
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION

**4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26)
SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010**

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **THE NSW BUSINESS CHAMBER LTD**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA LTD**

19 MAY 2019

1. INTRODUCTION

- 1.1 This submission is made on behalf of Australian Business Industrial (**ABI**), the New South Wales Business Chamber Ltd (**NSWBC**), Aged & Community Services Australia (**ACSA**) and Leading Age Services Australia Limited (**LASA**).
- 1.2 This submission is filed in accordance with the Directions of the Fair Work Commission (**Commission**) issued on 1 May 2019.
- 1.3 This submission addresses the following sections of the Directions:
- (a) Item A: Modern Awards containing reference to translators and interpreters;
 - (b) Item E: Community language skills and the classification structure; and
 - (c) Item F: Part-time employment and casual employment Full Bench.
- 1.4 These items are addressed below under separate headings.
- 1.5 We thank the Commission for the opportunity to comment on these matters and provide this submission.

2. ITEM A: MODERN AWARDS CONTAINING REFERENCES TO TRANSLATORS AND INTERPRETERS

2.1 On 26 April 2019, the Commission published a Background Document setting out details of modern awards and modern enterprise awards that either:

- (a) contain references to translators and/or interpreters; or
- (b) contain allowances for use of language skills.

2.2 Interested parties have been asked to comment on both the accuracy and the relevance of the Background Document. We address these two issues as follows.

Accuracy of the Background Document

2.3 Our clients have not identified any inaccuracies in respect of the information contained in the Background Paper. However, we have identified two other awards which are not listed in the Background Paper and which contain relevant provisions. They are:

- (a) the *Professional Diving Industry (Recreational) Award 2010*; and
- (b) the *Educational Services (Post-Secondary Education) Award 2010*.

2.4 The *Professional Diving Industry (Recreational) Award 2010* contains an entitlement to an allowance for employees required by their employer to “instruct” in a language other than English.¹

2.5 In relation to the *Educational Services (Post-Secondary Education) Award 2010*, while it does not contain any form of language allowance, the classifications for Teachers and Tutor/instructors at Schedule C contain references to “TESOL” qualifications required to be held by employees who are “Teachers employed in English language colleges or in TESOL courses”.

Relevance of the matters referred to in the Background Document

2.6 Having regard to the Background Document and to the additional award provisions that we have identified which are referred to above, it appears that there are 15 modern awards or modern enterprise awards that contain references to translators/interpreters and/or language allowances.

¹ See clause 15.4.

- 2.7 Of those 15 awards, 12 contain an allowance in respect of the use of language skills. The other three awards simply contain references to interpreters or other language skills within the classification structures of those instruments.²
- 2.8 We do not consider that the three awards containing references to interpreters or other language skills within the classification structures have any relevance to the current proceedings or to the claim advanced by the ASU in respect of a community language allowance in the SCHCDS Award.

Relevance of the industrial instruments that contain a language allowance

- 2.9 The task before the Commission in these proceedings is to review the SCHCDS Award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about what terms should be included in the SCHCDS Award, only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.
- 2.10 In that sense, the task is clearly focussed on reviewing the SCHCDS Award (and not any other award), and considering factors relevant or peculiar to the SCHCDS industry. It is unsurprising and appropriate that there will naturally be variability of terms and conditions across the modern awards system, given that each modern award must provide a 'fair and relevant' set of minimum terms and conditions for the particular industry or occupation..
- 2.11 Against that statutory backdrop, the starting point should be that the existence of certain terms in other modern awards is of no relevance to the Commission's review of a particular modern award. The only exception to this principle might be where there is similarity between the industries which are covered by those awards. Where the Commission is satisfied that such similarity exists, it may be appropriate to consider terms of another modern award in the context of arriving at a conclusion as to the terms of the modern award under review.
- 2.12 Of the 12 awards which contain some form of language allowance:
- (a) six of those are modern awards;
 - (b) five are modern enterprise awards; and
 - (c) one is a State reference public sector award.

