs TV programming and all programs aired between 6pm and 10pm were required to have closed captions. As of 2016, 100% of all news and current affairs TV programming and all programs aired between 6am and 12pm are required to have closed captions. The *Broadcast Services Act* provides the legislative basis for captioning, including its frequency and consistency.
19. The CPSU has participated in law reform in the area of captioning, representing our members interests. On 8 December 2014 the CPSU put a submission to the Standing Committee on Environment and Communications which was conducting an inquiry into the *Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014*. A copy of the CPSU's submission is annexed to this statement and marked Annexure "SBMC-1".

CPSU representation of subtitlers and subtitling editors

20. The CPSU history has represented captioners, subtitlers and subtitling editors at SBS since its inception. To the best of my knowledge, SBS no longer employes captioners, a service that is now outsourced.
21. Subtitlers and subtitling editors perform an important role at SBS, consistent with the SBS charter, which says SBS must "provide multilingual and multicultural radio, television and digital media services . . ."
22. Subtitlers and subtitling editors employed by SBS have their terms and conditions of employment covered by the *Australian Government Industry Award 2016* and the *SBS Enterprise Agreement 2016* (AE422408).
23. I am aware that subtitling at SBS has changed considerably over time, with fewer subtitlers and subtitling editors directly employed by SBS.
24. I aware that there are several businesses in Australia who offer subtitling services.

CPSU application to vary the Broadcasting and Recorded Entertainment Award

25. The CPSU's application is to cover captioner, audio-describer, subtitler and subtitling editor by the *Broadcasting and Recorded Entertainment Award*. The purpose of that application is to provide an appropriate award safety net of terms and conditions for captioners and audio-describers and to ensure that where work performed by subtitlers and subtitling editors outside SBS is also appropriately award covered.

SIGNED

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

DATED 7 April 2017



"SBMC-1"

Community & Public Sector Union
Michael Tull • National President

8 December 2014

Committee Secretary
Standing Committee on Environment and Communications
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Committee Secretary

Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (Senate)

The CPSU welcomes the opportunity to make a submission to the Senate Standing Committee on Environment and Communications inquiry into the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014.

The PSU Group of the Community and Public Sector Union (CPSU) is an active and progressive union with approximately 55,000 members. The CPSU represents employees in Commonwealth government employment including the Australian Public Service (APS), the telecommunications sector, and broadcasting including the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS). The CPSU also represents employees in the captioning industry.

The CPSU is concerned about the impact of proposed changes to captioning on deaf and hearing impaired Australians. If passed, the Bill would:

- remove compliance reporting for free-to-air television so they no longer have to publically report that they are meeting the captioning obligations;
- result in more complex calculations for determining how much captioning sports channels should provide;
- water down the measurement and regulation of caption quality; and
- remove the legal requirement to review the operation of captioning obligations before 31 December 2015.

The CPSU is also concerned that the requirement for reports, provided to the ACMA under the New Eligible Drama Expenditure Scheme, to be independently audited will be removed. The removal of auditing requirements for Australian content has the potential to impact the amount of Australian content shown by local broadcasters.

Captioning reform

The basic principle of captioning is to allow deaf and hearing impaired Australians access to television. The provision of captioning must be fair, transparent and properly monitored. This ensures that subscription television viewers receive what they expect and have paid for and broadcasters know that its competitors are complying with the regulations.

It is not clear how the Bill will improve captioning services for deaf or hearing impaired Australians. This should be the primary focus of any reforms to captioning regulation. Rather, the proposed changes will make it easier for broadcasters to provide less captioning and water down captioning quality while still meeting obligations.

The proposed Bill removes current annual reporting requirements for free to air broadcasters and replaces it with a complaints based process.

Furthermore, subscription television licensees will be able to vary how they meet their captioning obligations by:

- Allowing the annual captioning target for channel providers to be “averaged” over associated sports channels;
- Granting 12 month exemptions from captioning obligations for new subscription television channels;
- Restricting repeat captioning obligations to programs provided by the same channel provider.

There are also implications for the quality of captioning as the Bill:

- requires the Captioning Quality Standard to differentiate between live and pre-recorded broadcasts, and
- introduces a new exception to captioning quality breaches where the breach is due to engineering or technical failures.