² See *Aged Care Award 2010; Amusement, Events and Recreation Award 2010; Educational Services (Post-Secondary Education) Award 2010*.

- 2.13 A number of observations can be made in respect of those instruments and the provisions contained therein.
- 2.14 **Firstly**, the Background Paper demonstrates that allowances payable to employees who are required in the course of their work to speak a language other than English are by no means a common feature of the modern awards system. Indeed, only 6 modern awards out of approximately 122 contain a language allowance.³ This suggests that there should be a compelling industry-specific basis for including such a term in a modern award.
- 2.15 **Secondly**, the Commission's task is ultimately to determine whether it is appropriate to insert a language allowance into the SCHCDS Award having regard to the considerations outlined in s 134. The existence of similar allowances in a small number of other modern awards is of limited, if any, relevance to that task. It certainly does not, of itself, provide a basis for granting the ASU claim.
- 2.16 **Thirdly**, in respect of the modern enterprise awards listed in the Background Paper, it is trite that modern enterprise awards are instruments of a very different character to modern awards. Modern enterprise awards are instruments that apply to a specific enterprise only (or a part of a single enterprise) or to a group of enterprises within the same franchise chain.⁴ They are made under a different statutory framework. Modern enterprise awards cannot be made under the FW Act, but rather can only be made in accordance with the process provided for by Part 2 of Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the **Transitional Act**).
- 2.17 Under the Transitional Act, in deciding whether or not to make a modern enterprise award, and in determining the content of that award, the Tribunal is required to take into account a range of prescribed factors including, among other things, enterprise-specific considerations such as:
- (a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;
 - (b) the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;
 - (c) the likely impact on the persons covered by the enterprise instrument of a decision to make, or not make, the modern enterprise award, including any impact on the

³ Excluding modern enterprise awards and State reference public sector awards.

⁴ See section 168A.

ongoing viability or competitiveness of any enterprise carried on by those persons;
and

(d) the views of the persons covered by the enterprise instrument.

2.18 Further, in performing its functions or powers under the FW Act so far as they relate to modern enterprise awards, the FW Act expressly requires the Commission to “recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises”.⁵

2.19 Equally, the same observations can be made in respect of State reference public sector modern awards. Such instruments were made under Schedule 6A of the Transitional Act, and were required to be made if the employers and organisations that were proposed parties had agreed to the making of the application.⁶

2.20 Given the materially different character of modern enterprise awards and State reference public sector modern awards, and the different frameworks that apply or applied in respect of those types of instruments, the terms and conditions contained within such instruments must be viewed in that context.

2.21 Notably, the terms in those instruments do not apply to a particular industry at large, but rather apply to a specific enterprise. On that basis, the existence of language allowances in those instruments does not lend any weight to the suggestion that the SCHCDS Award should contain such an allowance.

2.22 In short, the existence of language allowances in a small number of modern enterprise awards or State reference public sector modern awards has no relevance to the current matter before the Commission.

2.23 **Fourth**, when one turns to the six modern awards containing language allowances, most of those six awards apply to industries that bear no similarity to the SCHCDS industry, and each of the terms in those awards is different to the variation advanced by the ASU in these proceedings. By way of example:

(a) In respect of the *Airline Operations – Ground Staff Award 2010*, the allowance is only payable in very confined circumstances, namely where an employee “is required to work in an international terminal and required to speak a foreign language”. The quantum of the allowance payable is dependent on the number of foreign languages

⁵ See section 168B.

⁶ Item 4(4) of Schedule 6A of the Transitional Act.

the employee is required to speak, and ranges from \$5.53 per week for one language, \$8.29 per week for two languages, and \$10.80 per week for three or more languages.