The enforcement of captioning obligations ensures that deaf and hearing impaired Australians are provided with quality captioning. The proposed changes will lead to a decline in standards, stringency and the quality of output by the captioning industry will suffer. As one member told the CPSU:

The captioning industry is competitive, and we already don't have enough prep time. Whoever can satisfy the requirements for the lowest price will get the contract, and captioning companies undercut each other on price. There is no possible world where reduced requirements in volume and accuracy won't be passed on to captioning companies in the form of pricing pressure.

Compliance reporting

The proposed Bill will mean that free-to-air broadcasters will no longer have to report annually on their compliance with captioning obligations, replacing it with a complaints-based approach.

The CPSU notes that there already is a “complaints-based approach” where ACMA can hear and investigate complaints.¹ Annual reporting obligations require broadcasters to compile this information to help guarantee the quality of captioning. Removing the annual reporting requirement would remove scrutiny and result in less accountability and could lead to the elimination of records of poor quality captioning as reporting will no longer be required.

CPSU members indicate that broadcasters (and in some cases contracted captioning companies) are best placed to collect data on captioning quality to provide to the ACMA to ensure compliance with captioning obligations. There would be problems with reliance on a complaints-based model as viewers may not know their rights with respect to captioning. For example, if a show is not captioned, they cannot be sure that it is required to be. Viewers may complain only to find it exempt from captioning requirements, they may not complain because they do not know they can or do not know who to contact, or what know what level of accuracy to expect.

Splitting of captioning target

Under present arrangements, each individual channel on subscription television must meet its target. The splitting of a quota across associated sports channels makes calculating quota requirements more complicated, and it removes the requirement for an individual channel to have a certain level of captioned broadcast. The proposal treats subscription television sports channels differently. Further, there may be adverse outcomes for individual consumers as they will have no ability to make purchase decisions with full knowledge of the level of captioning to be provided.

CPSU members indicated that during events such as the Olympics or Soccer World Cup, broadcasters voluntarily exceed their captioning requirements on associated sports channels. This change would let broadcasters use large events where extensive captioning is commercially attractive to cut back on formal captioning obligations. At present, sports networks tend to have a predictable weekly schedule and caption accordingly, the proposed changes may increase viewer uncertainty about when to expect captions. A sport which required captions last week to meet the quota might not this week, solely because the Commonwealth Games is on the other associated channel.

Restricting repeat captioning obligations

The Bill proposes that programs previously captioned on a subscription television channel will no longer have to be captioned if previously shown on another subscription channel. The CPSU is concerned that it may discourage networks from including caption files with programs they sell or repeat screenings.

¹ ACMA, Complaints about captioning, 10 April 2014, <http://www.acma.gov.au/Citizen/Consumer-info/Rights-and-safeguards/Captioning/complaints-about-captioning-i-acma-1>

Exemptions from captioning obligations

The present system allows licensees to designate new channels as being excluded and not subject to captioning requirements. The proposed Bill takes it a step further, making a new channel automatically exempt for at least a year.

It is unclear why this change is necessary. The current arrangements already allow a new channel to be exempt from caption requirements. The CPSU is concerned it will only reinforce the treatment of captioning as an afterthought. Rather than making it easier to get an exemption, broadcasters should be encouraged to include captioning from the establishment of a new channel and to build-in systems and procedures that can be scaled up to make sure that captioning is part of the production process from the beginning.

Differentiating between live and pre-recorded broadcasts

The CPSU acknowledges the differences in captioning between live and pre-recorded broadcasts.. CPSU members have indicated that standards do and should vary between pre-recorded and live content, however, they are concerned that live broadcasts by networks may be used as an excuse for poor quality captioning. Members also expressed a concern that there may be less incentive to provide early access to files, or to make scripts and other resources available which improve live captioning.

New exception to captioning quality breaches

The Bill proposes an exemption from breaches of quality standards if it is due to a technical or engineering difficulty which could have not been reasonably foreseen. CPSU members are concerned there may be less incentive for broadcasters to build and maintain backup plans, and to exceed their captioning requirements to meet obligations in case something goes wrong.

New Eligible Drama Expenditure Scheme auditing requirements

Currently certain subscription television channel providers and licensees are required to spend at least 10 per cent of their total programming expenditure on new Australian or New Zealand drama productions or co-productions. Channel providers are required to report their annual eligible drama expenditure for the financial year and it must be accompanied by a certificate from a registered auditor stating that the return is correct.

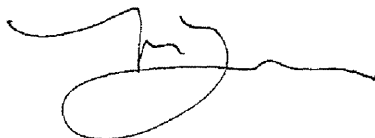
While the Bill does not affect the level of Australian drama expenditure required by subscription television licensees, the CPSU is concerned it may impact on the currently high level of compliance. The CPSU does not believe that a spot check approach by ACMA to ensure compliance will be sufficient.

Consultation

The CPSU notes that existing statutory requirement for the ACMA to review the operation of captioning obligations before 31 December 2015 will be repealed which will not give the public a chance to comment. A public consultation process has not been undertaken and there is an opportunity to review the captioning regulations to ensure best practice.

Should you wish to discuss this submission any further I can be contacted on (02) 8204 6910.

Yours sincerely



Michael Tull
CPSU National President

IN FAIR WORK COMMISSION

FWA Matter No: AM2014/259

Applicant: Community and Public Sector Union (“The CPSU”)

**In the matter of an application to vary the coverage of a modern award during a
review of modern awards –s 156**

Statement of MICHAEL McGETTIGAN 6 April 2017

I, Michael McGettigan, of Ericsson Access Services, captioner, solemnly and sincerely make the following Statement:

1. I am employed by Ericsson as a captioner and I make this statement from my own knowledge.
2. I make this statement in support of the CPSU’s application to vary the *Broadcasting and Recorded Entertainment Award* (the BREA) to cover work performed in the industry by captioners and audio-describers.
3. Since September 4th, 2001, I have performed work with the Ericsson (formerly Red Bee Media and the Australian Caption Centre) as a Captioner/Editor in the Offline/File department. My qualifications are a Bachelor of Arts (Communications) as well as extensive on-the-job training.
4. I am a CPSU member and have previously participated in representing members in individual grievances with management and in enterprise agreement negotiations.

Captioning at Ericsson and its predecessors

5. I began work as a captioner with the Australian Captioning Centre (ACC) on September 4th, 2001. At that stage the ACC was a not-for-profit company which provided captioning services to the ABC, SBS, Network Ten, Channel Seven and Channel Nine and television advertising clients, as well as captioning DVD and video material for a number of clients. To the best of my knowledge captioning was also provided in-house at most free-to-air TV networks at least until the early 2000s.
6. In 2006, the ACC sold its captioning services and contracts to Red Bee Media Australia.
7. In 2015 Red Bee Media Australia was purchased by Ericsson, who are my current employer.
8. I am currently classified as a Level 3 Captioner under the Red Bee Media Enterprise Agreement 2015.

The changing work of a captioner

9. The work of a captioner is fundamentally to make media more accessible for Deaf and hearing impaired viewers by providing text for broadcast, recorded and digital media, which accurately reflects dialogue and sound effects within a program. This work may be done live to air via re-voicing or by a stenographer, or, in my case in the File department, through the captioning of pre-recorded material using enterprise-specific software developed by Red Bee and Ericsson in conjunction with a software company. Captioning of television broadcast is mandated by Commonwealth legislation, which over time has increased the amounts of broadcast media programs to be captioned.

10. Since beginning as a captioner in 2001, developments in technology and increased competition in the marketplace has changed my role markedly. Changing technology has seen a move from working with videocassettes and master tapes back in 2001 through to the present day, where everything is received and sent digitally. These changes have meant, for example, I am able to work remotely through flexible working arrangements for employees. Also, captioning software has improved to reduce some of the manual tasks previously required and assist in providing clients with more accurate files and corresponding increases in productivity.
11. However, these changes in technology have also meant programs being fast-tracked from overseas, delivered within hours of broadcast and with faster turnaround times, increasing the pressure on captioners to perform to strict accuracy standards but in a short period. Other changes in the industry mean there is now an increased variety of work, i.e. different media platforms with an ever-increasing range of specifications, adding to the complexity of the work involved.
12. I believe the changes in the captioning industry have made my role as a captioner more complex, more time critical and intense, to a higher standard of accuracy and for more diverse types of media.
13. As legislation has gradually led to staged increases in the amount of programming required to be broadcast with captions, the commercial market for captions has expanded. This has also occurred due to an increase in the number of platforms through which media is consumed. My employer Ericsson is one of several businesses which provide captioning services, however Ericsson is probably the largest and most well established because of its history in the Australian Captioning Centre.