- (b) The *Broadcasting, Recorded Entertainment and Cinemas Award 2010* provides an entitlement to a language allowance where “an Indigenous employee is required to have a recognised proficiency in English as well as that employee’s traditional Aboriginal and Torres Strait Islander language for the performance of their duty”. The award provides for two different levels of allowance depending on the proficiency level, which equate to \$25.71 per week or \$51.47 per week. As a prerequisite to the entitlement, the employee is required to obtain bilingual accreditation through a recognised Aboriginal and Torres Strait Islander Language Centre/Group or an alternative agency agreed to between the employer and the employee.
- (c) In respect of the *Health Professionals and Support Services Award 2010*, this award provides an entitlement to an ‘occasional interpreting allowance’ for employees who are not employed as full-time interpreters, but are ‘required to perform interpreting duties’. The quantum of the allowance is 0.11% of the standard rate for each occasion (which is presently \$1.00), with a maximum additional payment of 1.27% of the standard rate per week (which is presently \$11.58).
- (d) In respect of the *Professional Diving Industry (Recreational) Award 2010*, this award provides an entitlement to an allowance where employees are “instructing in a language other than English, where required”. The quantum of this allowance is \$46.88 per week.
- (e) In respect of the *Aboriginal Community Controlled Health Services Award 2010*, this award provides an entitlement to an allowance where an employee is “competently bilingual” and is “regularly required in the course of their duties” to use one or more of their languages. The quantum of the annual allowance is 206.93% of the standard rate for Level 1 and 414.18% of the standard rate for Level 2. Presently that is \$1,927.35 (approximately \$37.06 per week) for Level 1 and \$3,857.67 (approximately \$74.19 per week) for Level 2. The difference between the levels is that Level 1 is an ‘elementary level’ for employees with minimal knowledge of the language for the purpose of simple communication, and Level 2 represents a level of

ability for the ordinary purposes of “general business, conversation, reading and writing”.

- 2.24 The existence of language allowances in a small number of modern awards is of little (if any) relevance to the current proceedings, for the reasons outlined above. Ultimately, the Commission must be satisfied, on the material before it in these proceedings, that there is a merit basis for the inclusion of such an allowance into the SCHCDS Award.
- 2.25 The fact that a small number of modern awards contain similar allowances does not circumvent the need for a merit basis for the variation to be made out.
- 2.26 In our respectful submission, the award clauses listed in the Background Paper are only relevant to these proceedings to the extent that they provide general guidance or assistance to the Commission in formulating the terms of any such clause, if the Commission was to be satisfied that a community language allowance of some kind should be inserted into the SCHCDS Award. However, the existence of the terms do not, of themselves, provide any support for such a finding to be made.

3. ITEM E: COMMUNITY LANGUAGE SKILLS AND THE CLASSIFICATION STRUCTURE

- 3.1 During the course of the proceedings, it was raised that the use of community language skills may already be contemplated within the classification structure of the SCHCDS Award.⁷ Interested parties have now been invited to file any material relating to this issue.
- 3.2 We have not identified any decision or authority which would provide a basis to definitively conclude that the classifications in the SCHCDS Award contemplate the use of “community language skills”, or the use of a language other than English or the use of Auslan.
- 3.3 However, the classifications within the SCHCDS Award contain a number of references to communication skills.
- 3.4 For example, the classifications in the Social and Community Services stream of the Award refer to employees being:
- (a) responsible for ‘written and verbal communication skills, and where relevant, skills required to assist with personal care and lifestyle support’;⁸
 - (b) required to have ‘basic numeracy, written and verbal communication skills relevant to the work area’;⁹ and
 - (c) required to have ‘basic skills in oral and written communication with clients and other members of the public’.¹⁰
- 3.5 The classification definitions in the Home Care Employees stream refers to employees:
- (a) having specialist knowledge and skills, including ‘assistance with communication’¹¹; and
 - (b) having interpersonal skills, including ‘oral communication skills and where appropriate written skills, with clients, members of the public and other employees’¹².
- 3.6 Although we have not identified any authority which supports this proposition, it is possible that references to “communication” within the SCHCDS Award contemplate the utilisation of bilingual skills or other language skills.