14. As the captioning industry has grown, so has competition in tendering for, and winning contracts to provide television network with captioned material. I believe this competition has put an increased demand on productivity and use of technology and also pressure on production and labour costs. I feel that I am working harder and under tighter deadline pressures than ever before, but competition from other businesses in the industry has limited what my employer can do in terms of increases to my remuneration. In my experience talking to my colleagues and other union members I find they share my experience.
15. To the best of my knowledge there are approximately 200-300 captioners/audio-describers working in Australia.
16. Currently, Ericsson holds contracts to provide captioning services for several television broadcasters and also does work for advertisers, government and other clients.
17. I believe captioners and audio-describers should have an appropriate safety net of terms and conditions across the industry.

Draft Determination

18. I refer to the amended draft determination which contains the changes the CPSU is seeking to include in the *Broadcasting and Recorded Entertainment Award*. I believe that determination correctly outlines the descriptions of skills and competencies of a captioner/audio describer and should be included in the Award.
19. The different levels of captioner contained in that draft determination reflect the level of skill required to perform the roles. Captioning requires both an aptitude for language, some mathematical and IT skills. Usually, the minimum requirement for the role is the completion of a university degree. The dynamic nature of the industry and client base, as well as constant technological development also means that on-the-job training and development is ongoing. Both this training, and the knowledge and skill which comes from long-term experience in the role, requires that these distinct levels are outlined.

20. That draft determination also contains certain conditions unique to captioning work, for example, paid 15 minute breaks every 2 hours. This is because the role requires extended periods of screen-based and keyboard work, and such rest breaks will help to prevent injury and illness, which is to both the employees' and employers' benefit. Additionally it provides an afternoon penalty rate of 17% for shifts that start after noon and before 6pm, that are longer than 7 hours. The reason for this is that captioners are often required to work outside normal office hours, due to the 24/7 nature of the broadcast, advertising and media industry, sacrificing leisure and family time during those hours.

SIGNED



DATED

6/4/2017

IN FAIR WORK COMMISSION

FWA Matter No: AM2014/259

Applicant: Community and Public Sector Union (“The CPSU”)

In the matter of an application to vary the coverage of a modern award during a review of modern awards –s 156

Statement of JOANNE CARLY ELLIS 7 April 2017

I, Ms Joanne Carly Ellis, 5-11 Mentmore Avenue Rosebery, solemnly and sincerely make the following Statement:

1. I am employed by Ericsson as an audio-describer and I make this statement from my own knowledge.
2. I make this statement in support of the CPSU’s application to vary the *Broadcasting and Recorded Entertainment Award* (the BREA) to cover work performed in the industry by captioners and audio-describers.
3. Since March 2007, I have performed work with Ericsson as a Captioner and Audio-Describer. My qualifications are a Bachelor of Arts (Professional Writing and Communication) and a Graduate Diploma of Arts (Media Arts and Production).
4. I am a CPSU member and have previously participated in representing members in individual grievances with management and in enterprise agreement negotiations.

Captioning and audio-describing at Ericsson and Red Bee Media

5. I began work as a captioner at Ericsson (then the Australian Caption Centre – the organisation also became Red Bee Media Australia before becoming part of Ericsson) in March 2007. In September 2012 I changed duties, to chiefly performing those of an audio-describer, a role I continue to perform.
6. I am covered by the *Red Bee Media Enterprise Agreement 2015*.

The role of an audio describer

7. The work of an audio-describer involves the following:

Using audio-description software to identify gaps in dialogue and write relevant and timely description to help blind/vision-impaired viewers to keep up with the program. This could include describing subtitles or text on screen, a change in time of day or scene, a new character or actions taken by a character. Audio description requires strong writing skills – description must be succinct, flow well and avoid repetition where possible. Audio describers must also take care to avoid transmitting their own value judgements and using discriminatory language.

8. Whilst captioning involves transcribing audio primarily for people who are Deaf/hard-of-hearing, audio description provides visual information that otherwise a viewer who is blind or has low vision may miss. Although captions may be edited for the sake of timing, captioners generally strive to provide work that accurately reflects the dialogue/sound in the program. In contrast, audio description is more subjective and requires practitioners to interpret the content to decide the most relevant information to provide. Although they frequently work on the same programs, the work of audio-describers is conducted separately to that of captioners.

The role of a captioner

9. Prior to and during my work as an audio-describer, I worked as a live and file captioner. This work involves:
 10. Providing accurate, timely captions for live and pre-recorded content. Captioners need to have an excellent command of English to produce work that uses correct grammar and spelling.
 11. Live captioners produce work using a mixture of three techniques:
 - Respeaking (where the captioner listens to the audio in a program and simultaneously speaks in a manner in which a computer can transcribe it). Because it requires the captioner to listen and speak simultaneously, it's very challenging. A minority of people who test for captioning jobs at Ericsson have the aptitude for respeaking.
 - Transmitting pre-prepared captions (developed with the use of a script).
 - Stenography (using a stenotype machine which allows users to type groups of letters at a time). Stenography is a highly specialized skill.
 12. File captioners caption pre-recorded programs with the use of specialised software and a mixture of typing and respeaking. They also edit caption files developed elsewhere to include ad breaks and suit network or Australian standards.
 13. Both roles require captioners to work to tight deadlines. File captioners face late-arriving media on a daily basis and live captioners need to prepare available material and transmit captions within the time constraints of a program. Live captioners are often forced to respond to sudden changes, for example, late-breaking news items or stories being swapped around in a rundown.

14. Since I began working in 2007, the division between live and file captioners has increasingly been broken down. Captioners are increasingly expected to develop skills across live and file work, and this forms part of the framework that determines levels of pay. For example, if live captioners have downtime from live-to-air work, they are expected to produce scripts for pre-recorded programming.
33. Captioners and audio describers are often called upon to meet tight deadlines. They work together closely, for example by sharing information, to meet those deadlines and ensure accuracy and work of the highest standard.
34. To transition to the role of an audio describer I spent two weeks training one-on-one with an experienced audio describer. After that I received reviews of every program I described for approximately the next six months. I was expected to learn general audio description standards and standards particular to my organisation and apply these to my work.
35. To the best of my knowledge there are several companies which provide captioning and audio-describing services in Australia.

Draft Determination

36. I refer to the amended draft determination which contains the changes the CPSU is seeking to include in the *Broadcasting and Recorded Entertainment Award*. That contained descriptions of skills and competencies of audio describer and captioner. I believe those descriptions adequately capture the different roles performed by captioners/audio describers and are appropriate to include in the Award.
37. That draft determination also contains certain conditions unique to captioning work, for example, paid 15 minute breaks every 2 hours. This is because captioning/audio description requires workers to be at their desks for long periods of time with little to no downtime in the flow of work.

SIGNED

A handwritten signature in black ink, appearing to read "Joanne Ellis".

DATED 7/4/2017

IN FAIR WORK COMMISSION

FWA Matter No: AM2014/259

Applicant: Community and Public Sector Union (“The CPSU”)

In the matter of an application to vary the coverage of a modern award during a review of modern awards –s 156

Statement of MICHAEL PENTECOST 5 April 2017

I, Michael Pentecost, of 14 Herbert St, Artarmon, Sydney, Subtitling Editor, solemnly and sincerely make the following Statement:

1. I am employed by SBS as a subtitling editor and I make this statement in my professional capacity. I make this statement from my own knowledge.
2. I make this statement in support of the CPSU’s application to vary the *Broadcasting and Recorded Entertainment Award* to cover work performed in the industry by subtitlers and subtitling editors.
3. I have been employed by SBS since the 1990s and I have performed work as a Subtitling Editor since 2005. My qualifications are a 2:1 BA Honours from Leicester University, UK.
4. My employment is covered by the *SBS Enterprise Agreement 2016* and I am classified as a Level 4. That Agreement is underpinned by the *Australian Government Industry Award 2016*.