⁷ Transcript 16 April 2019 PN905

⁸ B.1.1(e)

⁹ B.1.3(a)(iv)

¹⁰ B.2.3(a)(i)

¹¹ E.2.3

¹² E.2.4

- 3.7 We note that the classification structure is derived from the *Social and Community Services (Queensland) Award 2001*, which has a very similar classification structure; however, we have not traced back the history of that instrument to determine whether there was any consideration of community language skills.
- 3.8 In our submission, it cannot be ruled out that references to “communication” throughout the classification structure contemplate employees using a language other than English or using Auslan to communicate with their clients and members of the public. However, we accept that, absent any evidence to support that notion, it would be reasonably open to the Commission to conclude that community language skills are not contemplated within the existing classification structure of the SCHCDS Award.

4. ITEM F: COMMENTS IN RESPECT OF THE CASUAL/PART-TIME EMPLOYMENT PROCEEDINGS FULL BENCH DECISION

4.1 Parties have been asked to comment on whether they take issue with any of the observations made paragraphs [554] and [630]-[633] of the Full Bench decision in the Part-time employment and casual employment proceedings issued on 5 July 2017.¹³ Interested parties have also been asked whether there is any more up to date information in addition to that referred to above.

4.2 In response to that request, we can confirm that our clients broadly agree with the observations made at paragraphs [554] and [630]-[633] of the Full Bench decision.

4.3 We make the following comments in respect to those passages of the decision:

- (a) It is correct that the NDIS involves an individualised funding model, thereby allowing persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans;
- (b) It is correct that the NDIS reforms have resulted in persons with disability being able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. This is a central feature of the NDIS, and is enshrined in the Objects of the *National Disability Insurance Scheme Act 2013*;¹⁴
- (c) It is well accepted that the NDIS has radically changed, and is continuing to radically change the disability support services sector;
- (d) It is correct (and should not be controversial) that employers have lost a large degree of control over the way in which services are delivered under the NDIS, are expected to be more responsive to client demands, and require greater flexibility in working hours to meet the objects of the NDIS;
- (e) Our clients continue to contend that, without increased workforce flexibility, the Award will contribute to an increased casualisation of the industry;
- (f) It is correct that Participants in the NDIS (and their carers) are required to prepare a NDIS plan in conjunction with the National Disability Insurance Agency, and that those Plans set out the support needs of that Participant. We intend to adduce

¹³ [2017] FWCFB 3541

¹⁴ See section 3.

evidence about the structure and details of those Plans, and how they operate in practice, during the upcoming tranche two hearing;

- (g) It is absolutely correct that the NDIA has been “aggressive” in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole;
- (h) The description in [631] of the way in which Participants are able to access services is accurate, however we understand that the terms of Service Agreements, and the way in which those terms are enforced, vary across operators; and
- (i) It is correct that the SCHCDS industry workforce is predominantly female.

4.4 In relation to the observations about client cancellations at [631], we note that the most recent NDIS Price Guide provides only a limited ability to charge participants for cancelled services. Under the current rules:

- (a) providers are not permitted to charge a cancellation fee where a participant cancels a scheduled service and provides notice of cancellation prior to 3pm the day before the scheduled service;
- (b) providers are permitted to charge up to 90% of the agreed price for a cancelled scheduled appointment where the service is cancelled after 3pm the day before the scheduled service (however a provider may only charge a cancellation fee against a participant plan up to 12 times per year for personal care and community access supports, following which the NDIA will require the provider to demonstrate they are taking steps to actively manage cancellations).¹⁵

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¹⁵ See page 18, *NDIS Price Guide New South Wales, Queensland, Victoria, Tasmania* (Valid from: 1 February 2019)



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