The duties and role of a subtitler

5. Subtitling in Australia is the placement of English-language captions within a foreign-language program in order to make possible its television broadcast to an English-speaking audience. Those captions appear at the bottom of the screen and are condensed for ease of viewer reading.
6. My role is that of subtitling editor and I work closely with subtitlers and have a good knowledge and understanding of how their work is performed.
7. It is the subtitlers' role to translate the foreign language featured in the program into English and add it as written text. A subtitler uses computer software, in this instance SWIFT, to access the timecode of a program's media file in order to create blocks within that file. The blocks are given a duration (i.e. of 5 seconds). SWIFT allows for the written translation to be included in the timed blocks. It is a task performed offline by necessity. Productivity rates are set at a minimum of number of subtitles per shift, but in reality are much higher.
8. Subtitlers need to be have an excellent command of their chosen foreign language (in Australia they are generally native speakers) and solid English skills. The translation of the foreign-language program into English must be mindful of nuance and cultural relevance, taking into account the reading speed of viewers. Where there are written scripts of the program of sufficient quality available, those scripts can be utilised to assist with the translation and subtitling.
9. The current technology used by subtitlers is software program called SWIFT by which subtitles are matched to timecode laid over the media file.

The duties and role of a subtitling editor

10. I perform work as a subtitling editor. The work involves the following. I access the media file of a foreign-language program in SWIFT along with the subtitles contained in timed blocks from the subtitler. I then further condense the subtitles to a readable length, reworking subtitles (and, in the case of foreign-language documentaries, renarration scripts) into idiomatic English while preserving the original intent and cultural significance of the program. I also conduct research where necessary into facts and acceptable name spellings. In addition I compile supers lists, credit rolls and edit points for censorship or timeslot purposes.

11. The research tools I employ to facilitate the editing of subtitles and renarration scripts include encyclopedias, dictionaries and the internet. Originally there was a process of collaboration between editor and subtitler following the editing stage, but this was discontinued several years ago for cost-saving reasons. Productivity rates are set at a minimum number of subtitles per shift, but in reality the number of subtitles achieved per shift is much higher. Following the editing stage, programs are then “onlined”, a process which creates a new master file with the subtitles “burnt” on. This is the media file which is then broadcast with the subtitles contained in it. These are referred to as “open” captions, as opposed to “closed” captions for the hearing impaired that can be turned on and off as necessary.

Draft Determination

12. I refer to the amended draft determination which contains the changes the CPSU is seeking to include in the *Broadcasting and Recorded Entertainment Award*. That document contained descriptions of skills and competencies of the subtitler and subtitling editor. I believe those descriptions adequately capture the roles performed and are appropriate to include in the Award.

Technological and organisational changes to the work of subtitlers and subtitling editors

13. At the time I commenced as a subtitling editor in 2005, SBS was the main if not sole employer of subtitlers and subtitling editors in Australia, employing approximately 50 subtitlers and editors, the majority of whom were subtitlers.
14. The main change in technology over the last 25 years in the subtitling industry has been the computerisation of the entire process made possible by software such as SCAN and SWIFT. Originally translations were made on paper and converted by typists and placed on a timeline. The current software means subtitlers and subtitling editors work directly within the timeline for the program from the outset. This has greatly increased productivity.
15. Since commencing my employment with SBS as a subtitling editor, the numbers of subtitlers and subtitling editors has changed considerably. While editing positions have been reduced to an extent (to around a dozen), there are now only three ongoing subtitling positions in the unit. Other subtitlers are employed on a contractual basis as and when deemed necessary. This change occurred largely in 2010, when approximately half the subtitling unit was made redundant.
16. These changes at SBS are because of fewer foreign language films and documentaries being broadcast by SBS on its main channel. SBS also has a greater reliance on subtitles produced outside of SBS. This includes overseas subtitles or subtitled scripts which are then timed and reworked by SBS subtitling editors.
17. Many of my former SBS colleagues who worked as subtitlers or subtitling editors prior to being made redundant or otherwise leaving SBS, perform work outside SBS in a freelance or other employment capacity, or as an employee of a firm that does subtitling and/or captioning.

SIGNED



DATED

5.4.17